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MANIPUR JUDICIAL COMMISSIONER'S COURT

1954

JUDICIAL COMMISSIONER :

The Hon ble Shri Brij Narayan.

GOVERNMENT ADVOCATE

Shri Suresh Chandra Bardhan.

REPORTER

Shri Koijam Rohini Kumar Singh, Pleader, Imphal.

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ALL INDIA REPORTER

1954

Manipur J. C.'s Court

A.I.R. 1954 MANIPUR 1 (Vol. 41, C.N. 1)

BRIJ NARAIN J. C. (13-5-1954).

Mst. Manihar Bibi, Appellant v. Rakha Singh and others, Respondents.

Civil Appeal Case No. 40 of 1953, against decree of D. J., Manipur, D/- 10-8-1953.

(a) T. P. Act (1882), S. 53 — Fraudulent transfer — Transfer for dower — (Muhammadan Law — Dower).

The question whether the transaction was really a transfer of property or sham or simulated transaction must be decided on the facts and circumstances of each particular case. (Para 6)

Held on evidence that the plaintiff-wife failed to establish that her dower was prompt and the deed of sale of property belonging to the husband, in her favour in lieu of the dower debt was genuine. The sale deed even if held to be genuine was without consideration and was executed in order to defeat or defraud the creditors of the husband and did not affect them because the deed was a sham transaction. (Paras 5 and 6)

Anno: T. P. Act, S. 53 N. 18.

(b) Muhammadan Law — Dower — Deferred.

There is no authority for the view that the deferred dower, agreed to be paid on death or divorce, becomes prompt, if demanded by the wife during the continuance of the marriage. (Para 5)

(c) Civil P. C. (1908), O. 7, R. 4 — Succession certificate — (Succession Act (1925), S. 214).

Suit by sons of deceased creditor on promissory note executed in favour of deceased creditor by the defendant — Plaintiffs obtaining succession certificate after institution of suit — Decree in suit is not void. (Para 7)

Anno. C. P. C., O. 7, R. 4 N. 3; Succ. Act, S. 214, N. 11, 12.

(d) T. P. Act (1882), S. 53 — Plea under, can be raised as defence to suit under O. 21, R. 63 — (Civil P. C. (1908), O. 21, R. 63).

The institution of a suit to avoid fraudulent transfer is not the only mode of avoiding it. It may be made by way of defence in a suit brought to enforce the transfer. Thus in a suit under O. 21, R. 63, Civil P. C., by a defeated claimant on the basis of a transfer made to him by the debtor, the creditor who has attached the property in execution of his decree may plead in defence that the transfer was fraudulent under S. 53 of the Transfer of Property Act. Case law Ref. (Paras 10)

Anno: T. P. Act, S. 53 N. 14; C. P. C., O. 21, R. 63 N. 20.

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(D) (V16) AIR 1929 All 238: 51 All 595	10
(E) (V37) AIR 1950 Pat 166: 28 Pat 928	11
(F) (V39) AIR 1952 Sau 68	11
(G) (V28) AIR 1941 Oudh 457	11

B. K. Ghosh, for Appellant; K. C. Chakroverty and R. K. Singh, for Respondents.

JUDGMENT: This appeal has been brought by Musammat Manihar Bibi appellant against the decree of the learned District Judge, Manipur, dated 10-8-1953 in Civil Suit No. 8 of 1952 which has been dismissed by the trial Court.

The facts of the case briefly stated are that Mahammad Kasim Mia respondent No. 3 was married to Musammat Manihar Bibi appellant on 5-7-1932 and the latter's dower debt was settled at Rs. 10,000/- for which an agreement deed had been executed. This agreement deed was alleged to have been lost during the bombing of Imphal in the last war, and so the appellant's mother when in her death-bed got another deed dated 10th January 1951, Ex. P/B from the husband whereby the latter gave the disputed property situated in plot No. 164, Maxwell Bazar, along with constructed buildings thereon as consideration for the dower debt and the appellant was given possession over the disputed plot on the same date.

The appellant, however, in order to feel secure got a regular sale deed from her husband on 5-7-1952 vide Ex. P/A and this deed was registered on 8-7-1952. The appellant claims to have let out the buildings in question vide Ex. P/B and so she claimed to be in possession also.

(2) Mahammad Kasim Mia respondent No. 3 had borrowed Rs. 12,000/- from Ganesh Singh and Giga Singh through the pro-note dated 10-7-1949 and this debt remained unpaid. On 5-3-1952 Rakha Singh, son of Ganesh Singh and Mahabir Singh, son of Giga Singh brought suit No. 16 of 1952 in the Court of the Sub-Judge, Manipur on the basis of the aforesaid pro-note and an application for attachment before judgment of the disputed property, was filed on 23rd June 1952. On the same date the learned Sub-Judge demanded cash security from the respondent No. 3 Mahammad Kasim Mia and later on on 23rd August 1952 when security was not furnished, an order for attachment before judgment was passed relating to this property and the Suit No. 16 of 1952 was decreed for Rs. 19,759/- on 25th August 1952.

It has already been mentioned by me that the sale deed with regard to the property in question was executed by Mohammad Kasim Mia in favour of the present appellant on 5-7-1952 after the application for attachment before judgment had been presented in Court on 23-6-1952.

Musammat Manihar Bibi appellant filed an objection under O. 38, Rules 8 and 10 read with O. 21, R. 58, Civil P. C., on 22-9-1952. This objection was opposed by the respondents Nos. 1 and 2 by means of reply dated 21-11-1952 and the appellant's objection was dismissed on the same date.

The present appellant then brought Suit No. 8 of 1952 under O. 21, R. 63, Civil Procedure Code on 19-12-1952 praying for declaration that Musammat Manihar Bibi was the owner in possession of the property in question and it was further prayed that the respondents Nos. 1 and 2 be permanently restrained from executing their decree passed in Suit No. 16 of 1952 (Execution Case No. 51 of 1952) and the execution proceedings be stayed until the disposal of the suit. This suit was also dismissed. and so Musammat Manihar Bibi has come in appeal.

(3) The respondents No. 1 and 2 denied that the respondent No. 3 owed any dower debt of Rs. 10,000/- to the appellant and they further denied that the respondent No. 3 had executed any agreement deed at the time of the marriage or on 10-1-1950 and the story about the loss of the agreement deed and the appellant's mother imploring her son-in-law to execute the deed dated 10-1-1950, has also been denied.

It was further contended that the dower debt of the appellant if any at all had become time-barred and in any case it was not subsisting on 10-1-1950 or on 5-7-1952. According to these two respondents the appellant had throughout been living with the respondent No. 3 in his house and she had never been in possession over the disputed property. It was also contended that the plaint was not duly verified and the court-fee paid was insufficient, but these pleas have not been pressed before me.

(4) The first question which is to be examined in this case is whether the appellant has proved that her dower debt amounted to Rs. 10,000/- and it was prompt.

Musammat Manihar Bibi did not appear in the witness box nor did she get her statement recorded on commission to prove that her dower debt was settled at Rs. 10,000/- and it was prompt. The respondent No. 3 made his statement in Court on 12th June 1953, but he merely stated that he did not admit the decree granted by the Sub Judge, but he did not produce any evidence. He thus failed to depose that the appellant's dower debt had been fixed at Rs. 10,000/- and that it was prompt.

If he had made any such statement in Court the present respondents Nos. 1 and 2 would have got an opportunity of cross-examining him on this question. (After going through the evidence of the appellant's witnesses His Honour proceeded:) The plaintiff's evidence thus does not establish in the present case that her dower was really settled at Rs. 10,000/- and it was prompt and it subsisted on 10-1-1950 and on 5th/8th July 1952.

(5) Mahabir Singh respondent No. 2 appeared in the witness box and he has deposed that Mahammad Kasim Mia admitted the execution of the pro-note dated 20-7-1949 and the appellant signed the acknowledgment receipt Ex. D/D on 5th December 1951. This statement clearly shows that after Mahammad Kasim Mia executed the pro-note dated 20th July 1949 and a registered notice of demand was served on him through the present appellant on 5th December 1951, he tried to execute fictitious deeds in order to save the property for himself and with this end in view he executed the unregistered and unstamped deed bearing 10th January 1950, as date of execution and later on when the application for attachment before judgment was filed by the respondents No. 1 and 2 on 23-6-1952 he executed the registered sale deed Ex. P/A on 5-7-1952 with this same object.

I have already mentioned above that Mahammad Kasim Mia made his statement in the trial Court, but he did not state specifically that the deed Ex. P/B had actually been executed by him on 10-1-1950 at the request of appellant's mother. It thus becomes established that the deeds Exs. P/B and P/A cannot be deemed to be genuine and valid as it has not been proved in this case that the appellant's dower debt was fixed at Rs. 10,000/- and it was prompt.

The argument that even the deferred dower becomes prompt if demanded by the wife during the continuance of the marriage, does not find support from any authority and as it is established from the plaintiff's own witness Obeidulla Mia that her dower was deferred and as Mahammad Kasim Mia is alive and there has been no divorce between the appellant and the respondent No. 3 so far, the plaintiff cannot be deemed to have any subsisting claim regarding her dower on 10-1-1950 or 5-7-1952 and so these deeds must be deemed to be without consideration even if they are held to be genuine for a moment for the sake of argument.

(6) The learned Advocate for the respondents No. 1 and 2 contended that if the appellant had been produced in the witness box he could very easily have shown from her cross-examination that her dower debt did not amount to more than Rs. 2/- or Rs. 4/- (Mihir Misil or proper dower) and that she had demanded her dower after her marriage and so the claim for this dower had become time barred long before 10-1-1950. But as the plaintiff did not appear in the witness box it cannot be held with certainty that the plaintiff's dower debt had become time-barred. In any case it is proved in this case that the plaintiff-appellant had no subsisting claim

as against the respondent No. 3 on 10-1-1950 and 5-7-1952 and so the deeds Exs. P/B and P/A were without consideration and as these deeds were executed for defeating or defrauding the creditors, the latter will not be affected by them because these deeds would amount to mere sham transactions.

The question whether the transaction was really a transfer of property or sham or simulated transaction must be decided on the facts and circumstances of each particular case and after taking into consideration the circumstances of this case and the evidence on the record referred to above I come to the definite conclusion that the deeds Exs. P/B and P/A merely incorporate sham transaction.

(7) The learned counsel for the appellant has urged that the decree in suit No. 16 of 1952 is not binding and it is legally inoperative as Rakha Singh and Mahabir Singh had not obtained succession certificates before instituting this suit in Court, but the evidence of Mahabir Singh shows that succession certificate has been obtained later on and as the decree passed in suit No. 16 of 1952, has become final, I do not think that the argument that the decree is void merely because succession certificates had not been obtained prior to institution of suit, has any force for, in the first place Rakha Singh is the son of Ganesh Singh, original creditor and Mahabir Singh is the son of Giga Singh original creditor and then they obtained succession certificates after instituting suit No. 16 of 1952 and so the decree passed in the suit could not be deemed to be void.

(8) The next argument that has been advanced on behalf of the appellant is that the decree dated 25th August 1952 in suit No. 16 of 1952 cannot be deemed to be binding as the pro-note on the basis of which this decree was passed had not been registered. As it has not been shown that registration of this pro-note was mandatory, I think this argument also cannot be deemed to be of any force.

(9) Third contention of the appellant is that the application for attachment before judgment dated 23-6-1952 was allowed ex parte and actual attachment was made on 23-8-1952. But the orders Exs. P/D-1 to P/D-4 show that the defendant Mahammad Kasim Mia was present in court and so this contention is also of no force.

The learned counsel for the appellant has also urged that the objection under O. 21, R. 58 filed by the present appellant on 22nd September 1952 was rejected on 21-11-1952 when the decree-holders filed their written reply without the appellant being given an opportunity to produce her evidence. The contention of the appellant is that as she had filed her objection without any delay and specially when there was no intention on her part to obstruct the execution proceedings, she should have been allowed to produce her witnesses.

I have already shown above that the decree was passed on 21-8-1952 and even though the appellant was living with the respondent No. 3 throughout and the respondent No. 3 used to be present in court, the objection under O. 21, R. 58 Civil Procedure Code, was not filed prior to 21-11-1952 and so the learned Sub Judge rejected it on the ground that it had been deliberately filed at late stage in order to delay execution proceedings.

The appellant filed review application vide Exs. D/B and D/A on 5-12-1952, but this application was also rejected. As such there is no force in the contention that the order rejecting objection under O. 21, R. 58, Civil Procedure Code dated 21-11-1952 is not binding on the present appellant.

(10) The appellant filed the suit No. 16 of 1952 under O. 21, R. 63, Civil P. C. and it has been contended on behalf of the appellant that the present respondents No. 1 and 2 should have brought a suit under S. 53 of the Transfer of Property Act for declaration that the sale deed Ex. P/A was not binding on the ground that a fraudulent transfer has been made through it and such a suit should have been brought on behalf of all the creditors.

It has been laid down in — 'Fazal-ul Rahim Khan v. Nawal Kishore', reported in AIR 1952 All 226 (FB) (A) that where there is no other creditor except the one in execution of whose decree the proceedings under O. 21, R. 63 have arisen, the suit for declaration as brought by that creditor could satisfy the requirements of the fourth clause and S. 53 of the Transfer of Property Act.

In Sami Asari v. Ashagiya Pillai', reported in AIR 1921 Mad 657 (B), it has been laid down that the institution of a suit to avoid fraudulent transfer is not the only mode of avoiding it. It may be made by way of defence in a suit brought to enforce the transfer. Thus in a suit under O. 21, R. 63, Civil P. C. by a defeated claimant on the basis of a transfer made to him by the debtor, the creditor who has attached the property in execution of his decree may plead in defence that the transfer was fraudulent under S. 53, Transfer of Property Act.

In Pasoo Devshi v. Anandji Bhula', AIR 1952 Kutch 39 (C), it has been held that when a mortgage is a possessory one, attachment is to be raised to the extent of mortgagee's interest in the property and when a mortgage is a simple one, attachment may be continued subject to such mortgage. In the first mentioned case the court has not only to be satisfied about the mortgage, but it has further to be satisfied about possession of the mortgagee on his own account. In the second mentioned case the court is only to be satisfied about the mortgage. Though the question of fraudulent transfer cannot be considered, the question of possession of the claimant on his own account and not on account of the judgment-debtor as his Benamidar or otherwise has to be considered.

As such the question raised by the present respondents No. 1 and 2 that the disputed property remained in possession of respondent No. 3 throughout and the deeds Ex. P/A and P/B were fictitious, could properly be gone through by the learned District Judge.

In Mt. Akram-un-nissa v. Mt. Mustafa-un-nissa, reported in AIR 1929 All 238 (D) it has been held that the principles embodied in S. 53, Transfer of Property Act are in accordance with the general principle of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases when a party bases his title on a transfer by a decree of the court where the provisions of S. 53, Transfer of Property Act, do not apply.

The learned District Judge has in the present case held that the deeds Exs. P/B and P/A are not binding on the respondents No. 1 and 2 on the ground that they were sham transactions and he upheld the view of the learned Sub Judge while dismissing the objection under O. 21, R.

53, Civil Procedure Code that these deeds were not binding on the analogy of S. 53, Transfer of Property Act, and so S. 53 was not clearly applied to this case. I think the principles enunciated above could properly be applied to this case and the judgment of the learned District Judge cannot be validly assailed on this ground.

(11) The plaintiff appellant no doubt tried to prove by the evidence of Abdul Rahman, Obeidulla Mia and Kali Mohan Chatterji witnesses that she was in possession over the disputed property. The patta dated 27th July 1947 Ex. D/C shows that this property was acquired by the respondent No. 3 and as the appellant has throughout been living with respondent No. 3 and no prior rent receipt has been produced by her, it becomes very difficult to infer that she really entered into possession over the disputed property.

The rent deed dated 5-7-1952 Ex. P/C was executed when Rakha Singh and Mahabir Singh had already instituted their suit No. 16 of 1952 in court. If the deed Ex. P/B was really executed on 10-1-1950 and possession had been delivered to the appellant on that date one would expect the appellant to have obtained at least one or two rent deeds from the tenants during the period from 10-1-1950 to 5-3-1952, but no such deed is forthcoming. As such the learned District Judge was justified in holding that the present appellant was never given possession over the disputed properties and the sham transactions Exs. P/B and P/A were executed in her favour in order to protect the respondent No. 3 from the clutches of the creditors.

The rulings reported in the case of 'Radhakant v. Ramanup Singh', reported in AIR 1950 Pat 166 (E) and — 'Adilja Ranchorlal v. Oza Mukundalal Swaika', reported in AIR 1952 Sau 68 (F), which lay down that objection under O. 21, R. 58 and O. 38, R. 10, Civil P. C., should be decided on the question of possession and not on the basis of title, cannot help the present appellant in any way, nor will the case of — 'Faqir Bux v. Thakur Prasad', help the present appellant: vide AIR 1941 Oudh 457 (G). In that case the plaintiff had accepted the gift deed in question as genuine, but he had contended that it was ineffective as against him. In the present case the respondents No. 1 and 2 never admitted the execution of any Kabin-nama by the respondent No. 3 in favour of the appellant on 5-1-1932 and they further denied execution of the deed Ex. P/B on 10-1-1950.

(12) Under the above circumstances, the present appeal has no force and it is dismissed with costs to the respondents No. 1 and 2.

B/R.G.D. Appeal dismissed.

A.I.R. 1954 MANIPUR 4 (Vol. 41, C.N. 2)

LAKSHMI NARAIN J. C. (26-3-1954)

Thokchom Haithumba Singh Petitioner v. R. K. Babusana Singh, Respondent.

Civil Revn Case No. 10 of 1953 to revise order of D. J., Manipur, in Misc. case No. 8 of 1953.

Civil P. C. (1908), O. 20, R. 14, S. 148 — Extension of time.

Under pre-emption decree plaintiff to deposit sale money by 16-11-1951 — Appeal dismissed on 5-5-1952 — Subsequent application to District Judge resulting in extension of time to deposit sale money till 10-8-1953 — Held that payment after period prescribed in decree would not be valid deposit. AIR Commentary, on C. P. C. referred. (Para 3)

Anno: Civil P. C., O. 20, R. 14, N. 7; S. 148, N. 19.

CASE REFERRED: Para

(A) ('03) 53 Pun Re 1903: 167 Pun LR 1903 3

B. B. Sen for Petitioner; T. N. Bhattacharya for Respondent.

ORDER: A suit for pre-emption brought by R. K. Babusana Singh against Th. Haithumba Singh was decreed by the Additional Munsiff, Manipur on 27-10-51. The plaintiff was to deposit or to pay to the defendant Rs. 65/- sale money by 16-11-51. Appeal against the above decree was dismissed by the District Judge on 5-5-52. The decree-holder Babusana Singh applied for execution of the above decree in the Court of the Munsiff (which was a successor court) as by that time the Court of the Additional Munsiff was terminated. As the pre-emption money was not deposited the decree-holder applied to that court for withdrawal of his application for execution. The learned Munsiff thereupon dismissed the execution suit on 4-4-53 on the ground that it did not lay as the D. H. did not deposit or pay the money within the prescribed period.

The D. H. after that filed a Misc. Application in the court of the District Judge which was registered as Misc. Case No. 8 of 1953 and resulted in extension of the time for deposit of the above amount till 10-8-53. The order was passed on 9-7-53. The present petition is for revising the above order by setting it aside on the ground that it was without jurisdiction and that the D. H. ought to have applied for extension of time to the successor Court i.e., viz., the Munsiff's Court.

(2) The Misc. application to the Court of the District Judge does not disclose under which law it was made, nor the order of the learned District Judge says under which provision of law the time was extended.

(3) Learned counsel for the opposite party has argued that the above order was passed by the learned District Judge under S. 148, C. P. C., although the order itself does not disclose it. He has not been able to satisfy me that such an order could be passed in a pre-emption decree. The learned counsel for the petitioner has placed reliance on 31C. 497 and 17 I. C. 912 as given on page 512 of Dr. Katju and Das, C. P. C. in which it has been held that "where time has been fixed and no provision is made for extension and an appeal is filed and no stay is obtained, payment after disposal of appeal and expiry of time fixed in decree would not be a valid deposit". Further reliance has been placed on the D. B. Ruling of the Punjab Chief Court, — 'Gurdit Singh v. Hukam Singh', 1903 Pun Re No. 53 at pp. 205 (206) (A) (as cited in — 'V. V. Chitaley's C. P. C. page 2142 of 1953 Edition) where it has been held that "in the plaintiff's default in paying the purchase money within the time allowed, the suit should be dismissed, though the decree does not contain a specific provision to that effect".

(4) I am quite in agreement with the above findings. I hold, therefore, that extension of time as ordered by the learned District Judge after about 2 years of the termination of period prescribed by the trial court on a Misc. Application of the D.H

was without jurisdiction. Under the circumstances of the case this petition is allowed with cost to parties.

B/H.G.P. Revision allowed.

A.I.R. 1954 MANIPUR 5 (Vol. 41, C.N. 3)

LAKSHMI NARAIN J. C. (23-3-1953)

Khundrakpam Muhon Singh, Appellant v. Haorungbam Amujao Singh and others, Respondents.

Civil Appeal Case No. 33 of 1952 against decree of D. J., Manipur in C. S. No. 2 of 1951.

Civil P. C. (1908), O. 2, R. 3 — Suit held bad for multifariousness — Suit held not covered by any of grounds mentioned in S. 44, Partnership Act — (Partnership Act (1932), S. 44).

Held after going through the reliefs that the suit suffered from multifariousness inasmuch as there were some causes of action alleged against defendants Nos. 1 and 2 and some against defendants Nos. 3 and 4 and thus resulting in misjoinder of defendants and causes of action. (Para 10)

Held further that in the suit (for dissolution of partnership against some of the defendants and for partition against some), there was no allegation in the plaint of any breach of partnership agreement, fabrication of accounts and misappropriation of partnership income on the part of the defendant partners, and that the suit was not covered by any of the grounds mentioned in S. 44, Partnership Act. (Paras 11, 12)

Anno: C. P. C., O. 2, R. 3 N. 8.

1953 Mulla: O. 2, R. 3, P. 542 N. "Misjoinder .....action" (8 Pts. extra in N. 8 to O. 2. R. 3 in AIR Com. — AIR 1920 PC 67: 47 Ind App 76 not noticed in Mulla).

N. Ibotombi Singh and B. B. Sen, for Appellant; K. C. Chakraverty assisted by R. K. Singh, for Respondents.

JUDGMENT: The plaintiff Muhon Singh in Suit No. 2 of 1951 of the District Judge's Court has brought this appeal against the judgment and decree passed by the above said Court by which his suit was dismissed with costs.

(2) Briefly the plaintiff's case is that he is one of the partners with the defendants in a workshop known as "M. M. Workshop" situated in Maxwell Bazar measuring about 90'x140' bearing revenue and Municipal tax whose settlement was duly made by the authorities in favour of the plaintiff and defendants Nos. 1 & 2.

The plaintiff states that about the end of February 1949 the joint business of the parties was more or less practically dissolved without however, settling the accounts amongst themselves. It is alleged that a temporary arrangement was made in April 1950 according to which the defendants were to work in 2/3rd portion of the site by constructing temporary workshop building and simultaneously the plaintiff by occupying the remaining 1/3rd portion of it. This arrangement, however, did not work satisfactorily; the plaintiff made an attempt to rebuild the business but failed which resulted in his serving notice on the defendants for distribution of the common property and assets and thereby to dissolve the workshop business.

The notice brought no fruits, hence this suit for partition of the shop site between the plaintiff and defendants Nos. 1 and 2 — the plaintiff to keep the 1/3rd portion of the shop site alleged to be in possession already, for dissolution of the partnership business, settlement of accounts, and getting 1/5th of the common movable property in the shape of machineries, equipments etc.

(3) The defendants in their written statements have denied the plaintiff's claim by saying that the suit is not maintainable in the present form and that the plaintiff has no right to sue the defendants for dissolution of partnership.

They say that the partnership business was started by all the 5 i.e. the plaintiff and the 4 defendants. It was only for convenience sake that only plaintiff and defendants Nos. 1 & 2 had applied for the site on behalf of all of them and that the plot was allotted to the firm. They deny that the partnership business was dissolved in 1949, on the contrary it is alleged that the partnership business continued and is still running on in the same name of the Firm in fact. It is denied that the partners had ever carried on their business separately or independently.

It is denied that the defendant was ever in possession of 1/3rd portion of the plot. The partnership business was carried on jointly for all times. All the partners have equal share in the business and are also equally liable for loss and enjoy profits. The plaintiff wanted to impose new conditions which were not acceptable. It is alleged in the written statement that the plaintiff is bound by clause 7 of the written document which provides that on retirement of a partner before 7 years from the start i.e. 1946 the retiring partner shall be entitled to 2/3rd of his dues and, therefore, the plaintiff has no more right than the above.

Retirement of a partner cannot result in dissolution when the remaining members are willing to continue the business. If the plaintiff does not want to remain a partner he may cease to be so. He is, if he so chooses, entitled to adjustment of accounts to find out his share of profit and loss as the case may be, but he has no right to ask for dissolution of the partnership or claim for any land or other property in the partnership when the defendants forming the bulk of majority are continuing the partnership business. There is no cause of action; the plaintiff's suit is liable to be dismissed with costs.

(4) On the above findings, the parties went on issues. The following issues were framed in the case:

(1) Has the plaintiff any cause of action for the suit? OPP.

(2) Is the suit maintainable in the present form? OPP.

(3) Was the plot No. 258/138 settled in favour of the plaintiff and defendants Nos. 1 & 2 in their private capacity or in favour of Firm? OPP & D.

(4) Was the plot already partitioned? OPP.

(5) Whether or not the plaintiff is competent to bring the present suit for the dissolution of the partnership business and its incidental matters and for the partition of the said plot? OPP & D.

(6) Is not the suit properly valued? OPD.

(7) What relief, if any, the plaintiff is entitled to? OPP.

If decision on issues 2 & 5 which are substantially the same does not go in favour of the plaintiff the other points which have been argued at length in this appeal by learned counsel of the parties, need not be discussed as that might prejudice a finding in case the plaintiff chooses to bring another suit in a proper manner.

(5) While deciding issue No. 4 the learned District Judge has held that the workshop plot has never been divided. The evidence led by the plaintiff on this score has not been relied on by him on the ground that it is flimsy, hearsay and discrepant. His inspection of the spot has also not led him to believe that the site was ever partitioned and used separately.

It is argued on behalf of the plaintiff-appellant that the things were put right by the defendants after the present suit was filed. This argument is refuted by the other side by saying that if that was the case, the plaintiff ought to have brought it to the notice of the Court as a subsequent event. The explanation of the learned counsel of the plaintiff has not been accepted by the trial Court as there was little or no proof of it and also on the ground that had it been so, some action on the part of the plaintiff was in the ordinary course necessary.

On inspection no visible sign was found that a separate workshop had been ever there in 1/3rd part of it as alleged by the plaintiff. I have no cause to differ from the finding of the trial Court on issue No. 4. (His Lordship perused the evidence and continued:)

(6-7) It is not unnatural that the other two partners i.e. defendants Nos. 3 & 4 who are younger in age thought it convenient that it would be sufficient for official purposes to file application for getting the site on behalf of the 3 elder ones, who are the plaintiff and defendants Nos. 1 & 2 as by that time none had lost confidence between themselves. The fact that they have been working jointly from the beginning in the same concern and then again continuously working in the present workshop, definitely go to show that they are also partners in the present workshop though the application for getting the site was made by the elder three. It can be safely said, therefore, that the site was obtained for the Firm consisting of all the five members who are partners to this suit and for purposes and in the course of business of the Firm. (His Lordship went through the evidence and proceeded:)

(8) The plaintiff has admitted in para No. 3 of the plaint that defendants Nos. 3 & 4 contributed their share on the new site settled with him and defendants Nos. 1 & 2.

(9) The following reliefs are claimed by the plaintiff in his plaint para. 7:

"(a) That the plot of land described in schedule A below be partitioned equally among the plaintiff and the defendants 1 and 2 with the distribution of its accompanying annual revenues and taxes.

(b) That one-third of the plot be allotted and demarcated specifically to the plaintiff, maintaining his present position in the eastern site.

(c) That the said partnership business of M. M. Workshop be dissolved.

(d) That the accounts of the partnership business be taken by the court and one-fifth share of the plaintiff be allotted to him.

(e) That the common property including the structure, machineries, equipments and apparatus etc. be distributed and the plaintiff be allowed to get his one-fifth share of them exclusively."

(10) The suit suffers from multifariousness inasmuch as there are some causes of action alleged against defendants Nos. 1 & 2 and some against defendants Nos. 3 and 4 and thus resulting in misjoinder of defendants and causes of action. As is clear from the above reliefs, the plaintiff has claimed partition of the workshop site between him and defendants Nos. 1 & 2, while dissolution of partnership against all the 4 defendants, also 1/5th share of structure etc. vide (e) above.

(11) There is no allegation in the plaint of any breach of partnership agreement, fabrication of accounts, and misappropriation of partnership income on the part of the defendants partners.

(12) The present suit is not covered by any of the grounds mentioned in S. 44 of the Indian Partnership Act.

(13) The finding reached at by the learned District Judge on issues Nos. 2, 4 & 5, therefore, need not be disturbed. The plaintiff is not competent to bring the present suit as it stands.

(14) Upon the above findings any discussion on the point of court-fee which ought to have been ad valorem as consequential relief is there is unnecessary and neither I should dwell on Ex. DJ "Rules of the Workshop", much debated by learned counsel of the parties.

(15) This appeal, therefore, is rejected with costs. Pleaders' fee Rs. 50/-.

C/R.G.D. Appeal dismissed.

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LAKSHMI NARAIN J. C. (26-3-1954)

E. Muhon Singh and others, Appellants v. Manipur State.

Criminal Appeals Nos. 1 to 4 of 1954, from order of S.-J., Manipur, D/- 18-12-1953.

(a) Evidence Act (1872), Ss. 24 and 30 — Confession — Retracted — Corroboration by another retracted confession.

In order to base a conviction on a retracted confession, the confession should be corroborated in material particulars. Another retracted confession of co-accused has seldom any corroborative value. (The retracted confession of co-accused which referred to another incident held did not corroborate the retracted confession of the accused). (Paras 11, 12)

Anno: Evidence Act, S. 24, N. 9, S. 30, N. 6, 9.

(b) Criminal P. C. (1898), S. 164 — Recording of confession.

While recording confession, the Magistrate should put suitable questions to the accused to make the matter clear. It is not enough to write the very brief statement made by the accused which does not disclose the matter properly. Confessions should never be recorded in a cursory manner. (Para 13)

Anno: Cr. P. C., S. 164 N. 15.

(c) Criminal P. C. (1898), Ss. 156 and 173 — Investigation — Record.

Documents of investigation and the like which are to form part of judicial record later on should never be prepared in pencil. They should always be in ink and should be legible. (Para 28)

Anno: Cr. P. C., S. 156, N. 7; S. 173, N. 1.

N. Ibotombi Singh, for Appellants in Cri. Appeals Nos. 1 and 2; Imo Singh, for Appellant in Cri. Appeal No. 3; Pisak Singh Appellant in custody from Jail; S. Bardhan, Public Prosecutor, for the State.

JUDGMENT: The above four appeals have arisen from the decision in sessions trial case No. 2 of 1953 by the Sessions Judge, Manipur, on 18-12-53 which resulted in conviction and sentence of the 4 appellants to 3 years R. I. and a fine of Rs. 100/- or in default one year's R. I. each, under section 395, I. P. C.

(2) It is alleged by the prosecution that on the night between 24/25-1-53, a dacoity was committed in the house of M. Tolchou Singh at Laimanai Basti by a gang of dacoits numbering 8 or 10. The above 4 appellants are alleged to belong to that gang.

The occurrence took place at about 2 A.M. Tolchou Singh P. W. 2 was sleeping in his house along with his wife Kamini Devi and a son Nimai Singh aged 15 years. Ningthemjao Singh was also there as a guest for the night. According to Tolchou Singh P. W. 2 the front door of his house was being forcibly broken open when the sound awakened him. Immediately he found some 4 persons rushing towards him. He was at that time going to conceal himself underneath his bedstead having smelled the bad game. One blow with a sword was flung at him which struck against the mosquito-curtain hanging on the bedstead. The dacoits dragged him on the ground, trampled over him, beat him and kicked him. Rs. 6000/- were demanded or threat to kill was there.

To save his life Tolchou Singh surrendered keys of his boxes which were broken open and articles taken away. Similarly Kamini Devi, P. W. 3, wife of Tolchou Singh was dealt with, and keys of almirah taken, resulting in the removal of articles from there. At the point of death, the inmates were not allowed to open their mouths. The guest P. W. 4 T. Ningthemjao Singh was also tied down, and the boy remained covered on account of fear.

According to Tolchou Singh he could recognise Mohon Singh & Pisak Singh accused out of the lot. After the departure of the dacoits, Ningthemjao Singh untied his binding with the help of his teeth, ran to P. W. 1 Amusana Singh's house nearby and informed him of the occurrence. Amusana Singh who is a son of Tolchou Singh informed the chaukidar and villagers. He went to the Police Station in the morning and lodged ejahar. The value of the stolen property removed is said to be Rs. 2218/-.

(3) All the 7 accused sent by the police after investigation were committed to the Sessions Court for trial under S. 395, I. P. C., out of which the above 4 were convicted and the remaining three were acquitted. The above 4 appellants pleaded not guilty to the charge and claimed to be tried. They produced no defence.

(4) The factum of dacoity is not questioned. It is vigorously contested on behalf of the appellants that they were not among the dacoits and that their guilt is not proved beyond any reasonable doubt. The two appellants Jugeswar Singh and Yaima Singh have retracted their confessional statements recorded by the Magistrate to whom they were sent for the purpose, saying that the same were the result of police pressure and beating.

(5) The only point for determination, therefore, is whether the four appellants or any of them were members of the gang who committed dacoity in the house of Tolchou Singh at Laimanai Basti on the alleged night and that their complicity in the crime is proved beyond any reasonable doubt.

(6) The only evidence against Jugeswar Singh appellant is his own and confessional statement made before the Magistrate on 15-5-53 which was later on retracted by him in the committing Magistrate's Court, as well as in the trial court saying that it was the result of police torturing, threat and beating. As some material corroboration is necessary for basing conviction on a retracted confession, the learned Sessions Judge has taken help of the retracted confessional statement made by another co-accused Soibam Yaima Singh before the same Magistrate on 14-5-53. The same kind of evidence is against S. Yaima Singh appellant also and nothing more, viz., his own retracted confessional statement which is sought to be corroborated by retracted confessional statement of Jugeswar Singh co-accused.

(7) It has thus become necessary to scrutinise both the retracted confessional statements of the two appellants on which their conviction is based and their corroborative value.

(8) It is also to be mentioned here, that the above two appellants are stated to have committed not less than 4 dacoities at different places and that the above confessing statement is with respect to all of them though dealt with separately in a very summary manner in one and the same statement of the above dates (sic).

(9) The relevant portion of the confessional statement Ex. PG made by W. Jugeswar Singh appellant before the Magistrate on 15-5-53 with respect to the dacoity in question runs as follows:

"I am also called Juge. About 3 months before I joined a dacoity committed in the house of a person of Laimanai Bustee who was not known to me. We were 8 dacoits:

1. Soibam Yaima Singh of Tekcham Bustee.
2. Soibam Angou Singh of the same place.
3. Heikrujam Angou Singh of Sapam.
4. Sapam Abung of Sapam.
5. Mohan of unknown Yumnak of Hiyanglam.
6. Pisak Singh of Wabagai.
7. Takhellambam Ningthoujao Singh of Thaubal.
8. I myself.

I took a gun. It has now been taken away by Purna and one Ibotombi. It is a pistol. We got one bicycle, one gold ring and some rupees as our booties. The cycle was taken away by Purna. The ring was taken away by one — I have forgotten his name. As regards money, it was distributed among us and each got about Rs. 50/-".

(10) Soibam Yaima Singh's confessional statement recorded on 14-5-53 with respect to the present occurrence is as follows:

"Joined dacoity four times. The first was committed about 4/5 months before at Langmeidong by 8 of us. We are:

1. Waikhom Juge of Papan.
2. Takhellambam Ningthoujao of Thaobal.

3. Heikrujam Angou Singh of Sapam.
4. Sapam Abung of the same place.
5. Keisam Pisak of Wabagai.
6. Mohon of unknown Yumnak of Hiyanglam.
7. Soibam Angou of Tekcham.
8. I myself.

I did not know the Yumnak of the house therein (sic) committed dacoity. We got one flannel wrapper one cycle & Rs. 100/- as our booty. The wrapper and the cycle were taken away by Juge. The money was distributed among us. Juge brought a gun. I was posted at the gate to watch men passing".

(11) The narration of facts in the above two confessional statements whose corroboration is sought by the other, is so different that it is difficult to reach a conclusion that they are with respect to the same occurrence. Thus while Jugeswar has stated on 15-5-53 that it was about 3 months ago that he joined a dacoity committed in the hous of a person of Laimanai Basti with 7 others, Yaima Singh has stated on 14-5-53 that he joined a dacoity committed about 4/5 months ago in the house of a person, whose Yumnak he did not know, at Langmeidong. The booty taken away by the gang is stated by Jugeswar Singh to be one cycle, one gold ring and some rupees, out of which the cycle was taken away by Purna, the ring was taken away by another whose name he did not know and the cash was divided between all of them (who are mentioned to be 8 persons) and each got Rs: 50/-.

It is to be noted here that the name of Purna is not mentioned by Jugeswar Singh as one of the dacoits in this dacoity. With regard to the booty Yaima Singh has stated that it consisted of one flannel wrapper, one cycle and Rs. 100/-. The wrapper and cycle he says was taken away by Juge (Jugeswar Singh) and the cash was distributed among all of them.

Thus according to Jugeswar Singh, the amount of cash got from the dacoity was about Rs. 400/- as it is only then that he could get Rs. 50/- as his share when it was equally distributed amongst all of them who were 8 persons and according to Yaima Singh the money consisted of only Rs. 100/-. It cannot be said, therefore, that these two appellants are referring to the same dacoity when the time, place and the booty got, are so different. Under the circumstances the corroborative value of one statement of the other is nil.

(11a) The learned Sessions Judge has tried to reconcile Langmeidong (a place where Yiama has stated that the dacoity was committed) to mean Laimanai (as stated by Jugeswar Singh) as both of these Bastees are situated very near to each other and that Langmeidong Bastee is much bigger than the other and so he has concluded that Yaima Singh must have meant Laimanai Bastee which is less important.

(12) I can only say such a conclusion is wholly unwarranted. In fact no such conclusion can be drawn under the circumstances when 4 different dacoities are mentioned to have been committed by the two accused appellants in the same confessional statement.

A retracted confession has seldom any corroborative value for another retracted confession of a co-accused. So the only evidence against Jugeswar Singh is his own retracted confessional statement standing all aloof without any the least corroboration. The confession itself is so summary and discrepant that no reliance can be placed on it.

Thus, how could the cycle be taken away by Purna who is not mentioned as one of the dacoits? Again the value of the property stolen is contradicted by other prosecution evidence. The list given on the spot itself discloses that it was worth Rs. 2218/- which is far more than the value stated in the confessional statement. As far as Yaima Singh, the same argument holds good and apart from it, he has not stated that the dacoity alleged to have been committed at Laimanai Bastee, was committed there. He has clearly stated that it was committed at Langmeidong. Thus offence under S. 395, I. P. C. with which both the above appellants viz., W. Jugeswar Singh and Soibam Yaima Singh were charged, has not been proved beyond any reasonable doubt. It is held accordingly.

(13) I have to remark that the learned Magistrate who recorded the above two confessional statements ought to have made the matter more clear by putting suitable questions. It is not enough to write the very brief statement made by the accused which does not disclose the matter properly. It is the duty of the Magistrate to put suitable questions to have the ambiguity cleared. Confessions should never be recorded in such a cursory manner.

(14) I take up the case of Muhon Singh appellant now. The evidence against him is of threefold character viz., (a) he has been named by the other 2 co-accused in their confessional statement, afterwards retracted, as one of the dacoits (b) he is identified by Tolchou Singh P. W. 2 owner of the house and (c) the recovery of a cycle pump from his house.

(15-27) (After considering all these factors, the judgment proceeded).

(28) All this reflects on the unsatisfactory nature of the investigation made in this case. Such documents & the like which are to form part of judicial record later on should never be prepared in pencil. They should always be in ink and should be legible.

(29) In view of the above observation, it is held that complicity of Muhon Singh appellant in the offence with which he is charged is not proved satisfactorily; he is given benefit of doubt.

(30) The conviction of Keisham Pisak Singh appellant rests upon the identification of Tolchou Singh P. W. 2 and the retracted confessional statements of the other two accused Jugeswar Singh and Yaima Singh. I have already ruled out the two confessional statements while dealing the case of both the co-accused appellants. They, therefore, cannot be taken into consideration for proving the guilt of Pisak Singh when they are ruled out against the makers of them. Tolchou Singh's identification has already been found unworthy of any reliance while dealing the case of Muhon Singh. I find, therefore, that the guilt of Pisak Singh appellant is also not satisfactorily proved.

(31) In view of the above, the conviction and sentence passed against all the 4 appellants namely, Elangbam Muhon Singh, Waikhom Jugeswar Singh, Soibam Yaima Singh and Keisham Pishak Singh in sessions trial case No. 2 of 1953 by the learned Sessions Judge, Manipur, are set aside with the result that all the four criminal appeals Nos. 1 to 4 of 1954 as detailed above are allowed.

(32) A copy of the judgment to be sent to the District Magistrate for proper action.

C/R.G.D. Order accordingly.

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BRIJ NARAIN J. C. (15-7-1954)

Wahengbam Kokngang Singh and another, **Defendants-Appellants** v. Wahengbam Ongbi **Pishak Devi**, Plaintiff-Respondent.

Civil Appeal No. 10 of 1954, against decree of **Sub-J.**, Manipur, D/- 27-3-1954.

(a) Hindu Law — Partition — Mode of — Actual division not necessary.

Partition, according to Hindu Law, consists **in numerical** division of the property; in other **words**, it consists in defining the shares of **the coparceners** in the joint property and an **actual** division of the property by metes and **bounds** is not necessary. 30 Cal 231 (PC), **Relied on.** (Para 6)

(b) Hindu Law — Partition — Onus — Burden is on defendant.

In a suit for partition, when the defendant **alleges** that the partition has already been **effected**, burden of proving lies on the defendant. **AIR** 1952 SC 72, Relied on. (Para 7)

The defendants ought to prove that there **was** actually definite division of the property. (Para 6)

(c) Hindu Law — Partition — Evidence of — Temporary exclusive possession of sons — Sale by one son.

Mere temporary possession, for the sake of **better** management, of a son of a particular plot of lands owned by the father, would **not** establish a regular partition. (Para 5)

Similarly, the mere fact that one son sold **a portion** of land for meeting the expenses **of father's** shradha ceremony, will not be **sufficient** to establish that the sons had separated during the life-time of their father. For, **if there had** really been any separation, the **land** belonging to one of the sons would not **have been** sold, but all the sons would have **sold some** of their land to contribute towards **the expenses** of the shradha ceremony of **their father.** (Para 7)

(d) Custom (General) — Essentials of validity.

A custom is a rule which, in a particular **family** or in a particular district, has, from **long usage**, obtained the force of law. It must **be ancient**, certain and reasonable and being **in derogation** to the general rules of law, **must be** construed strictly. 3 Ind App 259 **(PC)**, Rel. on. (Para 8)

It is, further, essential that it should be **established** to be so by clear and unambiguous **evidence**, for it is only by means of such **evidence** that the Courts can be assured of **its existence** and of the fact that it possesses **the condition** of antiquity and certainty on **which alone** its legal title to recognition **depends. It** must not be opposed to morality **or public** policy and it must not be expressly **forbidden** by the Legislature. (Para 8)

(e) Custom (General) — Proof — Presumption of custom of partition in Manipur — (Hindu Law — Partition — Custom).

Where the evidence shows that the alleged **custom was** not valid in numerous instances, the custom could not be held to be proved. (Para 8)

Where it was contended that according to the custom in Manipur the sons on attaining majority became separate from their father, and so it should be presumed that there was always separation between the major sons and their father in Manipur:

Held that in the absence of cogent evidence on behalf of the defendants to prove this custom, it would be proper to hold that no such custom existed in Manipur. (Para 3)

CASES REFERRED: Paras

(A) ('50) Second Appeal No. 343 of 1950 (Manipur) 2, 9

(B) ('03) 30 Cal 231: 30 Ind App 1 (PC) 6

(C) (V39) AIR 1952 SC 72: 1951 SCR 603 (SC) 7

(D) ('75-76) 3 Ind App 259: 26 WR 55 (PC) 8

S. Somorendra Singh, for Appellants; T. N. Bhattacharya, for Respondent.

JUDGMENT: This appeal arises out of a partition suit No. 151 of 1951 which was decreed by the learned Sub-Judge, Manipur on 27-3-1954. The plaintiff-respondent Thenbi Singh, later on represented by Srimati Pishak Devi, sued for partition of the lands mentioned in pattas No. 46/426 I. W. T. & 46/350 I. W. T. on the ground that these lands stood in the name of Wahengbam Hera Singh, and as these lands remained joint and the plaintiff could not enjoy his share properly, partition became inevitable. The plaintiff claimed one half share in the lands mentioned above by right of inheritance from Wahengbam Mera Singh and Khoidong Singh.

(2) The defendants-appellants contended that the plaintiff has no cause of action for the suit as Wahengbam Hera Singh had partitioned his lands among his four sons and their descendants remained in exclusive possession over the shares which had been allotted to them under this family settlement. It has been further contended that the suit was barred by estoppel owing to decisions in civil suit No. 76 of 1949-50 and civil appeal No. 103 of 1950 and the second appeal No. 343 of 1950 (A) in the Judicial Commissioner's Court, Manipur. Lastly it was contended that the presumption of jointness was inapplicable to Hindu families living in Manipur on account of a custom prevailing to that effect.

(3) According to the plaintiff an area of 54 bighas 3 kattas 2 lessas originally covered by the patta No. 46/426 I. W. T. & land measuring an area of 7 bighas 1 katta 16 lessas covered by patta No. 46/350 I. W. T had been standing in the name of Wahengbam Hera Singh who died about 25 years ago leaving behind him 4 sons of whom Wahengbam Kokngang Singh and Wahengbam Tombi Singh defendants 1 and 2 were from his second wife, and Khoidong Singh and Chaoba Singh were from his first wife. Chaoba Singh, according to the plaintiff, died about 15 years ago leaving his son Ibochauba Singh who also died in the first part of the year 1942 A. D. The plaintiff's father Khoidong Singh also died in the second part of the year 1942 A. D. leaving the plaintiff, a minor. The plaintiff and the defen-

dants were alleged to have, for sufficiently long time, lived jointly and enjoyed the patta lands and the Ingkhol at Fumloo village. But the plaintiff demanded partition of his half share on attaining majority as he represented the branch of Wahengbam Hera Singh from his first wife, while the defendants were alleged to be entitled to the other half as they represented the descendants of Wahengbam Hera Singh from his second wife.

(4) The learned Sub-Judge decreed the suit and so the defendants have come in appeal. The following points arise for determination in this appeal:

1. Whether there had been a partition of the joint family properties during the life-time of Wahengbam Hera Singh and all the diffierent sons of Wahengbam Hera Singh subsequently remained in exclusive possession of the properties which had been allowed to them by their father by means of a family settlement.

2. Is there any custom in Manipur by which sons on attaining majority are regarded as separate from their father during the latter's life-time?

3. Was the plaintiff's suit barred by estoppel?

FINDINGS

Point No. 1. The following short pedigree will make the matter clear:

WAHENGBAM HERA SINGH

= First wife		= Second wife	
Chaoba Singh	Khoidong Singh	Kokngang Singh (D-1)	Tombi Singh (D-2)
Ibochauba Singh	Thenbi Singh (P-1) died on 30th May 1952, now represented by Srimati Pishak Devi respondent.		

The plaintiff examined Ibomacha Singh, I, Hokendra Singh, Wahengbam Inakkhunba Singh, Tomba Singh and Gour Singh witnesses to prove that the properties left by Wahengbam Hera Singh have not yet been partitioned among the branches of his sons and all the sons and their descendants continued to remain in joint possession over them, even though different lands were entered in the names of different sons in the pattas.

The plaintiff produced 32 documents and the documents Exs. P/AA, P/BB, P/CC, P/DD, P/EE, and P/FF relate to the lands in question. The jamabandis Ex. P/AA and Exs. P/CC to P/FF and the order Ex. P/BB as well as the order Ex. P/B show that proceedings were started in the Revenue Court about the lands in question and it was decided that these lands came down to the parties from their ancestor Wahengbam Hera Singh. The defendants produced jambandis Exs. D/A to D/D and revenue receipts Ex. D/G as well as jamabandis Exs. D/H to D/J and these documents also establish that the lands in question besides other lands were owned by Wahengbam Hera Singh and later on different lands remained in the names of different sons. The defendants examined Wahengbam Kokngang Singh, W. Tolchou Singh, Kerani Singh, Nakol Singh, Wahengbam Bidur Singh and Balhav Singh witnesses in order to show that Wahengbam Hera Singh had divided his properties among his sons during his life-time.

(5) It has been contended by the learned counsel for the appellants that W. Tolchou Singh is related to the parties and is 74 years old, and similarly Kerani Singh is also 60 years old, and so their statements should have been believed. The evidence of Nakol Singh D. W. 4 contradicts the statements of these 2 witnesses by showing that Wahengbam Hera Singh had separated his 2 sons only by giving them 8 paris of land while the remaining minor sons remained joint with him and 8 paris of land remained for these minor sons. Bidur Singh D. W. 5 has tried to show that no property remained joint at the time of the death of Wahengbam Hera Singh, but this version does not find support from the statement of Nakol Singh D. W. 4. Balhav Singh D. W. 6 tried to show that the father of the plaintiff, Khoidong Singh, had told him that the land of patta No. 46/179 had been given to him by his father and if this statement is believed it would go to show that for the sake of better management some of the lands were given to a particular son of Wahengbam Hera Singh for cultivation for some time and so the fact that revenue receipts were issued regarding specific plots in the name of any particular son, will not be of any material consequence. The argument that as no objection was raised, on the exclusive possession of particular sons on particular plots of land belonging to Wahengbam Hera Singh, it should be inferred that Wahengbam Hera Singh had actually partitioned his properties among his sons cannot be accepted, because mere temporary possession for the sake of better management, of a son of a particular plot of lands owned by the father, would not establish a regular partition.

(6) Partition, according to Hindu Law, consists in numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property and an actual division of the property by metes and bounds is not necessary, vide — 'Ram Pershad v. Lakhpati, Koer', 30 Cal 231 (PC) (B). The defendants ought to have proved that there was actually definite division of the property, but the evidence produced by the defendants goes to show that at least 2 of the sons of Wahengbam Hera Singh remained joint and as the defendants' evidence was full of grave discrepancies, I think the learned Sub-Judge was perfectly justified in disbelieving their evidence. Wahengbam Hera Singh had 12 paris of land and the defendants' case is that he gave 4 paris of land to each of his sons during the alleged partition or family settlement, but this cannot be accepted as correct for he could not possibly give more than 3 paris to each of his sons. It has not been established in this case whether Wahengbam Hera Singh carried out this partition immediately before his death or long before his death. Again some of the lands which are contended by the defendants to have been in possession of Wahengbam Hera Singh appear to have been acquired by Chaoba Singh, vide Ex. P/E and Ex.

P/F. Khoidong Singh also appears to have acquired some property out of the properties in question by means of Ex. P/1. As such the defendants have failed to prove what specific property was really with Wahengbam Hera Singh, and they have further failed to prove what specific property was given to any particular son in the alleged partition.

(7) The mere fact that Khoidong Singh sold 3 paris of land under patta No. 47/97 N. to Lukhoi Singh on 8-11-1925 for meeting the expenses of father's shradha ceremony, will not be sufficient to establish that the sons had separated during the life-time of their father. For if, there had really been any separation, the land belonging to one of the sons would not have been sold, but all the sons would have sold some of their land to contribute towards the expenses of the shradha ceremony of their father. Khoidong Singh would certainly have sold joint property for meeting the expenses of the shradha ceremony of their father and so I think this fact also does not establish that Wahengbam Hera Singh had partitioned his properties among his four sons during his life-time. The burden of proving partition lay on the defendants; vide — 'Bhagwati Prasad v. Rameshwari Kuer', AIR 1952 SC 72 (C), and after going through the evidence on the record, I agree with the learned Sub-Judge in holding that they have failed to substantiate their contention. I. therefore, decide this point against the appellants.

(8) 'Point No. 2'. A custom is a rule which in a particular family or in a particular district, has from long usage, obtained the force of law. 'It must be ancient, certain and reasonable' and being in derogation to the general rules of law, must be construed strictly, vide — 'Hurpurshad v. Sheo Dyal', 3 Ind App 259 (PC) (D). It is, further, essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the condition of antiquity and certainty on which alone its legal title to recognition depends. It must not be opposed to morality or public policy and it must not be expressly forbidden by the Legislature. Where the evidence shows that the custom alleged was not valid in numerous instances, the custom could not be held to be proved vide — 'Mulla's Hindu Law, 1952 Edn., page 16'.

In the present case the defendants did not produce any reliable evidence to show that the alleged custom was followed in any specific instances. The alleged custom also does not fulfil essential requisites of a valid custom laid down above. It has been vaguely contended that in Manipur the sons on attaining majority become separate from their father, and so it should be presumed that there is always separation between the major sons and their father in Manipur. In the absence of cogent evidence on behalf of the defendants to prove this custom, I think it proper to hold that no such custom exists in Manipur. This point is also decided against the appellant.

(9) 'Point No. 3'. It has been contended that the judgment in civil suit No. 76 of 1949-50 Ex. PT by which the dispute regarding the assets left by Ibonchauba Singh was compromised in this Court in 'Second Appeal No. 343 of 1950 (A)' operates as estoppel in this case. It does not appear that the dispute in the former case was relating to the property of Wahengbam Hera Singh and as the question whether there was any partition among the sons of Wahengbam Hera Singh during his life-time was not raised in that case, I think the judgment in that case cannot bar the present suit. The present plaintiff nowhere declared in that case that he would not lay any claim to any other property left by Wahengbam Hera Singh, and so this point also must be decided against the defendants-appellants.

(10) The appeal, therefore, fails and it is hereby dismissed with cost to the respondent.

D.R.R. Appeal dismissed.

A.I.R. 1954 MANIPUR 11 (Vol. 41, C.N. 6)

BRIJ NARAIN J. C. (17-5-1954)

Soraisem Kamini Singh, Appellant v. Chongtham Iboyaima Singh, Respondent.

Civil Appeal Case No. 38 of 1953, against decree of Dist. J. Manipur, in Civil Suit No. 8 of 1951.

(a) Registration Act (1908), S. 17 — Endorsement and receipt regarding part payment of mortgage debt.

A writing given by the mortgagee about part payment towards the mortgage debt is not compulsorily registrable and therefore such a writing even if unregistered is admissible in evidence. (Para 4)

Anno: Reg. Act, S. 17 N. 70.

(b) Evidence Act (1872), S. 17 — Admission — Construction.

Every admission should be given plain, literal and fair meaning and its scope should not be widened or restricted on the basis of suspicions or surmises. (Para 8)

(c) Evidence Act (1872), Ss. 31, 95 to 97 — Admission not conclusive proof.

Writing admitting payment of money by mortgagor — Mortgagee can under Ss. 31, 95 to 97 contend that the admission is not conclusive and that some money had been paid towards any other deed than the mortgage deed in suit. (Para 8)

Anno: Evi. Act, S. 31 N. 2.

CASES REFERRED: Paras

(A) ('10) 14 Cal WN 617: 5 Ind Cas 165 4
(B) (V28) AIR 1941 Pat 246: 192 Ind Cas 861 4
(C) (V12) AIR 1925 All 802: 47 All 873 4
(D) ('07) 34 Cal 223: 5 Cal LJ 192 4
(E) ('07) 34 Cal 305: 5 Cal LJ 270 4
(F) ('10) 33 Mad 100: 3 Ind Cas 729 4

N. Ibotombi Singh, for Appellant; B. B. Sen, for Respondent.

JUDGMENT: This is a first appeal against the judgment of the learned District Judge of Manipur in a mortgage suit. The facts of the case lie within a short compass and the whole controversy so far as this appeal is concerned centres round the short point as to whether or not the appel-

lant's mortgage dues had been paid up before the institution of this suit on 28-7-1949 by means of the writing Ex. D/A.

(2) The important facts of the case are uncontroverted and it has not been challenged that Chongtham Iboyaima Singh of Khwai Wahengbam Leikai, defendant borrowed Rs. 4000/- from Soraisem Kamini Singh of Segalambi, Takhellambam Leikai, plaintiff on 28-1-1949 at 3 per cent. per mensem, vide Ex. P/A and a double-storied (shop) building situated in No. 145/36 Imphal Town Fund, was mortgaged in this deed. The plaintiff alleged that nothing had been paid towards the principal or interest and so the suit which has given rise to this appeal, was instituted on 25-1-1951 for recovery of Rs. 5678-as. 10-ps. 8 along with costs and pendente lite and future interest, etc.

(3) The defence was that Rs. 2000/- had been paid within 5 months of the execution of the mortgage deed in question and Rs. 2120/- were paid to the plaintiff on 28-7-1949 and only Rs. 600/- remained due on the defendant on account of interest and the plaintiff gave the writing Ex. D/A on this occasion. The learned District Judge accepted the defendant's contention and decreed the suit for Rs. 600/- only and so the plaintiff has come to this Court in appeal.

(4) Soraisem Kamini Singh, plaintiff, admitted in his cross-examination that he had written out Ex. D/A but later on he denied this fact. The learned District Judge inferred from this denial that the entire case put forward by the defendant was correct. It has been contended by the learned counsel for the appellant that the writing Ex. D/A was inadmissible in evidence as it should have been registered. This argument does not find support from S. 17, Indian Registration Act, nor from any ruling of any High Court.

In — 'Digambar Das v. Harendra Naraian', 14 Cal WN 617 (A) it has been laid down that the creditor may accept an amount tendered in part payment if the debtor does not make it a condition that the tender is to be in discharge of the whole. It was held in — 'Ram Kirpal v. Baleswar Choudhury', AIR 1941 Pat 246 (B) that it was open to the mortgagor to rely on evidence other than the endorsements on the mortgage bond such as a receipt signed by the mortgagee or his agent even though the mortgage deed contained a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt would be payments endorsed on the mortgage deed itself. As such there is no justification for holding that any writing about any part payment towards the satisfaction of a mortgage debt must be registered and so I think the writing Ex. D/A which was admitted by the plaintiff, was properly accepted in evidence in this case vide also — 'Amar Singh v. Mt. Ram Dei', AIR 1925 All 802 (C); — 'Satyabadi Behara v. Mt. Hirabati', 34 Cal 223 (D); — 'Jagat Tarini Dasi v. Naba Gopal', 34 Cal 305 (E); — 'Valayuda Naicker v. Hyder Hussan Khan Sahib', 33 Mad 100 (F).

(5) The next question which is also very material for the decision of this case is whether Ex. D/A establishes or not that the entire principal mortgage money has been paid up. The document Ex. D/A runs as follows:

> "The amount of Rs. 600/- taken by Sri Chongtham Iboyaima Singh is the interest for six months up to 28-7-1949".

The plaintiff has admitted in cross-examination that he gave a deed (Ex. D/A) to the defendant saying that Rs. 600/- being interest up-to-date was received by him. The learned District Judge after taking into consideration these two admissions and after observing that the demeanour of the plaintiff was very suspicious came to the conclusion that Rs. 4120/- had been paid up and only Rs. 600/- remained due on the defendant.

(6) The defendant examined himself and he produced Thowdam Bolaram Singh witness. The defendant admittedly did not take any receipt on the first occasion when Rs. 2000/- are alleged to have been paid by him within 5 months of the execution of the mortgage deed and on the second occasion also when the defendant paid up the entire principal mortgage money and Rs. 120/- as interest, the defendant did not get these facts mentioned in Ex. D/A. Thowdam Bolaram has stated that Rs. 2120/- were paid 15 days after the first payment but the defendant's statement shows that the first payment was made on 28-5-1949 and the second on 28-7-1949. The defendant had not named Thowdam Bolaram as his witness before whom the alleged payments were made and as this witness is a co-worker of the defendant in a contract business, he cannot be deemed to be impartial. Thowdam Bolaram says that he had asked the plaintiff as to why was not the deed destroyed as the loan was being repaid, but the defendant did not make any such statement. Thowdam Bolaram does not state that the payments made before him were regarding the dues of the mortgage deed in suit and as he did not see the plaintiff writing out Ex. D/A nor did he hear any talk about its execution, it seems very difficult to accept his statement at its face value. As such it becomes very difficult to hold that statements of these witnesses go to substantiate the defendant's contention.

(7) Section 17 of the Indian Evidence Act defines an admission as follows:

> "An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

Sections 18 to 20 mention that statements made by a party to the proceeding and other persons, under circumstances mentioned therein are admissible while S. 21 lays down that admissions are relevant and may be proved as against the person who makes them or his representative in interest. Section 31, Evidence Act, clearly lays down that admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

(8) If the contents of Ex. D/A are carefully examined it becomes clear, if plain grammatical meaning is given to the words used, that this document merely shows that Rs. 600/- had become

due on the defendant as interest for six months up to 28-7-1949 and it does not show that any sum had been paid. Even if it had been mentioned that something had been paid, the plaintiff could under Ss. 31, 95 to 97, Evidence Act, contend that the admission was not conclusive and some money had been paid about any other deed. Thus there seems to be no justification for holding that Ex. D/A proves that the sum of Rs. 4120/- had been paid up by the defendant. Every admission should be given plain, literal and fair meaning and its scope should not be widened or restricted on the basis of suspicions or surmises, but in this case a finding has been given to the effect that Rs. 4120/- had been paid through Ex. D/A, on mere suspicions and surmises which is not justified.

(9) The admission of the plaintiff during the course of cross-examination, no doubt, clearly shows that Rs. 600/- had been paid to him towards interest when he wrote out Ex. D/A and so it can be safely held that this sum was actually paid. No other point has been pressed before me.

(10) The plaintiff is, therefore, entitled to a decree for Rs. 5078-as. 10- ps. 8 only along with interest pendente lite at one per cent. per mensem and future interest at 6 per cent per annum. The rest of the claim stands dismissed. The parties will get and pay costs according to their success and failure. The appeal is, therefore, allowed to the extent indicated above.

(11) A preliminary decree under O. 34, R. 4, Civil P. C., be prepared with six months' period for payment.

K.S.B. Appeal partly allowed.

A.I.R. 1954 MANIPUR 13 (Vol. 41, C.N. 7)

BRIJ NARAIN J. C. (29-7-1954)

Manipur State v. Laisram Bokul Singh, Respondent.

Criminal Appeal No. 7 of 1954, against order of S. J., Manipur, D/- 31-3-1954.

(a) Evidence Act (1872), Ss. 101 to 103 — Currency note recovered from accused — Burden to prove that note belonged to him.

Where it was established that a currency note formed part of the money which was to be deposited in the Treasury and that it was given to a person for being kept in his custody to be deposited in the Treasury later on and the note was recovered from the outer court-yard of the accused:

Held, that it was for the accused to prove that the note belonged to him and that he retained possession over the note honestly. (Para 5)

Anno: Evidence Act, Ss. 101 to 103 N. 3.

(b) Evidence Act (1872), Ss. 25 and 27 — Confession by accused — Admissibility.

Any confession made by the accused before a Police Officer will not be legally admissible under S. 25. But the words distinctly relating to facts discovered are clearly admissible under S. 27. (Para 6)

Anno: Evidence Act, S. 25 N. 3; S. 27 N. 7.

(c) Penal Code (1860), S. 411 — Possession of accused incriminatory — False explanation — Effect — (Evidence Act (1872), S. 114).

Where the nature of the property and the circumstances indicate that the possession of the accused was not in the natural course of things, but was incriminatory, the fact that a false explanation was given by the accused regarding receipt of the property makes the prosecution case stronger and more acceptable. (Para 6)

Anno: Penal Code, S. 411 N. 6; Evidence Act, S. 114 N. 7.

(d) Criminal P. C. (1898), Ss. 417 and 423 (1) (a) — Order of acquittal. when can be set aside.

On Government appeal under S. 417 the well-known principle recognised in the administration of criminal justice that the order of acquittal has strengthened presumption of innocence in favour of the accused and that he is entitled to the benefit of doubt, must not be lost sight of. But the order of acquittal can be set aside if the decision of the Sessions Judge is manifestly erroneous. (Para 8-10)

Anno: Criminal P. C., S. 423 N. 15 Pts. 5 and 19.

(e) Penal Code (1860), S. 420 — Wilful misrepresentation — Intention to defraud.

Wilful misrepresentation of a definite fact with intention to defraud would be cheating. Along with this, it has to be shown that the misrepresentation made was false to the accused's knowledge at the time when it was made. (Para 11)

Anno: Penal Code, S. 420 N. 4 and 6.

(f) Penal Code (1860), S. 411 — What prosecution has to prove.

It is the duty of the prosecution in order to establish the charge under S. 411 to prove (1) that the stolen property was in possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property. (Para 12)

Anno: Penal Code, S. 411 N. 1.

(g) Evidence Act (1872), S. 114 — Possession of stolen property — Presumption.

As soon as the prosecution produces evidence to the effect that the person has been found in possession of the money which has been the subject matter of theft, the presumption at once arises under S. 114 that the possessor is either a thief or the receiver of stolen property and this presumption when unexplained shall be regarded as conclusive fact. (Para 12)

Anno: Evidence Act, S. 114 N. 7.

(h) Criminal P. C. (1898), Ss. 237 and 423 (1) (a) — Appellate Court's power to convict for another offence.

The appellate Court can convict the accused of another offence or of a minor offence covered by the offence of which he has been acquitted provided no prejudice has been caused to the accused. (Para 13)

Anno: Criminal P. C., S. 423 N. 19 Pt. 2.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 15: 1954 Cri LJ 230 (SC) 6, 8-10
(B) (V41) AIR 1954 Mad 433: 1954 Cri LJ 583 6
(C) (V37) AIR 1950 All 631 6
(D) (V41) AIR 1954 Him-P 33: 1954 Cri LJ 833 8-10
(E) (V41) AIR 1954 Punj 121: 1954 Cri LJ 746 8-10
(F) (V41) AIR 1954 SC 39: 1954 Cri LJ 335 (SC) 8-10
(G) (V39) AIR 1952 J & K 26: 1952 Cri LJ 1230 11
(H) (V41) AIR 1954 SC 51: 1954 Cri LJ 338 (SC) 11
(I) (V35) AIR 1948 Lah 80: 49 Cri LJ 147 12
(J) (V15) AIR 1928 Bom 130: 29 Cri LJ 403 13
(K) (V12) AIR 1925 Sind 105: 25 Cri LJ 1057 13

S. C. Bardhan, Public Prosecutor, for the State, N. Ibotombi Singh and Y. Imo Singh, for Respondent.

JUDGMENT: This is an appeal on behalf of the Manipur State under Section 417, Cr. P. C., read with Section 20, Manipur State Courts Act, 1947, against the order of acquittal of the respondent passed by the Sessions Judge, Manipur, in criminal appeal No. 20 of 1954 on 31-3-1954. The respondent was originally convicted by the senior Extra Assistant Commissioner in criminal case No. 675 of 1954 on 8-3-1954 under Section 417 and was sentenced to one year's rigorous imprisonment and a fine of Rs. 400/- and in default of payment of fine a further term of 4 months' rigorous imprisonment.

(2) The facts of the case as alleged by the prosecution are that Waithou Phumnam Fishery was purchased by the Waithou Phumnam Mapan Fishery Co-operative Society Limited during the year 1953 for Rs. 40,000/- and odd and the Patsal (proceeds money) was to be paid in 3 instalments.

The first two instalments appeared to have been paid earlier and a sum of Rs. 7,500/- was raised in the village for payment of the third Kist (instalment) and the money was taken to the Imphal Treasury for being deposited there during the Rathajatra festival, but as Laisram Kirti Singh, cashier P. W. 2, Maimom Mani Singh, Secretary P. W. 3, Thangjam Jatra Singh, Chairman P. W. 4 and Yumnam Gour Singh P. W. 7 reached the Treasury late the money could not be deposited and as it was a holiday on the next day the amount was converted from G. C. notes of lower denominations to seventy five 100 rupee notes and one of these notes was torn cross-wise in the middle and a piece of white paper was affixed on its back to join the torn parts, vide Ex. P-7 and the statements of Kistur Chand Seraogi P. W. 10 & Wahengbam Bishambhar Singh, Poddar, Imphal Treasury P. W. 11.

As the money could not be deposited in the Treasury it was kept with the cashier Laisram Kirti Singh P. W. 2, vide statement of Mutum Yaima Singh P. W. 9. The present respondent Laisram Bokul Singh and Moirangthem Angou Singh P. W. 8 went to the house of the cashier 4 days before the Punarjatra which took place on 21-7-1953 and the cashier was told that a stranger (Mayang) could double the G. C. notes and so the sum of Rs. 7,500/- relating to the third Kist (instalment) might be doubled and the amount thus obtained be distributed among the cashier, present respondent, the Mayang and others.

At first Laisram Kirti Singh P. W. 2 did not believe the above version, but on the next day Bokul Singh respondent went again to him along with the outsider (Mayang) and one Kumaro Singh and the cashier produced a 10 rupee note and the Mayang attached it to a blank paper of equal size and then it was wrapped with cotton Ex. P-3 and was kept between 2 mirrors Exs. P-1 and P-2 tied with thread Ex. P-4 and after that it was wrapped with a piece of cloth Ex. P-9. The bundle was then kept inside an almirah to be opened on the next day.

On the next day the Mayang, the respondent and others went to the cashier's house at 8 A. M. The almirah was opened and the outsider unwrapped the mirrors when two 10-rupee notes were found. The cashier retained his own note and gave the other to the outsider. The present respondent then asked the cashier P. W. 2 to utilise the opportunity by getting the sum of Rs. 7,500/- doubled. In the afternoon the cashier produced the G. C. notes of Rs. 7,500 and he and the outsider were closeted in a room and the doors and windows of the room were closed while the respondent waited outside in the verandah.

The notes produced by the cashier were kept on a bed and a chair was put near the bed as desired by the outsider who sat on the chair. The cashier produced a plate as desired by the outsider and this plate was placed on the bed. Some liquid was poured on that plate and the outsider then produced a bundle of foolscap papers, cut into pieces as big as 100-rupee note and the outsider then put a paper and applied some liquid from the plate and then put a 100-rupee note on that paper. Similarly all the other 100-rupee notes were put between the 2 blank papers. Then the outsider wrapped all the currency notes in a sheet of white paper and the note Ex. P-7 which was torn crosswise in the middle was also wrapped up along with the others. Cotton Ex. P-3 was put on all sides of the bundle of the currency notes.

Thereafter the bundle was again wrapped up in a paper. Then the two mirrors were placed on the opposite side of the bundle and a paper was wrapped again over these mirrors Exs. P-1 and P-2 and a piece of cloth Ex. P-9 was wrapped around the bundle and then the bundle was tied with thread Ex. P-4. A substance like wax was melted by means of a match fire and was allowed to fall on the G. C. note Ex. P-4a. The stranger then made a sign to the cashier to keep the bundle inside the almirah which the cashier did and he locked the almirah, then the cashier and the outsider came out and the present respondent was found sitting in the verandah.

The respondent and Kumaro Singh promised to return next day and the respondent assured the cashier not to worry. On the next day, however, they did not turn up, and Maimom Mani Singh, Secretary P. W. 3, went to the cashier and asked

him to go and pay the Patsal. The cashier narrated the whole story to the Secretary and he opened the almirah and then the bundle was opened and no currency note was found in it and only blank paper Ex. P-5 was found.

The cashier then ran to the Chairman Thangjam Jatra Singh P. W. 4 and one full day was taken in going to Imphal and later on the next day a typed report dated 23-7-1953 was handed over to the Superintendent of Police, Manipur, and on its basis the first information report was prepared by Ch. Mani Singh, O/C Thaubal P. S., P. W. 12. The O/C inspected the locality and he recovered Exs. P-1 to P-5, vide recovery list Ex. P/D. Bokul Singh respondent was then arrested and he pointed out the place from which a Kouta Ex. P-8 was recovered and seventy-one 100-rupee notes and some pieces of papers Ex. P-11 were recovered from that Kouta (tin case), vide recovery list Ex. P/F; vide also the statements of Mutum Mera Singh P. W. 6 and Laisram Ram Singh P. W. 5.

As some of the accused were found absconding proceedings under Sections 87 and 88 Cr. P. C., had to be started, vide proclamation Ex. P/C and the orders of attachment Exs. P/B and P/E and the warrant issued against Kumaro Singh Ex. P/A which has been duly proved by the Head Constable Bacha Singh P. W. 1. The O/C after completing the investigation challaned the present respondent and Lairengbam Kumaro Singh and one unknown person (Gunendra) shown on the right side in the photograph, vide Ex. P-6, under Section 420, I. P. C., on 5-8-1953.

(3) The respondent contended that he had enmity with the cashier and his party and he had been implicated in this case on account of enmity. According to the respondent he never mentioned to the cashier that the G. C. notes could be doubled and the money which was recovered from his house really belonged to him and it had been borrowed by him through the deed dated 13-7-1953, vide Ex. D/A, from Oinam Iboton Singh D. W. 2. Regarding the cut note Ex. P-7 the respondent has stated that it was given to him by the cashier on 19th or 20th July 1953, because the cashier had to pay him Rs. 22/- on account of the respondent's feeding a stranger physician at the request of the cashier for a number of days.

According to the respondent this stranger was put up by the cashier at his house on the ground that the said physician was an untouchable and so the cashier paid Rs. 22/- to the respondent as feeding charges of the physician and the respondent returned Rs. 78/- to the cashier vide the statement of Mutum Jugol Singh D. W. 1. Koijam Madhumongol Singh D. W. 3 is the scribe of the deed Ex. D/A while Laisram Kundale Singh D. W. 4, father of the respondent & Potsangbam Yaima Singh D. W. 5 have been examined to show that the respondent really borrowed Rs. 7,500/- from Oinam Iboton Singh D. W. 2 through Ex. D/A in their presence.

(4) It has been contended by the learned Government Advocate that the learned Sessions Judge has not approached this case from a correct standpoint and there was absolutely no ground for disbelieving the evidence of Laisram Kirti Singh, Maimom Mani Singh, Thangjam Jatra Singh and Yumnam Gour Singh in so far as their statements go to establish that a sum of Rs. 7,500/- was raised in the village for payment of the third kist and this money was taken to the Imphal Treasury for being deposited there during the Rathajatra festival. The mere fact that there was a minor discrepancy regarding the exact date on which the money was to be deposited, will not be of any material consequence.

The evidence of Wahengbam Bishambhor Singh, Poddar P. W. 11 goes to support the prosecution case on this point and as this witness is a disinterested witness, I think the prosecution case to the above effect ought to have been believed. It is further clear from the evidence of these witnesses that the money was not deposited in the Treasury on the day on which it was presented as Laisram Kirti Singh and others reached the Treasury late. It is further established from the prosecution evidence that as the Treasury was closed on the next day being a holiday, the cashier was directed to take the sum of Rs. 7,500/- after having changed the G. C. notes of lower denominations into seventy-five 100-rupee notes.

The evidence of the Poddar Wahengbam Bishambhor Singh established that the torn note Ex. P-7 was given by him on the express condition that if it would not be accepted by the Treasury, it would be changed. The evidence of the Poddar finds support from the entry in the diary Ex. P/A and this entry has been duly proved by Thangjam Jatra Singh P. W. 4. Even if no reliance is placed on the entry in the diary Ex. P/A on the ground that this diary was produced in Court at a late stage, I think the evidence of Wahengbam Bishambhor Singh Poddar cannot be easily brushed aside as it finds ample support from the statements of Laisram Kirti Singh, Maimom Mani Singh and other prosecution witnesses, and it goes to establish fully that this torn note Ex. P-7 really formed part of the sum of Rs. 7,500/- which had been kept with the cashier for being deposited in the Treasury towards third instalment later on.

(5) Once it is established that this note Ex. P-7 formed part of the money which was to be deposited in the Treasury as the third instalment and it was given to Laisram Kirti Singh P. W. 2 for being kept in his custody to be deposited in the Treasury later on, it was for the respondent to prove that this torn note which was recovered from the outer courtyard from the Kouta Ex. P-8 by the D/C Ch. Mani Singh P. W. 12 in the presence of Mutum Mera Singh and Laisram Ram Singh vide recovery list Ex. P/F, belonged to him and that he retained possession over this note honestly.

The respondent came forward with the theory that an outsider (Mayang) had been brought by Laisram Kirti Singh to him on the allegation that he was a physician but as he was an untouchable, and he could not be made to stay at the house of the cashier, so the respondent agreed to allow the physician to stay at his house, and the cashier

paid him Rs. 22/- on this account. According to the respondent the cashier paid him this 100-rupee note and the respondent returned Rs. 78/- to the cashier.

In the first place the respondent contended that he had enmity with the cashier and members of his party were out to falsely implicate him in this case. If there had been any truth in this version, it seems very difficult to believe that the respondent would have agreed to provide accommodation and feed an outsider (Mayang) at the request of Laisram Kirti Singh, cashier. Again if it were a fact that the cashier had given this torn note to the respondent, the latter would not have accepted it without any condition of its being received back in case it was not encashed elsewhere, but no such promise is said to have been made by the cashier to the respondent.

Lastly the theory of the respondent mentioned above has not been proved by any cogent evidence. The respondent examined Mutum Jugol Singh who is a chance witness and even though this witness has tried to show that Kirti Singh gave the note Ex. P-7 to the respondent and he promised to receive it back, the statement of this witness appears to be highly improbable, as this witness could not possibly be expected to identify the particular note which he could not have seen except for a second or two. This witness has admitted in cross-examination that he did not look at the cut note and so it must be held that the statement of this witness was not properly scrutinised by the learned Sessions Judge.

(6) The evidence of the O/C Ch. Mani Singh P. W. 12 proves that a sum of Rs. 7,100/- was recovered from the outer court-yard of the respondent and his statement on this point is duly proved by the statements of the witnesses present at the time of recovery as well as the recovery list Ex. P/F and the respondent also clearly admitted this recovery in his statement before the Court. There is no doubt that any confession made by the respondent before the O/C will not be legally admissible under Section 25, Indian Evidence Act, vide — 'Zwinglee Ariel v. State of Madhya Pradesh', AIR 1954 SC 15 (A), the words distinctly relating to facts discovered are clearly admissible under Section 27 of that Act, vide — 'Public Prosecutor v. Indla China Lingiah', AIR 1954 Mad 433 (B), where it is laid down that it is permissible to connect the accused and the object with each other through the information but not either of them with the crime.

In the course of such a strict construction of Section 27, of the Evidence Act, by precisely limiting the information admissible to so much of it as distinctly serves to connect the accused with the object alone, it sometimes happens that the admissible portion amounts to a confession, which it does in cases where the gist of the offence is possession or concealment. The law is not that S. 27 prohibits the same.

The prosecution evidence in the present case proves that the note Ex. P-7 along with other G. C. notes of 100-rupees were recovered from the possession of the respondent & the respondent has admitted this fact before the trial Court. I have already pointed out above that it has been proved in this case that the note Ex. P-7 was given by the Poddar P.W. 11 to the cashier and it formed part of Rs. 7,500/- which was to be deposited in the Treasury as third kist and which had been stolen, vide the report dated 23-7-1953.

As the respondent failed to prove that the cashier gave this note to him and as the respondent buried this note along with other G. C. note in his outer court-yard near the plinth of his house, it becomes clear that he never really believed that he was honestly entitled to it. If the respondent had really believed that the note Ex. P-7 belonged to him he would keep it inside his house and not in the outer court-yard which has no boundary walls. The fact that the respondent kept such a big amount in the outer court-yard only goes to strengthen the prosecution case.

As the property (which was of immense value when the status of the respondent is taken into consideration) and the circumstances (this huge sum was kept in the outer court-yard) indicate that the possession of the respondent was not in the natural course of things, but was incriminatory, the fact that a false explanation was given by the respondent regarding receipt of Ex. P-7, makes the prosecution case stronger and more acceptable vide — 'Babulal v. State', AIR 1950 All 631 (C).

(7) The respondent tried to show that he borrowed a big sum of Rs. 7,000/- from Oinam Iboton Singh D.W. 2 through the deed Ex. D/A. The respondent no doubt produced the scribe of this deed and he examined his father and one Potsnagbam Yaima Singh to show that the deed Ex. D/A is genuine. It has not been shown that Oinam Iboton Singh had the means to advance such a big sum and then he had no good reason for advancing this sum without taking any security of immoveable property.

The document Ex. D/A appears to be suspicious on the face of it, and I think the learned Magistrate has for good reasons held it to be purposive. If Oinam Iboton Singh had any money dealings on any previous occasion, there could have been good ground for his advancing such a big amount to the respondent on a pro-note, but no previous money dealings have been proved in this case. I am, therefore, of opinion that the case of the respondent on this point also was not at all established.

It, therefore, follows that the recovery of the note Ex. P-7 which is proved to have been kept in the custody of Laisram Kirti Singh P.W. 2 from the possession of the respondent without any proper justification, is incriminatory and the circumstances of this case fully show that the respondent dishonestly retained possession over it. If the respondent honestly believed that he was entitled to keep this money he would not have tried to put all sorts of theories in this case to which reference has already been made and which could not be substantiated by him. (After considering some other arguments of the respondent his Lordship continued).

(8-10) There is no doubt, on Government appeal under S. 417, Criminal P. C., the well-known principle recognised in the administration of criminal justice that the order of acquittal has strengthened presumption of innocence in favour of the appellant and that he was entitled to the benefit of doubt, must not be lost sight of, vide — 'AIR 1954 SC 15 (A)'; — 'State of Himachal Pradesh v. Mirza Hossein Beg', AIR 1954 Him-P 33 (D); — 'Mohindar Singh v. The State', AIR 1954 Punj 121 (E), — 'Trimbak v. State of Madhya Pradesh', AIR 1954 SC 39 (F). But the order of acquittal can be set aside if the decision of the Sessions Judge is manifestly erroneous as it appears to be in this case, vide S. 423 (1) (a), Criminal P. C.

(11) The prosecution attempted to prove that the present respondent actually cheated Kirti Singh P. W. 2 by inducing him to part with Rs. 7,500/- so that the same may be doubled. The F. I. R. lodged in this case shows that the prosecution clearly alleged that the respondent had committed theft and not cheating and then the 2 witnesses of the alleged occurrence, Khomba and Kumar, mentioned in the F. I. R. were not produced in the Court. In view of this fact I think the learned Sessions Judge was justified in holding that the prosecution had withheld the best evidence and has relied on other witnesses who were not mentioned in the F. I. R. and so the statement of these witnesses could not be deemed sufficient for proving the offence under S. 420, I. P. C.

In — 'Amir Chand v. Lok Nath', AIR 1952 J & K 26 (G) it has been laid down that wilful misrepresentation of a definite fact with intention to defraud would be cheating, (vide also — 'Habib Md. v. State of Hyderabad', AIR 1954 SC 51 (H)). Along with this, it has to be shown that the misrepresentation made was false to the accused's knowledge at the time when it was made. In the present case it has not been proved by cogent evidence that the present respondent made any such wilful misrepresentation to the cashier and so I think the prosecution evidence is not sufficient to establish the charge under S. 420, I. P. C., against the respondent.

(12) But the evidence of the prosecution witnesses discussed above fully proves that the sum of Rs. 7,500/- was produced before the Imphal Treasury for being deposited there towards the third instalment by the cashier P. W. 2 along with others and this sum was not accepted as the cashier reached the Treasury late and later on G. C. notes of lower denominations were changed to 75 G. C. notes of 100-rupee notes and the cut note Ex. P/7 was one of these notes.

Later on this note was recovered from the outer court-yard of the respondent at the instance of the respondent himself and as the respondent did not give any satisfactory explanation as to how he came into possession of it and as the respondent kept it in a tin case buried in his outer court-yard, it becomes clear that the respondent dishonestly retained possession over it. It is the duty of the prosecution in order to establish the charge under S. 411, I. P. C., to prove (1) that the stolen property was in possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it and (3) the accused has knowledge that the property was stolen property.

As soon as the prosecution produced evidence to the effect that the person has been found in possession of the money which has been the subject-matter of theft, the presumption at once arises under S. 114, Evidence Act, that the possessor is either thief or the receiver of stolen property and this presumption when unexplained shall be regarded as conclusive fact vide — 'Fateh Mohd. v. Emperor', AIR 1948 Lah 80 (I).

In the present case I have shown above that the respondent did not give any reasonable explanation as to how he came into possession and why did he keep such huge amount in the outer court-yard and so I think the charge under S. 411, I. P. C., has been established against the respondent in the present case at least with respect to the G. C. Note Ex. P-7 beyond all reasonable doubt and the learned Sessions Judge's order of acquittal passed on the basis of manifestly erroneous appreciation of evidence has not been proper and legal.

(13) In view of the provisions under Ss. 423 (1) (a) & 237, Criminal P. C., & in view of the rulings reported in — 'Emperor v. Ismail Khadirsab', AIR 1928 Bom 130 (J) and — 'Faizullah v. King-Emperor', AIR 1925 Sind 105 (K), the appellate Court can certainly convict the accused of another offence or of a minor offence covered by the offence of which he has been acquitted provided no prejudice has been caused to the accused.

(14) I, therefore, allow this appeal & set aside the order of acquittal which has been passed by the learned Sessions Judge in this case & I convict the respondent under S. 411, I. P. C., & sentence him to one year's rigorous imprisonment under this section. The respondent should surrender immediately to serve the sentence which has been imposed on him.

(15) The note Ex. P-7 will be returned to Laisram Kirti Singh and the remaining G. C. notes will be returned to the person from whom they were taken into custody but this order will be subject to the result of any regular civil suit which might be brought by any of the party regarding declaration of his right to those notes.

V.R.B. Appeal allowed.

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BRIJ NARAIN J. C. (18-5-1954)

Koijam Tombi Singh, Defendant-Appellant v. Chanambam Ibomcha Singh, Plaintiff-Respondent.

Civil Appeal Case No. 19 of 1952, against decree of Dist. J., Manipur, D/- 22-4-1952.

(a) Manipur Registration Rules, Cl. 1-B — Exemption.

Documents relating to advances made by plaintiff to defendant who was to carry out specific work in accordance with contract between them are exempted under Cl. 1-B of the Registration Rules in force in Manipur in

1948, from the operation of the Rules and therefore do not require registration. (Para 6)

(b) **Partnership Act (1932), Ss. 11, 41 and 48 — Compulsory dissolution — Suit by one partner against another for recovery of advances made by him and utilized by latter as his share of capital in partnership business — Maintainability.**

One partner can sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital. AIR 1927 Mad 68, Rel. on. (Para 6)

Where the plaintiff and the defendant entered into an agreement of partnership to carry on the business of collecting copper wire from the jungle and the plaintiff had made certain advances to the defendant who utilized them as his share of capital in the partnership business but the partnership business came to an end on account of an order of the military authorities that the collection of copper wire was unauthorised and unlawful and the plaintiff brought a suit against the defendant for recovery of advances made by him to the defendant and also for recovery of his share of the profits:

Held that the plaintiff was entitled to get a decree for the sums advanced by him to the defendant and was not debarred from bringing the suit on the ground that the suit had been instituted on the basis of isolated items relating to the partnership business in which any number of transactions had been carried out. (Para 6)

Held further that the plaintiff could not properly be allowed a decree for any sum regarding his profits or regarding price of the copper wire collected by the parties, unless the entire accounts of the partnership business which had not been produced in the case had been gone through. AIR 1927 Mad 89; AIR 1920 Cal 1021 and AIR 1952 Cal 397, Rel. on. (Para 7)

Anno: Partnership Act, S. 41 N. 1.

CASES REFERRED:

	Paras
(A) (V14) AIR 1927 Mad 68: 97 Ind Cas 757	6
(B) (V14) AIR 1927 Mad 89: 99 Ind Cas 459	7
(C) (V7) AIR 1920 Cal 1021: 24 Cal WN 703	7
(D) (V39) AIR 1952 Cal 397: 86 Cal LJ 29	7

K. C. Chakraverty, B. B. Sen and R. K. Singh, for Appellant; Somorendra Singh, for Respondent.

JUDGMENT: This is an appeal against judgment dated 22-4-1952 of the learned District Judge, Manipur, in Suit No. 10 of 1950 by which the plaintiff-respondent's claim has been decreed to the extent of Rs. 5338-2-0 with proportionate costs. The plaintiff came to Court with the allegations that there was an arrangement between the parties by which the defendant promised to procure license for collecting copper wire from the jungle and then the plaintiff was to collect copper wire from the jungle and the defendant was to buy the copper wire on cash payment. The British Government had set up telegraph poles and copper wires thereon, but later on the enemy in the last war uprooted those poles and copper wire had been thrown at various places in the jungle. The defendant got a permission from the Ranchi Military No. 21 for collecting copper wire and he gave authority to the plaintiff for doing so in the jungle and thus a joint business for collecting copper wire was undertaken by the parties.

About 450 maunds of copper wire were collected and were stocked in the custody of the plaintiff. Later on a wire was received from the Divisional Engineer, Shillong, to hand over all the copper wire to the E. S. T. and thus copper wire was taken from the godown of the plaintiff at Bishnupur. A sum of Rs. 36,012-8-0 was claimed as price of the copper wire, but D. E. T. Shillong Division gave the reply Ex. D/L saying that no price would be paid as the collection was unauthorised. Thus the joint business came to an end according to the plaintiff and the latter brought the present suit for recovery of Rs. 10,681-10-0 with costs in this manner that Rs. 1500/- were alleged to have been advanced to the defendant on 7-5-1948 and Rs. 4000/- were said to have been advanced to him on 9-6-1948 and before that date Rs. 500/- were taken by the defendant on 17-12-1947 and Rs. 4676-10-0 were claimed as price of copper wire and a sum of Rs. 5/- was claimed on account of coolie charge.

(2) The defendant-appellant contended that the plaintiff had no cause of action for the suit and the amendment made by the plaintiff in his original plaint was invalid and illegal. According to the defendant there was a partnership business between the parties in respect of copper wire and this business was duly dissolved and there was no profit in that business due to interference by the telegraph authorities of the Government of India. As the learned District Judge decreed the suit to the extent of Rs. 5338-2-0, the defendant has come to this Court in appeal.

(3) The plaintiff produced the deed Ex. P/A dated 7-5-1948 which was executed by the defendant in his favour for Rs. 1500/- vide Ex. D/D and another deed Ex. P/B dated 17-12-1947 was also produced to show that the defendant was given Rs. 500/- as advance by the plaintiff. The third deed Ex. P/C-A dated 9-6-1948 goes to establish that the defendant was advanced a third sum of Rs. 4000/- in this way that Rs. 1500/- were advanced on that day and Rs. 2500/- were advanced a little earlier. The chits Ex. P/D-A, Ex. P/E-A and Ex. P/F-A had been produced to show that the copper wire collected in the joint business was actually taken away by the Telegraph authorities under the orders of the paramount power i.e. the Government of India. These documents do go to show that the plaintiff did advance different sums to the defendant so that the latter might utilise them for collecting copper wire from the jungle at the latter's request.

(4) Chanambam Ibomcha Singh plaintiff examined himself and he produced P. Irabant Singh, L. Gulap Singh, H. Amu Singh and Rameswar Sarma witnesses and their evidence also goes to establish that the defendant was really advanced different sums of money mentioned above and the latter executed deeds Ex. P/A, Ex. P/B and Ex. P/C-A in favour of the plaintiff.

(5) The defendant examined himself and he produced Ch. Khagendra Singh, W. Bacha Singh, M. Nadiachand Singh and L. Pisak Singh and he relied on the hand-note dated 7-3-1948 Ex. D/B as well as the letter dated 29-12-1947 Ex. D/A by which permission was given for the collection of iron scraps. The deed Ex. D/C dated 7-5-1948 has been relied upon to show that there was a partnership business for collection of copper wire and iron scraps. The letters dated 17-1-1948 Ex. D/D, dated 11-4-1948 Ex. D/E, dated 4-2-1948 Ex. D/F, dated 4-6-1948 Ex. D/G, dated 8-4-1949 Ex. D/H and dated 3-5-1949 Ex. D/L have been produced to show that the work had to be given up because the copper wire was confiscated by the paramount authority. The bill Ex. D/I for Rs. 36,012-8-0 was submitted on account of the price of the copper wire but no payment was made and the telegrams Ex. D/J and Ex. D/K show that the parties were asked to hand over the copper wire to the telegraph authorities on the ground that collection made by them was unauthorised.

(6) The first contention put forward by the learned Advocate for the appellant is that the plaintiff could not be given a decree in this suit because the deeds Ex. P/A, Ex. P/B and Ex. P/C as well as Ex. D/B were unregistered. According to the appellant's contention the rules regarding registration in force in Manipur at that time were as follows:

1. The following documents must be registered:
   (a) Homestead lands.
   (b) Culturable lands or crops.
   (c) Cattle and ponies.
2. Deeds of a cash value of more than Rs. 15/-.
3. Transfers of all fisheries, ferries, salt wells and grass Mahals.
4. Agreements of hypothecation of crops of more than 12 pots of Dhan.

Clause 1-B lays down an exemption from the operation of the registration rules. It provides that advances by contractors 'and others' in cases where advances are given to Dafadars, labourers or other employees for the performance of any specific work would be exempted from the operation of the registration rules. The evidence to which I have already referred above, shows that the plaintiff had advanced different sums to the extent of Rs. 4500/- to the defendant for carrying on specific work, viz., of removing copper wire from the jungle in accordance with the terms of the contract between the parties which was reduced to writing, vide Ex. D/C. Even if it be assumed that this money was invested in the partnership business by the defendant as his capital after taking advances from the plaintiff, the latter would not be debarred from bringing the present suit on the ground that the suit had been instituted on the basis of isolated items relating to the partnership business in which any number of transactions had been carried out.

His Lordship Madhavan Nair J. in — 'Uthira Reddiar v. Muthi Reddiar', AIR 1927 Mad 68 (A), held that one partner can sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital. In view of this ruling I think the present plaintiff could maintain this suit on account of advances which had been made by him to the defendant and these sums were utilised by the defendant as his capital in the partnership business.

In view of the exemption provided in the Manipur registration rule quoted above, I think the documents Ex. P/A, Ex. P/B and Ex. P/C did not require registration as they related to advances made by the plaintiff to the defendant who was to carry out specific work in accordance with the contract between the parties. As the deed Ex. P/A related to profits on account of partnership business, I think no decree can properly be passed in favour of the plaintiff regarding this sum unless entire partnership accounts are gone through, but the entire partnership accounts have not been produced in this case. Regarding the other 3 items of Rs. 500/-, Rs. 2500/- and Rs. 1500/- the position is quite clear and it is that these sums were advanced by the plaintiff to the defendant and the latter utilised these sums as capital in the partnership business and so I am definitely of opinion that the plaintiff could be awarded a decree for the above-mentioned sum in the present suit.

(7) The second contention put forward by the learned Advocate for the appellant is that the plaintiff could not be allowed any decree in this case because the entire business collapsed not on account of default of the defendant but because the paramount authority, viz., the Government of India held that the collection of copper wire by the parties was unauthorised and unlawful and reliance has been placed on — 'Gundayya v. Subbaya', AIR 1927 Mad 89 (B); — 'Kunjilal Monohardas v. Durga Prasad Debiprosad', AIR 1920 Cal 1021 (C) and — 'Ramkumar Agarwalla v. P. C. Roy and Co. (India) Ltd.', AIR 1952 Cal 397 (D). These rulings lay down that Court must find that there was any intention and any purpose for entering into the contract and that purpose and intention have been frustrated by occurrence of a subsequent event and the Court cannot reform a contract on equitable principles.

It has been admitted before me by the learned counsel of the parties at the time of argument that the accounts given by the learned District Judge in his judgment are not correct and I think in view of the rulings cited above the plaintiff could not properly be allowed any sum on account of his profit in the partnership business unless the entire account of the partnership business has been gone through. I think the defendant's contention on this point has considerable force and the plaintiff cannot properly be allowed a decree for any sum regarding profits or regarding price of copper wire collected by the parties. But there can be no valid ground for disallowing the plaintiff the decree for sums which have been advanced by him to the defendant to be used by the latter as his capital in the partnership business for carrying out specific work and I think the plaintiff was entitled to get decree for Rs. 4500/- only on the basis of Ex. P/B, Ex. P/C-A and the rest of the plaintiff's claim fails and should be dismissed.

(8) The result is that this appeal is allowed and the decree passed by the learned District Judge is

modified to this extent that the plaintiff's claim is decreed for Rs. 4500/- only and the rest of his claim is dismissed. The parties will get and pay cost according to their success and failure in both the Courts.

K.S.B. Decree modified.

A.I.R. 1954 MANIPUR 20 (Vol. 41, C.N. 9)

BRIJ NARAIN J. C., (15-6-1954)

Khundrakpam Yaima Singh and others, Defendants-Petitioners v. Ahongsangbam Tomba Singh and another, Plaintiffs-Opposite Parties.

Civil Revn. No. 13 of 1952, against Order of Dist. J. Manipur D/- 17-11-1951 & Supplementary order, D/- 5-5-1952.

(a) Limitation Act (1908), Ss. 5, 14 — Existence of circumstances contemplated by S. 14 — Manipur State Court's Act, S. 29.

Where the provisions of the Manipur State Court's Act barring the second appeal were somehow overlooked but it could not be said that simply because the fact that the suit was valued at Rs. 100/- only and not more, was not taken notice of by the lawyer who filed the second appeal the defendants-petitioners were guilty of gross negligence, and it appeared that very important questions of law were not properly decided by the lower appellate Court who reversed the judgment of the trial Court, the applicants should be allowed the benefits of Ss. 5 and 14: AIR 1953 Punj 298 Disting. (Para 4)

Anno: Limit. Act S. 5 N. 8, 9; S. 14 N. 11, 20.

(b) Civil P. C. (1908), Ss. 9, 152; O. 20 R. 3 — Suit not for worshipping deity at place where situated but for bringing it to new place — Decree not containing direction of removal of idol — Second appeal — Modification in decree by lower appellate Court — Legality.

In a suit for religious rites and ceremonies plaintiffs did not allege that they were prevented from worshipping the idol at the place where it had been kept in accordance with the custom of the village but prayed for bringing out the idol to a new place where they proposed to celebrate their Haraoba. The trial Court dismissed the suit but the lower appellate Court passed a decree. The order passing the decree did not however contain any direction regarding the removal of the idol to the new place and so, when a second appeal was filed against that order, the lower appellate Court passed subsequent order allowing the removal of the idol.

Held, that the suit as prayed for in the trial Court was cognizable by the Civil Court. The decree passed by the lower appellate Court however, was infructuous as it was bound to be so in the absence of an allegation that plaintiffs were prevented from worshipping the idol at the place where it had been kept. The subsequent order passed by the lower appellate Court during the pendency of a second appeal, would not be legally operative as such orders could only be passed by the second Appellate Court: AIR 1949 Orissa 1, Relied on. (Paras 5, 6, 7)

Anno: C. P. C. S. 9 N. 23, 48; S. 152 N. 2; O. 20 R. 3 N. 3.

(c) Custom — Manipur State — Maharaja is the religious head.

In the Manipur State, the Maharaja is regarded not only as a living deity but as the head of the oldest State religion and as the secular head of the whole people including royal clan. (Para 8)

CASES REFERRED: Paras

(A) (V40) AIR 1953 Punj 298: 55 Pun LR 524 4
(B) ('10) 14 Cal WN 584: 37 Cal 548 5
(C) ('81-82) 6 Bom 116 6
(D) ('80-81) 5 Bom 80 6
(E) ('05) 32 Cal 1072: 2 Cal LJ 590 6
(F) (V36) AIR 1949 Orissa 1: 14 Cut LT 73 6

K. C. Chakraverty and R. K. Singh, for Petitioners; Somorendra Singh, for Opposite-Parties.

ORDER: This is a Civil Revision against the order passed by learned District Judge, Manipur, in Civil Appeal No. 54 of 1951 on 17-11-1951 and also against the supplementary order passed by him on 5-5-1952 by which the decree passed by the learned Munsiff, Manipur, in suit No. 211 of 1950 on 22-6-1951 was set aside and the claim of the plaintiffs-opposite parties for holding Haroaba (worship by dancing before the Lai deity) separately by taking the deity to a new place, was allowed.

(2) It appears from the pleadings of the parties that the plaintiffs-opposite parties are the representatives of the Thongthak of Keinou village, while the defendants-applicants are the representatives of the Thongkha party of the same village. According to the plaintiffs-opposite parties their village deity Nangthel Leima was used to be kept at a place (Harabung) which was not sufficiently spacious for holding the worship, and so they bought another piece of land for the purpose of worshipping and they obtained permission from the Pandit Loisang to hold Haraoba separately by means of the permission Ex. P/A in the month of Sajibu (April) after the defendants-applicants finished their Haraoba in the month of Lamda (March-April).

According to the plaintiffs the defendants extended the period of their Haraoba up to the date fixed by the Pandits for the beginning of the Haraoba by the plaintiffs and so the latter approached the District Magistrate, Manipur, to attach the Lai (deity), but the District Magistrate ordered the parties to go to the Civil Court and so the suit No. 211 of 1950 was instituted in the Court of the Munsiff, Manipur.

(3) The defendants-applicants contended that there was never any agreement amongst the inhabitants of the village Keinou regarding holding of the Haraoba by the plaintiffs and for carrying away the deity to the place of the plaintiffs. It was further contended that the plaintiffs' attempts to hold Haraoba separately was against the custom of the village and also against the principles of public endowment. It was also contended that the permission Ex. P/A was cancelled by the Maharaja of Manipur who is said to be the final

authority in this religious matter. Number of other pleas were also raised but they were not pressed. The plaintiffs had examined Ahongsangbam Tomba, Moirangthem Ibochaoba, Khumallambam Mani and Wangkhem Jnaneswar witnesses, while the defendants had examined Thaunaujam Palo, Nameirakpam Dinachandra, Yumnam Chaoyaima and Yumnam Chaoba witnesses.

(4) The learned counsel of the plaintiffs-opposite parties has contended that the present application in revision cannot be considered on merits as it is time barred. The learned District Judge decided the appeal on 12-11-1951 and it was conceded before me that after adding the number of days taken in obtaining copies of the judgment the period of 90 days elapsed on 3-3-1952, but the present application in revision was filed in this Court on 20-6-1952, i.e., after a lapse of 3 months and 17 days. It appears that the present applicants at first filed a second appeal No. 2 of 1952 on 29-5-1952, but as the suit was valued at Rs. 100/- only, and as under S. 29, Manipur State Courts' Act, no second appeal lies in such cases it was prayed that the appeal No. 2 of 1952 be treated as a revision, but this prayer was not allowed and so on 20-6-1952 the appeal No. 2 of 1952 was withdrawn and the present application in revision was instituted.

The learned Advocate for the applicants has claimed benefit of Ss. 5 and 14, Indian Limitation Act, and it has also been contended that in any case the present application in revision would be governed by Art. 181, Limitation Act, as no period of limitation has been prescribed for filing applications in revision; and as the present applicants filed a second appeal under an honest mistaken belief that a second appeal could be filed, and as they prosecuted it with due diligence, I think the present applicants should properly be allowed the benefit of Ss. 5 and 14, Limitation Act, even if it be held for a moment that an application in revision should also be brought within the 90 days (which is to be the period of limitation prescribed for filing a second appeal).

The ruling of — 'Dinanath v. Munshi Ram', AIR 1953 Punj 298 (A) which lays down that where the mistake of party's legal adviser as to jurisdictional value and court-fee was such that if the legal adviser had only taken the trouble of looking up any elementary book on Court-fees and Suits Valuation Act, he would have discovered it, no question of bona fide mistake or good faith can arise and time cannot be extended under S. 5, Limitation Act, has no application to the facts of the present case. In the present case the provisions of the Manipur State Courts' Act were somehow overlooked and it cannot be said that simply because the fact that the present suit was valued at Rs. 100/- only and not more, was not taken notice of by the lawyer who filed the second appeal No. 2 of 1952, the present petitioners were guilty of gross negligence. As it appears that in the present case very important questions of law were not properly decided by the learned District Judge who reversed the judgment of the learned Munsiff, I think the present applicants should properly be allowed benefit of S. 14, Limitation Act. I, therefore, hold that the present application in revision is not time barred.

(5) It has been strenuously argued by the learned Advocate for the applicants that the learned District Judge by allowing this appeal passed an infructuous decree as he had not ordered that the deity be removed to the new place where the plaintiffs proposed to celebrate their Haraoba and the order dated 5-5-1952 was passed by him during the time when second appeal No. 2 of 1952 was pending in this Court. According to the present applicants the order dated 5-5-1952 was absolutely without jurisdiction and reliance was placed on — 'Parmanand Das Gossain v. Kripasindhu Roy', 14 Cal WN 584 at p. 586 (B) in which it has been clearly laid down that S. 148, Civil P. C., does not authorise the first Court to modify the decree or extend the time allowed by it for execution of a Kabuliyat after an appeal had been preferred from that decree and the only Court which can pass such order after an appeal has been preferred is the Appellate Court. The judgment dated 12-11-1951 clearly shows that the following order was passed in appeal by the learned District Judge:

> "I now order that decree be passed in favour of the plaintiffs-appellants against the defendants-respondents declaring that the Parwana Ex. P/A in the records of the District Magistrate's Miscellaneous case No. 1 of 1951 issued by the Pandit Loisang Pana and Moiba shall be obeyed i.e. Thongkha will perform Haraoba in Lamdan in the existing Harungbung and Thongthak in the new Harungbung. Auspicious date will be fixed by the parties concerned in consultation with the Pandit every year."

This order did not in any way contain any direction regarding removal of the deity to the new place, and it was against this order that the second appeal No. 2 of 1952 was brought by the present applicants in this Court long before the order for removal of the deity was passed by the learned District Judge on 5-5-1952. As such the order passed in first appeal No. 54 of 1951 dated 5-5-1952 would not be legally operative, as such orders could only be passed by the Appellate Court.

(6) Section 9, Civil P. C., lays down that

> "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> Explanation: A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

The suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature vide — 'Rama v. Shivram', 6 Bom 116 (C); — 'Vasudev v. Vamnaji', 5 Bom 80 (D) and — 'Lokenath Misra v. Dasarathi Tewari', 32 Cal 1072 (E). It has been laid down in — 'Radhakrishna Das v. Radharaman Swami', AIR 1949 Orissa 1 (F) that a suit by a worshipper, not based on any right to the property in the idol, or to an office, against its custodians to locate it in a parti-

cular temple instead of in another, there being no allegation that the plaintiff is prevented from worshipping the idol at the latter temple, is not cognizable by the Civil Court. I think this ruling is clearly applicable to the facts of the present revision as in this case the plaintiffs did not allege that they were prevented from worshipping the idol at the place where it had been kept for a considerable long time in accordance with the custom of the village. As such it becomes clear that the decree passed by the learned District Judge was bound to be infructuous.

(7) The plaint of the suit No. 211 of 1950 however discloses that there was a prayer for bringing out the image of the goddess Ningthel Leima Khuleima in the Harungbung newly arranged and so the suit as prayed in the Court of the Munsiff, was cognizable by the civil Courts, but the decree passed by the learned District Judge in appeal on 12-11-1951 was infructuous.

(8) The plaintiffs relied on permission Ex. P/A, Exs. P/B to P/D to show that they were permitted by the Pandit Achouba and this permission was binding on the entire people of the village, but it appears from the document Ex. D/A that the Maharaja of Manipur passed contrary orders later on and the Pandit who had given the permission Ex. P/A was dismissed. T. C. Hudson in his book on Meitheis (Manipuris), 1908 Edition, at page 107 writes as follows:

"But the great characteristics of the rites of the pre-Hindu system is the management of these rites by the Maiba (oracle), Paiba, or in some cases by the Raja who is, in fact, regarded not only as a living deity, but as the head of the old State religion and the secular head of the whole people including Ningtheuji or royal clan".

(9) Manu's Smriti, discourse 7, volume III part 2, translated by Dr. Ganganath Jha in verse 13 lays down:

"For this reason (that the king is a great divinity in human form) no one should transgress that favourable decree which the king should ordain in favour of his favourites or that unfavourable decree that he should ordain against those in his disfavour".

The Manipur Merger Agreement vide page 232 of the White Paper on the Indian States also lays down in Article II that His Highness the Maharaja shall continue to enjoy all personal rights, privileges, dignity and authority for religious observance of customs, usages, rites and ceremonies and institutions in charge of him in the State, which he would have enjoyed had this agreement not been made.

The plaintiff No. 1 has admitted in his statement that no permission has been given to the plaintiff to remove the idol, and Moirangthem Ibochaoba P. W. 2 has clearly admitted that His Highness has got option to change the order of the Pandit Loisang and the Pandit Maiba who are under the Maharaja. As such it becomes clear that the order Ex. D/A which was passed later on by the Maharaja will be binding on the parties and the order of the learned District Judge dated 5-5-1952 cannot be operative and the present plaintiffs-opposite parties cannot remove the idol to a new place.

(10) The learned District Judge has not given any cogent reason why Haraobung should be allowed to be changed to another place as it is established from evidence on the record that the land acquired by the plaintiffs is not revenue free; and as income of the idol is very limited, it would not be in the interest of the idol to allow waste & unhealthy competition as it would involve needless extra-expenditure in holding Haraoba at two places in one year. The question whether the deity should be removed against the order of the Maharaja who continues to enjoy his old powers on religious matters even after the integration must also be answered against the plaintiffs-opposite parties under the circumstances mentioned above, and as the plaintiffs could not be allowed adjudication merely on some religious rites in the present case, I think the present suit could not legally succeed. The question whether the conflict in dates of two Haraobungs should be permitted or not, would not arise at all when according to the custom of the village and also according to the orders of the religious head i.e., the Maharaja of Manipur that the deity could not be removed and two Haraobungs would not be permitted during the course of one year in this village. The holding of two Haraobas would not be justified considering the income of the deity and other circumstances, mentioned above and so I think the decree passed by the learned District Judge cannot be legally sustained.

(11) I, therefore, allow this application in revision and I set aside the order which has been passed by the Learned District Judge and the plaintiffs' suit stands dismissed with costs in all the Courts.

H.G.P. Revision allowed.

A.I.R. 1954 MANIPUR 22 (Vol. 41, C.N. 10)

BRIJ NARAIN J. C. (30-4-1954)

Kali Prosad Gupta, Appellant v. Rameswar Prosad Gupta, Respondent.

Civil Appeal No. 2 of 1954, against decree of Sub-J., Manipur in Title Suit No. 10 of 1952.

(a) Hindu Law — Gift — Power of father under Mitakshara—(Evidence Act (1872), Ss. 101-103) — (T. P. Act (1882), Ss. 7 and 122).

A father under the Mitakshara law has no power to dispose of the joint family property by gift or will except in certain cases when he disposes of a small portion of moveables of joint family or makes gift out of affection or he makes gift within reasonable limit of the ancestral property for 'pious purposes' though the position with regard to separate or self-acquired property appears to be different. Where a person claims a half portion of the property on the allegation that a few years after his marriage with the daughter of the donor the property was gifted to him

by the donor but fails to prove that the property was the self-acquired property of the donor he fails to establish that the donor could have legally made the gift of that property to him. (Paras 2-3)

Anno: Evidence Act, Ss. 101-103 N. 56; T. P. Act, S. 7 N. 7; S. 122 N. 3.

(b) Hindu Law — Gift — Gift by Hindu at Maxwell Bazar, Imphal, in 1935 — Transfer not effected by registered instrument — Validity — (Registration Act (1908), S. 17) — (Rules for the Management of the State of Manipur — Rules relating to registration) — (T. P. Act (1882), S. 123).

To a gift made by a Hindu at Maxwell Bazar, Imphal, in or near about February 1935 the provision of S. 123, T. P. Act, relating to attestation will not apply because the T. P. Act was not in force in Manipur in 1935. As Maxwell Bazar was not a part of the territory of the Maharaja of Manipur the rules relating to registration found in the "Rules for the Management of the State of Manipur" which were in force in Manipur State from 1907 until the Indian Registration Act came into force there from 16-4-1950, were inapplicable to Maxwell Bazar. Therefore the contention that there should have been a registered instrument and that an oral gift though accompanied by delivery of possession was not valid is without force. (Paras 4, 5)

Anno: T. P. Act, S. 123 N. 2; Regis. Act, S. 17 N. 8.

K. C. Chakraverty and Rohini Kumar Singh, for Appellant; B. B. Sen, for Respondent.

JUDGMENT: This appeal arises out of a suit which was brought by Rameswar Prosad Gupta of Maxwell Bazar, Imphal, for obtaining a declaration that the southern half portion of the plot No. 71 along with buildings thereon situated at Maxwell Bazar, Imphal, belonged to him and he was in possession thereof.

According to the plaintiff-respondent Bunsiram Halui was the holder of the plot in question and he had constructed a pucca building thereon and he used to reside there with his family which consisted of two wives, Srimati Monsari and Srimati Kungari, two daughters Srimati Dasodiya and Srimati Ramdasi, and one Kali Prosad Gupta who is the present appellant. Bunsiram's daughter Ramdasi (since deceased) was married to the present plaintiff-respondent, Rameswar Prosad Gupta, during the life-time of Bunsiram. According to the plaintiff he had been residing in the house in question as Gharjamai (Thong. enba) and so Bunsiram made oral gift of half portion of the aforesaid plot along with the buildings thereon and also half portion in the business which he had been carrying on, and since then the plaintiff remained in possession of the southern portion of the building.

Bunsiram died about 4 years after the marriage of the plaintiff and Kali Prosad appellant was a minor at that time, but on attaining majority he partitioned his share in the business. The plaintiff continued to remain in possession of the southern portion of the plot and buildings thereon. As the appellant got his name mutated over the entire suit property Rameswar Prosad Gupta had brought the present suit for declaration. The defendant appellant denied the plaintiff's title as well as oral gift and he contended that the plaintiff worked as a watchman after the death of Bunsiram as the defendant-appellant along with his mother had left for his native land in Bihar.

(2-3) The learned Sub-Judge who tried this case decreed it and so the defendant has come in appeal. The first question which arises for determination in this case is whether the plaintiff-respondent could properly succeed in this case without proving that the disputed property was self-acquired property of Bunsiram.

(The Court after considering the evidence on record held that the evidence on the record did not prove in any way that the disputed property was self-acquired property of Bunsiram and then stated). It is admitted that the parties are governed by the Mitakshara law and as a father under the Mitakshara law has no power to dispose of the joint family property by gift or will except in certain cases when he disposes of a small portion of moveables of joint family or makes gift out of affection or he makes gift within reasonable limit of the ancestral property for 'pious purposes'. The position with regard to separate or self-acquired property appears to be different, but as the plaintiff, in the present case, has not proved that the disputed property was the self-acquired property of Bunsiram, I hold that the plaintiff has failed to prove that Bunsiram could legally make gift of the disputed property to him.

(4-5) (The Court then examined the question whether Bunsiram had actually made any oral gift to the plaintiff-respondent before his death and held that the plaintiff failed to prove the alleged oral gift and that the theory of the defendant that the plaintiff looked after the property after the death of Bunsiram merely as a watchman and paid taxes in that capacity was probable and that from that conduct alone it could not be inferred that Bunsiram had made a gift of half of his property to the plaintiff. It then proceeded to state). The learned Advocate for the appellant has urged that no oral gift was permissible in Manipur State in or near about February 1935. There is no doubt that the Indian Registration Act has been enforced in this State from 16-4-50, but prior to year 1950 'Rules for the Management of the State of Manipur' had been in force from 1907 onwards. Rules regarding registration were as follows [:]

REGISTRATION.

1. The following documents must be registered:
   (1) Mortgages and deeds of gift or sale of:
      (a) Homestead lands;
      (b) Culturable lands or crops;
      (c) Cattle and ponies;
   (2) Deeds of a cash value of more than Rs. 15/-;
   (3) Transfers of all fisheries, ferries, salt-wells and grass mahals;

(4) Agreement for hypothecation of crops of more than 12 pots of dhan.

It has been urged on the basis of this rule that no oral gift could be made in the State of Manipur regarding immoveable property and residential building in the year 1935 when Bunsiram died.

The appellant's contention is that the present case would be governed by the rule relating to Hindu gifts to which the Transfer of Property Act, 1882, applies. In such cases rule of pure Hindu law that delivery of possession is essential to the validity of a gift, is abrogated by Section 123 of that Act. Under that Act delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of a moveable property. For the purpose of making a gift of immoveable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least 2 witnesses.

The Transfer of Property Act was not in force in Manipur in 1935. The provision regarding attestation would not be binding but according to the appellant no oral gift could be made by Bunsiram in favour of the plaintiff in 1935 and if any gift were to be made it could be made only by means of registered instrument. On behalf of the respondent it has been urged that Maxwell Bazar was not a part of Manipur State then and so the rule regarding gift under pure Hindu law would be applicable in this case and this rule is that such a gift need not be in writing, but the gift must be accompanied by delivery of possession of the subject of the gift from the donor to the donee. It has been conceded before me at the time of argument that Maxwell Bazar area was not a part of territory of the Maharajah of Manipur and so rules relating to registration referred to above were inapplicable there. I am, therefore, unable to find any force in this contention of the appellant.

But as the plaintiff-respondent failed to prove in this case that Bunsiram made any oral gift in his favour regarding the disputed property and as he further failed to prove that the disputed property was self-acquired property of Bunsiram, I hold that the plaintiff's case could not legally succeed and the finding of the learned Sub-Judge to the contrary is incorrect.

(6) I, therefore, allow this appeal and set aside the decree which has been passed by the learned Sub-Judge in this case and the plaintiff's suit is dismissed with cost in both the Courts.

M.K.S. **Appeal allowed.**

E N D

THE ALL INDIA REPORTER

1954

[Vol. 41]

MYSORE SECTION

MYSORE HIGH COURT

1954

CHIEF JUSTICE :

The Hon'ble Mr. Justice Rao Bahadur P. Medapa, B.A., B.L.

PUISNE JUDGES :

The Hon'ble Mr. Justice R. Venkataramiah, M.A., LL.B.
" " " N. Balakrishniah, B.A., LL.B.
" " " T. N. Mallappa, B.A., LL.B.
" " " B. Vasudeva Murthy, B.A., LL.B.
" " " K. N. Padmanabhiah.

ADVOCATES-GENERAL :

Shri Nittur Srinivasa Rao.
" G. Chennappa (Asst.).

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1954
Mysore High Court

***AIR 1954 MYSORE 1 (Vol. 41, C. N. 1)**
(FULL BENCH)
MEDAPA C. J., VENKATA RAMAIYA AND MALLAPPA JJ.

S. Sundara Rao, Appellant v. B. Appiah Naidu and another, Respondents.

Second Appeal No. 171/1949-50, D/- 7-7-1953, from order of Addl. Dist. Judge, Mysore, D/- 10-6-1949.

(a) Limitation Act (1908), Art. 182 — Proper Court — Application to take some step-in-aid of execution.

A transfer of the decree is a necessary preliminary to the execution of the same in another Court. As such it is a "step-in-aid" of execution. And if each application is filed within three years from the date of disposal of the prior application, these must all be held to be within time. 25 Mys. CCR 298 (FB), Foll. (Para 3)

Per Mallappa J.: A decree-holder's application made to the Court which passed the decree for transferring the decree to another Court long after his first application for transfer, presuming 'bona fide' that the latter Court must have sent back to the former Court the report under S. 41, Civil P. C., along with the decree copy should be held to be a step-in-aid. Case law Ref. (Para 16)

Anno: Lim. Act, Art. 182 N. 89 and 99.

***(b) Civil P. C. (1908), S. 38, O. 21, Rr. 6 and 7 — Jurisdiction of transferee Court — 28 Mys. CCR 191, Overruled.**

In the proceeding for the transfer of a decree for execution in another Court, the sending of a decree copy is not an essential condition for the transferee Court having jurisdiction to execute decree.

And, hence, the date on which copy of the decree was produced in the proceedings for transfer does not affect the question of limitation. The law does not make it obligatory for a copy of the decree being filed by the decree-holder. 52 Mys HCR 400; AIR 1953 SC 65, Rel. on; 54 Mys HCR 58, Disting.; 28 Mys CCR 191, Overruled. (Paras 4, 10)

(c) Civil P. C. (1908), S. 38 — Limitation Act (1908), Art. 182 — Decree transferred — Application for execution to transferor Court — Proper Court.

The Court that transfers a decree to another Court does not lose its control over the decree transferred by it and has in fact power to withdraw the decree. Hence, an application made to the Court which passed the decree to execute it or transfer it for execution even after the decree has already been transferred to another Court for execution is an application made to the proper Court and in accordance with law. AIR 1935 Lah 465 (FB) and AIR 1942 Nag 63, Foll. (Paras 5, 12)

Anno: C. P. C., S. 38 N. 10; Lim. Act, Art. 182 N. 89.

(d) Civil P. C. (1908), O. 21, R. 28 and S. 42 — Executability of decree.

Questions relating to executability of decree such as limitation can be raised and decided in the Court which passed the decree when transfer is applied for. The words in O. 21, R. 28 lend support to this view. (Para 7)

Anno: C. P. C., O. 21 R. 28 N. 1; S. 42 N. 3.

Nittoor Srinivasa Rao, for Appellant; S. K. Venkataranga Iyengar, for Respondents.

CASES REFERRED TO:
(A) 25 Mys CCR 298 (FB) (Pr 3)
(B) ('39) AIR 1939 Cal 651: 187 Ind Cas 67 (Prs, 3, 7)
(C) ('47) 52 Mys HCR 400 (Pr 4)
(D) 28 Mys CCR 191 (Prs 4, 9, 10)
(E) (49) 54 Mys HCR 58 (Prs 5, 11)
(F) ('35) AIR 1935 Lah 465: 157 Ind Cas 488 (FB) (Pr 5)
(G) ('53) AIR 1953 SC 65: 1953 SCR 377 (SC) (Prs 6, 10)
(H) ('31) AIR 1931 Cal 312: 58 Cal 832 (Pr 7)
(I) ('33) AIR 1933 Mad 627: 56 Mad 692 (Pr 10)
(J) ('16) AIR 1916 PC 16: 43 Ind App 238 (PC) (Pr 12)
(K) ('23) AIR 1923 Pat 384: 2 Pat 247 (Pr 12)
(L) ('25) AIR 1925 All 276(2): 47 All 57 (Pr 12)
(M) ('42) AIR 1942 Nag 63: ILR (1942) Nag 539 (Pr 13)
(N) ('37) AIR 1937 Nag 305: ILR (1937) Nag 440 (Pr 13)
(O) ('40) AIR 1940 Pat 677: 191 Ind Cas 695 (Pr 14)
(P) ('39) AIR 1939 Mad 378: 186 Ind Cas 449 (Pr 15)

(Q) ('34) AIR 1934 PC 14: 55 All 993 (PC) (Pr 15)
(R) ('49) 54 Mys HCR 275 (Pr 15)
(S) ('34) AIR 1934 Bom 266: 151 Ind Cas 767 (Pr 15)
(T) ('97) 1897 All WN 75: 19 All 337 (Pr 15)
(U) ('09) 1 Ind Cas 57: 9 Cal LJ 443 (Pr 15)

VENKATA RAMAIYA J.:

The appellant is a judgment-debtor who has failed in both Courts in his contention that the decree, execution of which is sought by respondent 1, is inexecutable. The decree is for payment of money by the appellant and another. It was passed in the Court of the First Munsiff, Bangalore, on 26-3-1932 and transferred on the application of the decree-holder, more than once to the Court at Mysore where the appellant resides. The first order for transfer was made on 7-6-1935 in Execution Case No. 1048 of 34-35, the second was on 22-7-1938 in Execution Case No. 1092 of 37-38, the next one was in Execution Case No. 949 of 40-41 on 14-10-1941. After this, Execution Case No. 643/41-42 was filed in the First Munsiff's Court Mysore, for executing the decree but dismissed on 29-5-1942 on account of non-payment of process. Transfer of the decree was again applied for in Execution Case No. 547/42-43 on the file of the First Munsif, Bangalore, and obtaining order for the same on 23-2-1942, respondent 1 instituted Execution Case No. 850/42-43 in the Court of the First Munsif, Mysore, for recovery of the amount by arrest of the appellant and attachment of his moveable properties.

(2) The objections to the execution raised in the Courts below and repeated here are, that mere filing of successive applications for transfer of the decree does not extend the time for purpose of execution, that the first application for execution, Execution Case No. 643/41-42 being filed more than 6 years from the date of decree, there is bar of limitation. As an additional reason for the same it was pointed out that more than three years from the date of disposal of the previous application had elapsed when copy of the decree was filed in Execution Case No. 1092/37-38 and that the later applications for transfer were filed without report of non-satisfaction from the transferee Court.

(3) The points for consideration chiefly are whether application for transfer is a step-in-aid of execution which would enlarge the period of limitation, whether production of copy of the decree is necessary for an application for transfer and whether a second or subsequent application for transfer is of no effect if at the time it was filed there was no report of non-satisfaction of the decree from the transferee Court to the Court which passed the decree. It cannot be denied that transfer of the decree is a necessary preliminary to the execution of the same in another Court and as such is a "step-in-aid" of execution. The opinion of the Full Bench in —'25 Mys. C. C. R. 298 (A)' is sufficient authority for this. As expressed in —'Manmatha Pal v. Sarada Prasad', AIR 1939 Cal. 651 at p. 655 (B)

> "An application for transfer of a decree is a step-in-aid of execution. By that application the decree-holder asks the Court which passed the decree to assist him for the purpose of carrying further proceedings to realise his decree."

Since the appellant is admittedly a resident in Mysore, want of bona fides in seeking the transfer of the decree cannot be imputed to the decree-holder. As each application was filed within three years from the date of disposal of the prior application, these must all be held to be within time.

(4) The date on which copy of the decree was produced in the proceedings for transfer cannot affect the question of limitation unless it is possible to hold that this application is not valid till the copy is filed. It has been clearly stated in —'Rama Rao v. Saraswathi Bai' 52 Mys H. C. R. 400 (C) that there is no obligation on the part of the decree-holder to file a copy of the decree along with the application for transfer. The view expressed in — '28 Mys CCR 191 (D)', that an application for transfer is defective till copy of the decree is filed and not in accordance with law till then is dissented from and is said to be not warranted by the facts of the case. Reference is also made in — '52 Mys H C R 400 (C)' to the observation in an unreported case that

> "A close examination of the facts of that case — '28 Mys C C R 191 (D)' clearly shows that the learned Judges did not intend to lay down such a broad proposition."

'28 Mys C C R 191 (D)' cannot, therefore, be regarded as laying down that in all cases the validity of an application for transfer depends on the production of copy of the decree and statements to that effect must be taken to be incorrect.

(5) 'Narayana Setty v. Padmanabhiah', 54 Mys H. C R 53 (E) has no bearing on the point as it deals with only the question of the transferee Court having jurisdiction to execute the decree if it has not returned copy of the decree. There is no need to discuss the soundness of this view as the question for decision in the present case is altogether different. Learned counsel cited some cases in which the question as to which is the proper Court in which the application for execution is to be filed and jurisdiction of the Court which passed the decree to entertain an application for transfer when report of non-satisfaction is not received from the transferee Court, is dealt with. Referring to the important decisions touching the point Jai Lal J. in the course of the judgment of the Full Bench in — 'Kanti Narain v. Madan Gopal', AIR 1935 Lah 465 (F) expresses

> "According to these tests an application made to the Court which passed the decree to execute it or transfer it for execution even after the decree has already been transferred to another Court for execution must be held to be an application made to the proper court and to be in accordance with law as the Court is competent to grant the application in any case after obtaining a report under S. 41 from the other Court and 'a fortiori' is competent to receive or to entertain the application. The application does not cease to be in accordance with law merely because before acting upon it the Court ought to take some preliminary action i.e. obtain a report under S. 41, C. P. C. and it is not necessary that the decree-holder should expressly ask in the application that this should be done."

Proceeding, the learned Judge remarked:

> "The only objection to transfer the decree to the same Court for the second time before the result of the previous application is certified by it could be on the score of futility of such an application, but this has no bearing on the question of jurisdiction."

(6) In a recent case reported in — 'Mohan Lal v. Benoy Kishna', AIR 1953 SC 65 (G) Das J. has held that omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in O. 21, R. 6, C. P. C., does not prevent the decree-

holder from applying for execution to the Court to which the decree has been transmitted. In that case the validity of a sale held in the Court at Asansol in execution of a decree of Calcutta High Court was questioned on the ground that it has no jurisdiction to execute the decree after a certificate under S. 41 was sent to the Calcutta Court which passed the decree. The learned Judge also held that no particular form for transmission of a decree is prescribed by the Code and that the Court can even 'suo motu' send the decree for execution to another Court. Ghulam Hasan J. applying the rule of constructive res judicata to execution proceedings held that failure of the judgment-debtor to object to the execution at earlier stages operated as a bar to raise any plea of want of jurisdiction.

(7) The present appellant cannot be said to have acted without delay as he failed to appear and put forward any objection either in Execution Case No. 1092/37-38 or Execution Case No. 849/40-41 in spite of his being served with notice. If, as contended, the decree is inexecutable for any reason it was up to the appellant to show that transfer of the decree sought for in these cases is unnecessary and a useless formality for an infructuous proceeding. He stayed away as if there was nothing to be said against the transfer. A decree is transferred not as a matter of course but as a means of obtaining satisfaction and if the assistance of the Court cannot be had to this end, there is no meaning in mechanically passing an order of transfer or allowing it to be passed. As stated in — 'AIR 1939 Cal 651 at p. 654 (B)':

> "The Court to which the application for transfer is made does not merely function as a post office but it has judicial duties to perform. It is required by statute to exercise judicial discretion. An objection raised by a judgment-debtor opposing the transfer will be an objection relating to execution of the decree. The words "relating to execution of the decree" in S. 47 are wide enough to cover the case."

Questions relating to executability of decree such as limitation can be raised and decided in the Court which passed the decree when transfer is applied for. (See — 'Sreenath Chakravarti v. Priyanath', AIR 1931 Cal 312 (H)). The words in O. 21, R. 28, C. P. C. lend support to this view. The objection of the appellant on the score of limitation, report of non-satisfaction etc., are thus belated and untenable. The appeal is dismissed with costs.

(8) MEDAPA C. J.: I agree.

(9) MALLAPPA J.: I agree. It has been laid down in — '28 Mys C C R 191 (D)' that the limitation for an application for transfer depends upon the production of the copy of the decree. It was observed in that case:

> "The decree-holder could not have obtained a transfer without the decree copy filed; the application was till then a defective one, and only became an application in accordance with law when the copy was filed."

It is contended in this case that though the application for transfer of the decree was filed in time, it was not a valid application as the copy of the decree was filed after the period of limitation. It is next urged that the transferring Court had no jurisdiction to receive any application for transfer as the decree copy sent along with the previous transfer proceedings had not been returned to that Court from the transferee Court. It is, therefore, of some importance to examine whether it is obligatory, for the decree-holder to file a copy of the decree for being sent to the transferee Court and whether the jurisdiction of any of the Courts is affected by the copy of the decree being not sent to the transferee Court or by the later Court not returning it.

(10) Section 39, C. P. C. merely authorises the Court which passes the decree to send it for execution to another Court in certain cases. It does not say that the application for transfer should be accompanied by a copy of the decree. Order 21, R. 6, C. P. C. states that the Court sending a decree for execution shall send a copy of the decree. But the omission to send a copy of the decree to the transferee Court does not prevent the decree-holder from applying to that Court for execution as is clear by the decision in — 'Modali Ademma v. Venkata Subbayya', AIR 1933 Mad 627 (I). The reason, however, for sending a copy of the decree is stated in O. 21, R. 7, C. P. C. According to it, a Court to which a decree is sent shall cause the copy to be filed without any further proof of the decree. It will thus be seen that sending of a decree copy is not an essential condition for the transferee Court having jurisdiction to execute the decree, and that is why it has been laid down by Das J. in — 'AIR 1953 SC 65 (G)':

> "That an omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in Cl. (b) of O. 21, R. 6 does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted."

Assuming, however, that it is essential for the transferring Court to send a copy of the decree to the transferee Court, nothing comes in the way of it getting a copy of the decree prepared and sending it to the transferee Court. As there is provision in S. 39, C. P. C. for a Court on its own motion sending a decree for execution to any subordinate Court of competent jurisdiction, it is clear that the law does not make it obligatory for a copy of the decree being filed by the decree-holder. The decision in — '28 Mys C C R 191 (D)' that an application for transfer is only valid when a copy of the decree is filed is not followed in later decisions of our High Court and it is to set at rest the conflict, if any, in the decisions of our Court that this case was referred for a decision by a Full Bench. The decision in — '28 Mys C C R 191 (D)' that an application for transfer is defective when it is not accompanied by a decree copy is incorrect.

(11) As regards the contention that the transferor Court's jurisdiction depends upon the decree copy being returned from the transferee Court, it is mainly based on an observation made in the case reported in — '54 Mys C C R 58 (E)', that the jurisdiction of the transferee Court ceases when the copy of the decree is returned by that Court to the Court that transferred the decree, with a certificate of non-satisfaction. This observation is based on S. 41 which provides that the Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution or where the former Court fails to execute the same the circumstances attending such failure. It is, however, clear that S. 41, Civil P. C. does not refer to the transferee Court returning the copy of the decree, if any, sent to it. Moreover the decision of the Supreme Court referred to above lays down that it is possible for the transferee Court to execute the decree which is transferred though no copy of the decree has

been sent to it. In such a case it cannot be conceived how the transferee Court could be expected to return the copy of the decree. But it has been observed in — '54 Mys C C R 58 at p. 68 (E)' that:

"What really puts an end to the jurisdiction of the transferee Court is the return of the decree copy to the Court that passed the decree as thereby the transfer proceedings come to an end. So long as the decree copy remains on the file of the transferee Court, the mere transmission of a certificate under S. 41, C. P. C. does not, in our opinion, put an end to the jurisdiction of the transferee Court."

These observations, however, it has to be stated with great respect, were unnecessary for the decision of the case as in that case it could not be said that the decree copy remained on the file of the transferee Court and there was merely a transmission of a certificate under S. 41, C. P. C. It was a case in which the certificate under S. 41 had not also been sent. So the decision cannot be taken as an authority, at any rate, for the position that the transferring Court gets jurisdiction only after it gets back a copy of the decree sent by it.

(12) There are a number of decisions as regards the question whether the Court that transfers a decree loses its jurisdiction in respect of it. It would be sufficient, however, to refer to the commentary in Mulla's Civil Procedure Code on the point (page 173):

"After transferring a decree to another Court for execution, the Court which passed the decree cannot itself execute the decree; and an application for execution made to it after the transfer and before a certificate of non-satisfaction under S. 41 has been returned, is not even a step-in-aid of execution so as to save limitation. This is one view. The other view is that there is no justification for holding that the transferor Court cannot execute a decree after it is transferred to another Court; and that when the transferor Court transfers a decree, it does not invest itself of its power but only vests the transferee Court with powers it would not otherwise have. The difference of opinion mainly turns on the construction placed on the judgment in — 'Maharaja of Bobili v. Narasaraju', AIR 1916 PC 16 (J). But the Court which passed the decree does not altogether surrender control of the execution proceeding. It has power under O. 21, R. 26, to make an order for stay of execution. It may withdraw execution by calling back the decree; or it may make an order for simultaneous execution by another Court; or it may make an order for rateable distribution. It has, moreover, jurisdiction to decide an objection as to limitation if referred to it by the transferee Court. If the decree is assigned after transfer, the assignee must apply for execution to the original Court. If after a decree has been transferred for execution the judgment-debtor dies, the Court which passed the decree is by S. 50 the proper Court to order that execution should proceed against the legal representative. This is, however, merely a question of procedure and if the transferee Court makes the order, that would be only an irregularity which might be waived."

As however rightly observed in the commentary on the Code of Civil Procedure by Chitaley and Annaji Rao on S. 38 while dealing with the decision of the Privy Council referred to above;

"The decision does not touch the question of the maintainability of simultaneous execution applications. On the strength of the said decision, it was, however, held in the undermentioned cases — 'Jnanendra Nath v. Gogendra Narain Sinha', AIR 1923 Pat 384 (K); — 'Muhammad Habibullah v. Tikamchand', AIR 1925 All 276 (2) (L) etc. that simultaneous executions are not permissible in two Courts. It is submitted that the latter view is not correct. Their Lordships' observations in the Privy Council case, during the course of the argument, that the tendency of the Code is against concurrent executions, appear to have influenced the decisions of the High Court. But the observations must be taken to refer to concurrent executions against the same property."

Considering that the Court that transfers a decree to another Court does not lose its control over the decree transferred by it and has in fact power to withdraw the decree, the contention that the transferring Court is not a proper Court for filing an application in respect of the decree is without substance.

(13) The decision in — 'Maruti Bansi v. Nanjappa Chetty', AIR 1942 Nag 63 (M) was relied on by the learned advocate for the judgment-debtors. It has been held in that case that:

"The Court which passes a decree does not lose its power to execute the decree after it transfers the decree to another Court for execution. Consequently, an application to the Court which passed the decree to recall it from the Court to which it was transferred by it for execution and to send it back there again would be an application made to the "proper Court" within the meaning of Art. 182(5) but such an application would in no way assist the execution and would therefore not be a step-in-aid of execution and hence would not save limitation under Art. 182 (5)."

This decision follows the observations in — 'Vishwanath Singh v. Mahabir Prasad', AIR 1937 Nag 305 (N), though in that decision the point was left undecided. It was observed in that case:

"It is, however, desirable to warn litigants against wasting the time of Courts by useless applications (that is applications which if granted do nothing) merely to mark time and save limitation."

In this case an application to transfer the decree was filed to the Court that passed the decree for transferring it to a Court in Mysore more than six months after the decree had previously been transferred to the latter Court. The rule of Practice contained in para. 246 of the Civil Rules of Practice and Circular Orders, Vol. I runs as follows:

"If after a decree has been sent to another Court for execution, the decree-holder does not, within six months from the date of transfer, apply for the execution thereof, the Court to which the decree has been sent shall certify the fact that no application for execution has been made to the Court which passed the decree and shall return the decree to that Court."

(14) It is contended in this case that in spite of this Rule of Practice no certificate was sent to the transferring Court though the decree-holder had not applied for the execution of the decree. Assuming that it is so, it is clear that the decree-holder could only have presumed that the transferring Court must have followed the Rule of Practice and sent a report under S. 41, C. P. C. along with the decree copy within six months' time after the decree was sent for execution as the decree-holder had not taken any steps within that

time to execute the decree. If, therefore, under a bona fide belief that the decree had been sent back to the transferring Court he applies to that Court for transferring the execution case again, it cannot be said that the decree-holder is making a nominal application and he is attempting to gain time. It is not a case in which he wanted to recall the decree from the transferee Court and to send it again. If it were so it could have been said that he was aware of the transferee Court not having followed the Rules of Practice referred to above. Dealing with a case in which an application was made for a transfer of a decree to a Court which at that time had not the necessary jurisdiction, but shortly before that, had such jurisdiction, it was held in the case reported in — 'Bishundeo Narain v. Raghunath Prasad', AIR 1940 Pat 677 (O) that the application was in accordance with law, and in that case Meredith J. observed as follows:

"What the rulings state is that the phrase 'made in accordance with law' does not include an application to the Court to do something which either from the decree-holder's direct knowledge in fact or from his presumed knowledge of law he must have known the Court was incompetent to do."

(15) In a similar case it was observed in — 'Santhappa v. Siddalingayya Eswarappa', AIR 1939 Mad 378 (P):

"The mere fact that a decree-holder applies for transmission of his decree to a Court, which does not exist, but which he wrongly believes to exist does not prevent his application as being one in accordance with law, inasmuch as it is a mistake of fact and not one of law."

There has been a conflict of decisions as to whether an application of this kind should be bona fide before it could be said to be a step-in-aid. But the conflict must be taken to have been set at rest by the decision of their Lordships of the Privy Council in — 'Khalil-ur-Rahman Khan v. Collector of Etah', AIR 1934 PC 14 (Q) that it was not necessary to be in accordance with law that it should have been made bona fide. The question arose for consideration in this Court in the case reported in — 'Lingiah v. Naranappa', 54 Mys H C R 275 (R) as to whether an execution application filed against a deceased judgment-debtor under a bona fide belief that he is alive is a step-in-aid for purposes of limitation within the meaning of Art. 182, Cl. 5, Limitation Act. The observations in — 'Gopal v. Raising', AIR 1934 Bom 266 (S) that:

"It is not easy to see why an application which fulfilled all the requirements of the law according to the information available to the judgment-creditor at the time it was made, should not be held to come within the article"

was followed as against the view in — 'Madho Prasad v. Kesho Prasad', 19 All 337 (T). A large number of other decisions have been referred to in it including the decision reported in — 'Manorath Das v. Ambika Kant', 9 Cal L J 443 (U) where it has been observed:

"If an application for execution of a decree be made under the inference of a bona fide mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179, Cl. 4, Limitation Act, which saves the execution of the decree from being time-barred."

(16) In this case the decree-holder's application made to the Court which passed the decree for transferring the decree to the Munsiff's Court at Mysore long after his first application for transfer, presuming bona fide that the latter Court must have sent back to the former Court the report under S. 41, Civil P. C. along with the decree copy, must therefore be held to be a step-in-aid. The contentions of the appellant cannot be upheld. I agree therefore that the appeal be dismissed with costs.

A/V.S.B. Appeal dismissed.

A.I.R. 1954 MYSORE 5 (Vol. 41, C. N. 2)

MALLAPPA J.

Sakamma, Plaintiff-Appellant v. Chikkannagowda, Defendant 1-Respondent.

Second Appeal No. 412 of 1949-50, D/- 16-9-1952, against decree of Addl. Sub-Judge, Tumkur, in R. A. No. 261 of 1946-47.

(a) Mysore Village Offices Act (4 of 1908), S. 5 — Scope.

Section 5 makes a distinction between emoluments assigned to the holder of a village office and other emoluments attached to the village office. The term 'emoluments of village offices,' clearly includes not only 'emoluments assigned to the holder of a village office' but also other emoluments which are entitled to be enjoyed by other members of a hakdar's family. Where the land in dispute is merely a service inam land which has not been assigned as an emolument to the holder of the village office, it can be enjoyed, transferred or partitioned between the different members of the hakdar's family. It is the members of the holder's family that are entitled to be in possession of the emoluments which are not assigned to the holder and not merely members of the holder's family. Members of the different branches of the family of the original holder of the village office from amongst whom village officers are chosen are members of the hakdar's family. (Para 2)

(b) Civil P. C. (1908), S. 9 — Suits expressly barred — (Mysore Village Offices Act (1908), S. 16).

A suit by the plaintiff who is in possession of service inam land by virtue of a gift from her father who was the last holder of the pateli office against the present holder of the office for permanent injunction restraining him from interfering with her peaceful possession does not involve the determination of any claim to succeed to or of the possession of any village office or the emoluments thereof and, therefore, is not barred from the cognizance of a civil Court under S. 16. (Paras 3, 4)

Anno: C.P.C., S. 9 N. 21, 35, 50, 51.

D. Venkatesaiah, for Appellant; R. Anantharaman and S. Nabhirajaiah, for Respondents.

CASES REFERRED:

(A) 29 Mys CCR 316
(B) ('90) 16 Ind App 186: 12 All 51 (PC)
(C) ('27) AIR 1927 Cal 931 (2): 100 Ind Cas 278
(D) 5 Mys CCR 19
(E) ('93) 20 Ind App 99: 20 Cal 834 (PC)
(F) ('32) 11 Mys LJ 333

JUDGMENT: The facts of the case under consideration in this appeal are not disputed. The correctness of the findings of the Courts below on questions of fact is not challenged. Both the

Courts have held that the plaintiff was the daughter of the deceased uncle of the defendant-respondent, who is the present holder of the Pateli Office of Chilaganahalli, a village in Koratagere Taluk. The property in dispute was in possession of defendant's uncle Kallurappa and after his death it has been in the possession of his daughter the plaintiff and her son for over 15 years by virtue of a gift made by her father under a registered deed, dated 22-1-1935. The plaintiff filed the suit under appeal for a permanent injunction restraining defendant 1 the Patel and defendant 2 his son, from interfering with her peaceful possession. Her son who is her legal representative is the appellant. It was contended by the defendants that the property is a pateli-inam land, that it belongs to defendant 1 and that the suit is not cognizable by a civil Court.

(2) The point for consideration is whether the plaintiff and her son the appellant after her death have been in lawful possession of the property and are entitled to the injunction prayed for, or whether defendant 1 is entitled to be in possession of that property as the holder of the village office, and the suit in a civil Court is barred. Section 5, Mysore Village Offices Act, 1908, is as follows:

"The emoluments of village offices, whether such offices be or be not hereditary, shall not be liable to be transferred, partitioned, or encumbered in any manner whatsoever, and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof.

Provided that in the case of lands which are not assigned as emoluments to the holder of a village office under rules framed under S. 22, nothing contained in this section shall be deemed to affect transfers, partitions or encumbrances, as between different members of a hakdar's family."

A careful reading of the section makes it clear that the section makes a distinction between emoluments assigned to the holder of a village office and other emoluments attached to the village office. The first portion of S. 5 states that emoluments of a village office are inalienable, imparttible and are not liable to attachment. The term 'emoluments of village offices' clearly includes not only 'emoluments assigned to the holder of a village office' but also other emoluments which are entitled to be enjoyed by other members of a hakdar's family. In this case, it has not been shown that the suit land forms part of the emoluments assigned to the holder of the pateli office. It is urged that it is stated in the Revenue Manual in para. 68 (1), "Potgi allowance is a full and sufficient remuneration for services rendered by village officers; the enjoyment of other perquisites of whatever kind ceases" and that it is thus clear that the land now in dispute is merely a service inam land which has not been assigned as an emolument to the holder of the village office. Anyway, there is clear evidence that it was not even formerly assigned to the holder of the office as the father of plaintiff who was the uncle of the holder was in possession of the property. It would not have been in the possession of plaintiff's father who was not a patel if it was intended to be an emolument assigned to the holder of the pateli office. It being thus not concluded in the emoluments assigned to the holder of a village office, there is nothing in S. 5 which comes in the way of this property being enjoyed, transferred or partitioned between the different members of the hakdar's family. What is, however, contended is that the persons entitled to enjoy the emoluments of a pateli office not assigned to the holder of the office are only persons of his family such as his sons or brothers. This is wrong as the section itself makes a distinction between the holder of the village office and the other hakdars. It is the members of the hakdar's family that are entitled to be in possession of the emoluments which are not assigned to the holder and not merely members of the holder's family. Section 8(2) which deals with succession to village offices states:

"The succession in the case of a permanent vacancy (a) shall be regulated by the ordinary provisions of the personal law applicable to the last holder, provided that it shall devolve on a single heir and that where there are more persons than one who would, under the ordinary provisions of the said law, be entitled to succeed to the last holder of the office, preference shall be given to the eldest member of the eldest branch among those persons, and (b) failing these shall devolve on one of the duly recognised hakdars in the order of their importance."

Section 8(2) makes it clear that failing heirs of the last male holder, other hakdars in the order of their importance are entitled to succeed to village office. Members of a hakdar's family are, therefore, not merely members of the family of the holder and the word hakdar has a wider meaning than the word holder. Members of the different branches of the family of the original holder of the village office from amongst whom village officers are chosen are members of the hakdar's family.

(3) It is, however, S. 16, Village Offices Act that takes away the jurisdiction of civil Courts to some extent, and it runs as follows:

"No Civil Court shall exercise jurisdiction in respect of any claim to succeed to or to the possession of, any village office, or the emoluments thereof, or any question as to the rate or amount of such emoluments; but, when the claim is as between different members of a hakdar's family of patel or shanbhog in respect of land entered in the Government records or otherwise shown as service inam land connected with the office of patel or shanbhog, such claim may be entertained and adjudicated upon by a Civil Court."

It is clear the section bars civil Courts from taking cognizance of suits in which any claim to succeed to or to the possession of, any village office or the emoluments thereof is laid. What is, however, more significant is the fact that even a claim as in this case, as between different members of a hakdar's family of patel or shanbhog in respect of service inam land is entertainable by a civil Court. The nature of the suit also comes under consideration when it was to be held that a suit is barred. It must be a suit in respect of a claim to succeed to or to the possession of any village office or the emoluments thereof. To understand clearly what suits are taken away from the cognizance of civil Courts it would be useful to examine what provision is made for the trial of those claims. When S. 16 takes away the jurisdiction in respect of certain claims, it confers jurisdiction on revenue authorities to decide these claims, and this is laid down in Ss. 9, 10 and 11 of the Act. Section 11(1) runs thus:

"Any person may sue before the Deputy Commissioner or Assistant Commissioner for any village office in an unalienated or alienated village or for recovery of the emoluments of any such office, on the ground that he is entitled under Ss. 8, 9 or 10 of this Regulation, as the case may be, to hold such office and enjoy such

emoluments; or being a minor, may sue before the Deputy Commissioner or Assistant Commissioner to be registered as successor of the last holder of any such office."

It is suits of this nature that are barred from being tried in civil Courts. I may here refer to the decision in — '29 Mys C C R 316 (A)' which says:

"Section 16 of the Village Offices Regulation 4 of 1908 only bars the jurisdiction of the civil Courts where the claim is to the possession of the emolument of a village office as such, that is to say where the claim is based on a right to be the office bearer.

Where the claim to the office of patel has already been decided by the revenue authorities, as also the fact that the land in dispute is part of the emoluments of the pateli office, and the land has been transferred to plaintiff's possession by the revenue authorities from the possession of the defendant, a suit subsequently instituted to recover possession of the land on the ground that defendant's possession is unlawful, does not involve any question as to the title to a village office or as to the possession of emoluments as such; and is therefore within the cognizance of the civil Courts."

This suit does not involve the determination of any claim to succeed to or to the possession of any village office or the emoluments thereof. There is nothing in S. 16 which takes away the right of the civil Courts to try such suits.

(4) Moreover no question of title arises in cases in suits of this kind where permanent injunction is sought for on the ground of plaintiff having been in lawful possession. As regards the right of a person in a case of this kind for a permanent injunction on the basis of the person having been in lawful possession of the property, though it may be found that that person has not got perfect title, I may refer to the decision in — 'Sundar v. Parbati', 12 All 51 (B), which is a decision of their Lordships of the Privy Council, wherein the observation of the Chief Justice, against whose judgment the appeal had been filed, viz. that 'possession is good title against all the world except the person who can show better title', has been cited with approval. Dealing with the rights of the persons to whom the property originally belonged, it was observed by their Lordships as under:

"Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh or of Baldeo Sahai one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title."

This decision has been followed in — 'Gouribala Devi v. Probhas Chandra', AIR 1927 Cal 931 (2) (C). It is also useful to refer to the following passage reported in — '5 Mys C C R 19 at p. 22 (D)':

"As osberved, however, by Pollock and Wright in their essay on possession in the Common Law, page 22, 'as against a mere wrong doer possession is conclusive proof of right to possess. Not only is existing possession protected against interference at the hands of a mere intruder, but in an action for wrong to the possession the intruder cannot be heard to say that any third person, to whose title he is himself a stranger, has a better title than the actual possessor:' & again at page 19 — 'possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title'."

Vide also — 'Ismail Ariff v. Mahomed Ghous', 20 Cal 834 (PC) (E). The above dictum is followed with approval in — 'Dodda Venkatappa v. Nagari', 11 Mys L J 333 (F).

(5) It has not been shown in this case that the defendant-respondent has any right to be in possession or enjoyment of the land in dispute. He has not shown that he is the heir of his divided uncle Kallurappa. If, for any reason, his married daughter the plaintiff cannot be said to be a member of that family, it has to be stated that she was entitled to an injunction as prayed for by her. It may be stated at this stage that she is now dead, and her son is brought on record as her legal representative and he, even apart from the gift to his mother, is entitled to the suit property as the heir of his maternal grandfather Kallurappa.

(6) In the result, the judgments and decrees of both the Courts below are set aside, and there will be a decree as prayed for in the plaint. The defendants will pay the costs of the plaintiff throughout.

B/K.S. Decree set aside.

A.I.R. 1954 MYSORE 7 (Vol. 41, C. N. 3)

VENKATARAMAIYA AND BALAKRISHNAIYA JJ.

Laksnminaranappa and another, Appellants v. Mysore Provincial Co-operative Apex Bank, Ltd., and another, Respondents.

Second Appeal No. 465 of 1947-48, D/- 30-3-1951, against decree of Dist. Judge, Mysore, in R. A. No. 42 of 1945-46.

(a) Mysore Land Revenue Code, S. 54 — Auction sale of entire jodi village for arrears of revenue — Name of only two principal jodidars entered in record — Sale is not irregular — Failure to establish Kadim tenancy will justify ejectment by purchaser. (Paras 3 and 7)

(b) Mysore Land Revenue Code, S. 54 (as amended in 1928) — (Quaere) Whether rights of jodidar as kadim tenant are forfeited and sold in auction sale for arrears of revenue. (Para 4)

M. Lakshminarayana Rao, for Appellants.

CASES REFERRED:

(A) 24 Mys LJ 39: (S. A. No. 354 of 1939-40)
(B) ('48) R. A. No. 25 of 1947-48 (Mys)

BALAKRISHNAIYA J.: The dispute in this appeal relates to Jodi Kittane village which is said to contain 28 vrittis owned by 51 sharers. Defendant 1 is the holder of 1½ vrittis in the said village. The plaintiff in the suit, from which this appeal arises, claims to have purchased the entire jodi village in an auction sale held by Government for arrears of revenue due on the holding for the year 1933-34. The suit was filed for possession of items 1 to 9 of the suit schedule properties which are alleged to be in the possession and enjoyment of defendant 1. Defendant 1 had, prior to the revenue sale, granted items 2 to 9 to defendant 2 on a permanent lease. The plaintiff has alternatively claimed a decree for all the rights of defendant 1 in items 2 to 9 in addition to actual possession of item 1. An additional claim for mesne profits is also laid in the suit. The plea of defendant 1 is,

in main, that the suit properties belonged to her permanent kadim tenancy rights and the plaintiff who has only purchased the jodidar's rights is not entitled to possession of the suit items. The trial court held that the plaintiff is only entitled to recover kandayam due to the jodidars from items 1 to 9 and disallowed the rest of the claim. On appeal, the learned District Judge decreed the plaintiff's suit granting the alternative claim for possession of item 1 and for the rights of defendant 1 against defendant 2. The legal representatives of defendant 1 since deceased, have preferred this appeal against that decision.

(2) Sri Lakshminarayana Rao, the learned Counsel on behalf of the appellant, raised two contentions namely, that the revenue sale did not have the effect of transferring the rights of defendant 1 in the jodi village and even if admitting, but not conceding, that the entire jodi village was sold, the sale did not affect the right to possession of items 1 to 9 which belonged to defendant 1 as the permanent or kadim tenant thereof. The argument in respect of the first contention is based on exhibit C the order of forfeiture, wherein a mention is made of two persons as the defaulters and in consequence, the sale in pursuance of forfeiture must be deemed to be the right, title and interest of only the defaulters named therein. It is difficult to accede to this argument. In the written statement, defendant 1 has admitted that what is sold is the right to collect the jodi of the entire village, nor could exhibit C be interpreted as the sale confined only to the shares of the defaulters named therein. It is not shown that all the 51 sharers in the village have been registered as 'occupants'.

(3) Section 54, Land Revenue Code, provided that arrears of land revenue is a paramount charge on the holding and every part thereof and empowers the Deputy Commissioner to forfeit the occupancy or holding and sell the same free from all tenures, rights and encumbrances created by the occupant or his predecessor-in-title. The section also stated that all the rights created by any occupant or his predecessor-in-title shall become liable 'unless the Deputy Commissioner otherwise directs'. Whether the sale and forfeiture is confined to the shares of the persons named in exhibit C, has to be determined by the examination of the history of the sale proceedings. Exhibit A is the notice of demand issued to Seshadri Iyengar and Lingappa. Exhibits I and II are similar notices, to the Apex Bank at Hassan and Bangalore respectively. Exhibit B is the attachment list dated 11-3-1934 giving the estimated value of the village to be Rs. 30,000/-. In Exhibit C, the entire village has been forfeited. In col. 7 of exhibit D the properties forfeited are described as the 'entire village' and the extent and assessment stated therein accord with the actual figures of the full holding; so also in exhibit E, the proclamation of sale published in the Gazette. In exhibits C and D the names of defaulters are mentioned as Seshadri Keshava Iyengar and Lingappa. Exhibits E and F name the defaulters as Jodidar Seshadri Keshava Iyengar and others. In exhibit B, the attachment list, the khatedar's name is stated to be 'Sri Rameswara Deity', Lingappa, Seshadri Keshava Iyengar and others': In Exhibit F, the document relating to the confirmation of sale, the name of khatedar is stated to be 'Lingappa and others'. Exhibit H is the confirmation of sale which puts down the khatedars as Lingappa and others; exhibit J the sale certificate, and exhibit L, the delivery receipt, also indicate that the entire village was dealt with. It is not denied that defendant 1 was one of the defaulters in payment of the land revenue. Admittedly, the arrears for which the sale was held represented the entire revenue due to Government for the year 1933-34. The entire Jodi payable to Government by all the sharers amounts to about Rs. 300/- and it cannot, therefore, be said that the two persons are the defaulters in respect of Rs. 1300/-. Hence, the arrears did not relate to the shares of persons named in the documents. Clause (17) of Section 3, Land Revenue Code, describes the 'registered occupant' as a sole occupant or the eldest or principal of several joint occupants whose name is authorisedly entered in the Government records; and an 'occupant' is described as a holder of land or, when there are more holders than one, the holder having the highest right in respect of any such land. Note 3 to Rule 9 under the 'Inam Rights' published in the Revenue Manual prescribes that subsequent alienees who derive their titles from the gifts made by the original holders of inams should not be entered in col. 15 of the said register. It is not shown that defendant 1 is the registered occupant, nor is she the holder of a recognised share assessed separately. Seshadri Iyengar and Lingappa are represented to be the Patel and Shanbhogue respectively and they are thus the principal persons representing the jodi rights. The forfeiture and sale records entered in the name of the principal jodidars representing the entire village cannot be characterised as irregular. In the circumstances, we are of opinion that what is sold is the entire village represented by the principal jodidars.

(4) On behalf of the appellant an important point was raised touching the effect of forfeiture and sale of a jodi village on the rights of kadim tenants. It was contended by the appellant that the rights of the kadim tenants are not affected. The contention is undoubtedly in consonance with the amendment to Section 54, Land Revenue Code, after 1928; but the moot point is about the rights of the jodidar, if he happens to be a kadim tenant also. Reliance is placed upon the decision of this Court reported in — '24 Mys LJ 39 (S. A. No. 354 of 1939-40) (A)'. Our attention is drawn to an observation by Nageswara Iyer J. — 'at pages 47-48' that—

> "In respect of lands in which the tenants hold kadim or permanent tenancies, the only right the inamdars have, is to collect the assessment thereon. They have no right to possession of lands and if according to the order of forfeiture, it was only the jodidars' rights that were forfeited, it would be going too far to contend that the permanent or kadim tenancy rights were also lost on account of the order of forfeiture".

This observation is in relation to interpretation of Section 54 which governed the subject matter of the appeal which arose before the amendment of 1928. But the respondents on the other hand cited a more recent decision in — 'R. A. No. 25 of 1947-48 (Mys) (B)' which is yet unreported wherein it is observed that—

> "Even if a jodidar can be said to have permanent tenancy rights in the lands of his jodi village, if he is the owner of the jodi village or in his vritti or share in the jodi village, in case he is only the owner of a vritti, the amendment does not state that any such rights of the jodidar remain unaffected by the sale".

There appears to be apparent conflict between the opinions expressed in the cases cited above. It is needless to say that a jodi village consists of jodidars and permanent tenants and it is not uncommon that a jodidar could be a permanent tenant as well. The forfeiture and sale after the amendment of 1928 could not be "so as not to

affect the rights of kadim tenants or permanent tenants in alienated holdings". As the legal position is rendered doubtful, the point needs clarification in an appropriate case when the question may again arise for decision. In the view we have taken about the facts in this case, it is unnecessary for us to express an opinion whether the rights of the jodidar as a kadim tenant also are forfeited and sold.

(5) The next contention is that defendant 1 held the suit lands as a permanent tenant. On a perusal of the oral and documentary evidence adduced in the case, we are of opinion that the contention remains unsubstantiated. The learned Counsel for the appellant rested his contention solely on exhibit IV, which is denominated as account No. 15 required to be maintained by jodidars. Khata No. 15 in exhibit IV refers to defendant 1. Exhibit IV contains the details of the lands owned by the vrittidars and others. Khatas 1 to 35 relate to the vrittidars of several lands; kathas 35 to 66 to the lands of kadim tenants and 66 to 198 are in the joint names of tenants and vrittidars. D. W. 1 who was the shanubhogue of the neighbouring village states that the suit lands were vritti lands of Lakshmidevamma. This witness who prepared exhibit B maintains that under the column 'Khatedar' he mentioned Sri Rameswara Devaru Lingappiah and Seshadri Iyengar and 'others'; the expression 'others' was added as there were many other jodidars for Kittane village. D. W. 2 one of the jodidars of Kittane village possessing 13/16ths share, explaining the entries in exhibit IV, states that the lands described in exhibit IV (a) belong to his vritti for which no kandayam is levied. The kandayam due and payable refer only to such lands which are not specifically described as rent free. He is paying a jodi of Rs. 11-7-0 and cesses to Government on the lands belonging to his vritti; but states that Rs. 11-7-0 does not represent kandayam of all the lands. On a proper calculation he had to pay about Rs. 36/- and the difference was being recovered from the ryots.

(6) Exhibit VVV is a sale deed by one other jodidar whose khata is 24 in exhibit IV possessing $1\frac{1}{8}$th vritti in the said Kittane village. In the sale deed of 1909 under reference, it is described as lands sold belonging to that vritti. Besides there are admissions by defendant 1 alone which are conclusive. Exhibit EE is a registered sale deed executed by defendant 1 relating to item No. 4 in exhibit IV wherein she described the land sold as one attached to her vritti. Exhibit BBB is a hypothecation bond of 1901 of items 1 to 6 where the lands hypothecated are described as belonging to $1\frac{1}{2}$ vrittis possessed by her. Ex. JJJ is a notice relating to item No. 5 in khata No. 15 in exhibit IV. Exhibit FFF is the copy of the plaint filed by defendant 1 in which the land in dispute is described as belonging to her vritti of Jodi Kittane village. Exhibit 'PP' is a document or mortgage by defendant 1 in which she describes the mortgaged property being connected with her $1\frac{1}{2}$ vrittis as entered in the Suit Rent Register of Kittane village. Similar references are not wanting in various other documents, but it is not necessary to pursue further to conclude that the schedule lands are comprised in the vritti of defendant 1.

(7) Yet another circumstance which supports the conclusion is that according to the revenue accounts, the total assessment of the village is Rs. 2297-12-0 and the jodi payable to Government is about Rs. 1300/-. The lands which are in the possession of tenants are assessed at about Rs. 1100/- and the remainder of about Rs. 300/- is proportionately distributed as the residuary liability of the sharers payable to Government. It is significant to note that in each of the kathas 1 to 35, an endorsement that the Jodidar had to pay the balance after deducting the amounts recovered from the ryots is made in respect of the amount for which the Jodidar is made responsible. The cumulative effect of these facts leads to the conclusion that the shares of lands of the Jodidars are registered in the name of either the jodidar or the jodidar and the tenant and the liability of the jodidar to the proportionate jodi payable to Government as entered in exhibit 'IV' does not indicate that the lands are assessed as if it were permanent holdings. It is argued for defendant 1 that exhibit 'IV' is an account indicating the persons in possession of the respective lands which conclusively establishes that the jodidars were in the possession of the lands as occupancy tenants. It is further maintained that exhibit 'VIII', a sale deed of 1877, shows that defendant 1 purchased the occupancy rights of item 2 of the schedule. There is no indication in the said document that the occupancy right was purchased; but, on the other hand, it is apparent that the land belonging to one vrittidar is transferred to another vrittidar which merely goes to augment the share of the purchaser. Exhibit 'XXII' is a delivery receipt of 1900 relating to some items in the schedule. From the arguments it is understood that in the dispute between defendant 1 and her mother-in-law, defendant 1 got delivery of some properties. What could be gathered from exhibit 'XII' is that probably in a family dispute, in relation to the property belonging to the same vritti, defendant 1 got delivery of the properties. The receipts produced for the payment of a sum of Rs. 13-10-10 by defendant 1 towards the jodi does not carry any further to support the theory that the lands belong to kadim tenancy. Further, in order to establish kadim or permanent tenancy the right in question ought to have been granted by one or other of the jodidars. It is not shown from whom defendant 1 derived her right as kadim tenant and the jodi according to her is paid direct to Government as evidenced by exhibit 'XXIX' and not any of the jodidars. On a consideration of the oral and documentary evidence, we are of opinion that defendant 1 has failed to establish that the suit schedule lands belong to her permanent occupancy or kadim tenancy and it followed therefore that defendant 1 cannot resist the title of the plaintiff who has purchased all the rights of the jodidars free from all tenures except those of the permanent tenants. Since defendant 1 has created the permanent lease in favour of defendant 2 before the sale in favour of the plaintiff, the plaintiff is not entitled to actual possession of items 2 to 9. The decision arrived at by the learned District Judge is correct and should be upheld.

(8) The appeal therefore fails. But, in the circumstances of the case, we direct that each party will bear his or her own costs throughout.

C./V.S.B. Appeal dismissed

A.I.R. 1954 MYSORE 9 (Vol. 41, C. N. 4)

MALLAPPA J.

V. Seetharama Rao, (Accused) Petitioner v. Govt. of Mysore.

Criminal Revn. Petn. No. 22 of 1952-53, D/- 30-1-1953, against decision of Addl. Sessions J., Shimoga, in Cri. A. No. 4 of 1951-52.

(a) Criminal P. C. (1898), S. 257 — Failure to secure attendance of defence witnesses.

The use of the word 'shall' in the section indicates that the language in it is impe-

rative. The Magistrate has no option in the matter of issuing process to compel the attendance of defence witnesses unless he considers that the application of the accused should be refused on the grounds specified in the section.

Where, therefore, an accused applies for issue of process for compelling the attendance of his witnesses and the application is not refused, the conviction and sentence of the accused, who is thus given no opportunity to prove his case, has to be set aside even if the prosecution evidence has made out a case for conviction. (Para 4)

Anno: Cri P. C., S. 257 N. 3.

(b) Penal Code (1860), S. 415 — Deception of A but loss caused to B — No offence of cheating.

The act or omission under S. 415, I. P. C. must be such as to cause or is likely to cause damage or harm to the person deceived. No offence of cheating can be said to have been committed if one person is induced by deception to do or omit to do something and the act or omission causes or is likely to cause damage or harm to another person. AIR 1941 Lah 460; AIR 1924 Cal 495 and AIR 1934 Lah 833. Rel. on. (Para 5)

Anno: I. P. C., S. 415 N. 8.

B. S. Puttasiddiah, for Petitioner; Advocate-General, for the State.

CASES REFERRED TO:

(A) ('41) AIR 1941 Lah 460: ILR (1941) 22 Lah 718: 43 Cri LJ 254 (Pr 7)
(B) ('24) AIR 1924 Cal 495: 51 Cal 250: 26 Cri LJ 330 (Pr 8)
(C) ('05) 2 Cal LJ 524: 3 Cri LJ 160 (Pr 3)
(D) ('19) AIR 1919 Cal 1088: 22 Cal WN 1001. 19 Cri LJ 781 (Pr 8)
(E) ('05) 32 Cal 775: 2 Cri LJ 388 (Pr 8)
(F) ('90) 17 Cal 606 (Pr 8)
(G) ('05) 9 Cal WN 764: 2 Cri LJ 422 (Pr 8)
(H) ('08) 12 Cal WN 750: 7 Cri LJ 342 (Pr 3)
(I) ('34) AIR 1934 Lah 833: 36 Cri LJ 274 (Pr 9)

ORDER: This is a revision petition against the conviction and sentence passed by the Additional Sessions Judge, Shimoga, in Chikmagalur Criminal Appeal No. 4 of 51-52, confirming the conviction of the accused of an offence under Section 417, I. P. C. but modifying the sentence passed on the petitioner by the Munsiff-Magistrate of Narasimharajapur in C. C. No. 98 of 50-51.

(2) The case against the petitioner is that he induced the Government to pass an order that certain G. I. Pipes belonging to Kallatipura village panchayat might be sold to him at the rate of 0-6-0 per foot and induced them to believe that they were needed by him for being used for agricultural purposes for his lands. That such an order was passed by the Government and that in his applications before different authorities he referred to lands as 'my' land or 'our' lands is not disputed. It is in evidence that the G. I. pipes had been laid for purposes of affording water facilities to the village and that they had become old and that when they were sold in auction the highest bidder was prepared to pay only Rs. 800/- for them. That sale was set aside as the Iron and Steel Controller, Bhadravathi, objected to the sale without his permission. Mysore Iron and Steel Works, Bhadravathi were prepared to purchase the G. I. Pipes at 0-4-9 per foot and this would have fetched a sum of Rs. 1,300/-. The petitioner however gave an offer to purchase the pipes at a rate of 0-6-0 per foot. But it is contended for the prosecution that the Government passed an order that these pipes might be sold to the petitioner in view of his stating that they were to be used for agricultural purposes and that the petitioner instead of using them for agricultural purposes has sold them away. It has to be remembered that the Government when it sanctioned the sale must have thought, like the petitioner, that those pipes could be used for agricultural purposes. It was evidently found later that they were not useful for agricultural purposes as is clear from the evidence of the expert P. W. 8. What is seriously contended is that the accused owns no lands and he deceived the Government by saying that he owns some lands and that he would use the pipes for agricultural purposes. It is unfortunate that the learned Magistrate did not give sufficient opportunity to the petitioner to prove his case.

(3) Six witnesses had been cited by the accused before the learned Magistrate. It is only in respect of two of them, the petitioner did not want any warrant to be issued. But the learned Magistrate was bound to secure the attendance of the other witnesses at any rate, if necessary by coercive steps. As succinctly brought to the notice of the learned Magistrate by the petitioner in his application, the prosecution had taken one and a quarter year to close its case and the petitioner was not even given breathing time to produce his witnesses. The learned Magistrate ought to have taken appropriate steps to secure the attendance of the defence witnesses. On this ground alone the judgment of the Courts below convicting the petitioner cannot stand.

(4) It is laid down in Section 257, Criminal P. C. as follows:

"If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing".

The use of the word 'shall' in the section indicates that the language in it is imperative. The Magistrate has no option in the matter of issuing process to compel the attendance of witnesses unless it be that he considers that the application of the accused should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and he records such ground in writing. The application of the accused for issue of process for compelling the attendance of his witnesses has not been refused on any such ground. The conviction and sentence of the accused who was given no opportunity to prove his case has therefore to be set aside even if the prosecution evidence has made out a case for conviction.

(5) The prosecution evidence even as it stands without any evidence to rebut it, is not sufficient to support the conviction of the accused of the offence of cheating under Section 417, I. P. C. The offence of cheating is defined in Section 415, I. P. C. It is as follows:

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property or in-

tentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to 'cheat' ".

The first ingredient of the offence is that a person must be deceived. This by itself is not sufficient for convicting the person deceiving of the offence of cheating. The second ingredient of the offence is that the person deceived must have been induced to deliver any property or induced to consent that any person shall retain any property or he must have been intentionally induced to do or omit to do anything which he would not do or omit, if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. It is important to notice that a person who by deception induces another person to do or omit to do anything which he would not do or omit if he were not so deceived, does not commit the offence of cheating unless the act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The act or omission must be such as to cause or is likely to cause damage or harm to the person deceived. No offence of cheating can be said to have been committed if one person is induced by deception to do or omit to do something and this act or omission causes or is likely to cause damage or harm to another person.

(6) In this case the prosecution version is that the petitioner-accused induced the Government of Mysore to pass an order that he may be allowed to buy some old pipes at the rate of six annas per foot and that he deceived the Government by stating that he wanted to make use of those pipes for agricultural purposes but that he ultimately sold them. It is in evidence that these pipes are too small for being used for agricultural purposes as has been spoken to by the Expert P. W. 8. If at the time the Government was approached by the petitioner for permission to purchase these pipes it was represented that these pipes would be used for agricultural purposes and the Government gave the permission, it is clear that both the petitioner and the Government at that time thought that the pipes were fit for agricultural purposes. Evidently the pipes could not be used for agricultural purposes, in accused's lands or the lands of others as the pipes were later found to be not fit for being used for such purposes. It cannot therefore be said that the Government were deceived into passing an order in favour of the petitioner. Assuming however that there is some reason to think that the Government were deceived into passing an order in favour of the accused and they would not have passed such an order if the accused had not deceived them, the question that arises is whether this act of Government causes or is likely to cause damage to Government. If any loss has incurred it is incurred by the Village Panchayathi. It is not shown that any loss was incurred at all even by the Village Panchayathi as the Mysore Iron and Steel Works, Bhadravathi were prepared to purchase the pipes only at the rate of 0-4-9 per foot while the petitioner offered to purchase and purchased them at the rate of 0-6-0 per foot. When the pipes had been auctioned in public auction the highest bidder was prepared to pay very much lower than what even the Mysore Iron and Steel Works, Bhadravathi were prepared to pay, it cannot be said that the act of Government in passing an order in favour of the accused caused or was likely to cause damage or harm to any one, still less to Government. Even if the evidence adduced by the prosecution is believed it is clear therefore that the accused is not guilty of the offence of cheating.

(7) I agree with Abdul Rashid J. in his observations in — 'Mohamed Baksh v. Emperor', AIR 1941 Lah 460 at p. 464 (A), that:

"It appears to me that the definition of 'Cheating' in S. 415, Indian Penal Code requires modification in order to cover cases where one person is deceived and another person suffers, or is likely to suffer, damage or harm in body, mind, reputation or property. It has been revealed in a number of cases that serious deception has been practised on Government Officials as a result of which certain other persons have suffered a great deal of harm in reputation or property. As the definition of 'cheating' at present stands, such cases are not covered by S. 415, Indian Penal Code and the punishment prescribed in Ss. 419 and 420 cannot be awarded to persons who practice deception on Government servants which results in damage and harm to third parties."

(3) I may here refer to the observations in — 'Superintendent and Remembrancer of Legal Affairs v. Manmatha Bhushan', AIR 1924 Cal 495 (B):

"There remains the charge of cheating in the second form. In that form the offence does not necessarily involve fraud or dishonesty. The words of the definition are undoubtedly wide and if pushed to the full limit of their meaning might embrace acts which the man in the street would hardly regard as criminal offences. That observation, however, raises a question of the appropriate punishment in the particular case rather than of construction.

Clause 392 of Lord Macaulay's draft corresponds to the first part of S. 415. The second part would appear to have been added at some later date after the Code had left his hands & the hands of the Indian Law Commissioners. The illustrations throw no light on what is meant by damage or harm in body, mind or reputation and so far as such damage is concerned the offence is not very appropriately placed in the Chapter of the Code relating to offences against property. An essential ingredient of the offence is the damage or harm caused or likely to be caused in the said respects or in property.....

It does not appear to be necessary that the resulting damage or likelihood of damage should have been within the actual contemplation of the accused when the deceit was practised. But authorities in this Court lay down

(i) that the person deceived must have acted under the influence of the deceit: — 'Ramanath v. King Emperor', 2 Cal LJ 524 (C) — 'Milton v. Sherman', AIR 1919 Cal 1088 (D):

(ii) that the facts must establish damage or likelihood of damage: — 'Baburam Rai v. Emperor', 32 Cal 775 (E)

and

(iii) that the damage must not be too remote: — 'Mojey v. Queen-Empress', 17 Cal 606 (F), — 'Kishori Lal v. Emperor', 9 Cal WN 764 (G), — 'Mahadev v. Dhonraj', 12 Cal WN 750 (H)."

(9) The observations of Tek Chand J. in — 'Rattan Singh v. Emperor', AIR 1934 Lah 833 (I), are as follows:

"In order to bring a case within the second part of S. 415, damage or harm caused, or likely to be caused, must be the necessary consequence

of the acts done by reason of the deceit practised or must be likely to follow therefrom, and the law does not take into account remote possibilities that may flow from the act. The damage or harm must be proximate and the natural result of the act or omission and does not include vague and contingent injury".

(10) On the whole the learned Magistrate erred in not issuing process for compelling the attendance of the witnesses of the accused. He was also wrong in thinking that a case is made out by the prosecution for conviction of the accused for an offence under S. 417, I. P. C.

(11) This revision petition is allowed. The conviction and sentence are set aside. The accused-petitioner stands acquitted of the offence under S. 417, I. P. C. Fine if levied shall be refunded The bail bonds stand cancelled.

B/D.R.R. Revision allowed.

A.I.R. 1954 MYSORE 12 (Vol. 41, C. N. 5)

VASUDEVAMURTHY J.

B. K. Linganna and others, Accused-Petitioners v. State of Mysore.

Criminal Revn. Petn. No. 33 of 1953, D/-13-3-1953, against order of Second City Magistrate, Mysore, in C. C. No. 2435 of 1952-53.

(a) Mysore Police Act, S. 56(o) — Place of public resort — (Police Act (1861), S. 34, Seventh).

The fact that loud speaker arrangements had been made for the public outside to hear what was going on inside a hall would surely not make the meeting public meeting or those premises places of public resort. (Para 2)

Anno: Police Act, S. 34 N. 1.

(b) Mysore Police Act, S. 56(o) — Place of public resort — (Police Act (1861), S. 34, Seventh).

Held that a hall like the Crawford Hall in Mysore which presumably belonged to the Government or to the University cannot be described as a place of public resort or a public place and any meeting held within the confines of such a building cannot be described as a public meeting, without proof. Case law ref. (Para 4)

Anno: Police Act, S. 34 N. 1.

(c) Criminal P. C. (1898), S. 239(a) — Same transaction.

The accused were present at a meeting held to inaugurate the work of the Committee on Educational Reforms in Mysore in the Crawford Hall, Mysore City, and there they behaved riotously and in a disorderly manner by shouting some slogans and throwing pamphlets: Held that the proximity of time, place and events was so apparent that what all the accused did was in the course of the same transaction. (Para 8)

Anno: Cr. P. C., S. 239 N. 6.

(d) Constitution of India, Art. 19(1)(a)(b) — Freedom of speech and expression and freedom to assemble peacefully.

It would be no answer to a proper charge that the accused behaved riotously at a private or even a public meeting violently or in an indecorous manner or disorderly way by insisting on the same being held in a particular language or in a particular way. (Para 9)

(e) Criminal P. C. (1898), S. 540 — Limits of discretionary power.

It is not either necessary or incumbent on the Court to examine witnesses as Court witnesses merely to fill up any lacuna for either party. (Para 11)

Anno: Cr. P. C., S. 540 N. 4.

(f) Criminal P. C. (1898), S. 244 — May issue summons.

An application for summoning witnesses made by an accused person can only be refused if the Court is satisfied that such application is made vexatiously or in order to delay the proceedings. Case law referred. (Para 12)

Anno: Cr. P. C., S. 244 N. 8.

(g) Criminal P. C. (1898), S. 244 — May issue summons.

Though it may be that the Court ought to be more careful in refusing requests for summoning witnesses for defence in warrant cases it cannot be held that the Court can treat the case of the accused in summons cases so very lightly. Held that the Magistrate could have and ought to have issued summons at least to some of the witnesses mentioned in their list even if he felt that all of them need not be summoned on the ground that it would be vexaticus or entail delay to do so. AIR 1940 Lah 58, Rel. on. (Para 15)

Anno: Cr. P. C., S. 244 N. 8.

K. S. Setlur and A. Shamanna, for Petitioners; A. R. Somanatha Iyer, Advocate-General, for the State.

CASES REFERRED TO:

(A) 33 Mys CCR 176 (Pr 4)
(B) 25 Mys CCR 105 (Pr 4)
(C) ('17) AIR 1917 Mad 124: 40 Mad 556: 18 Cri LJ 7 (Pr 4)
(D) ('16) AIR 1916 Mad 474: 39 Mad 886: 16 Cri LJ 704 (Pr 4)
(E) 7 Mys LJ 144 (Pr 7)
(F) ('40) AIR 1940 Sind 113: 41 Cri LJ 724 (Pr 10)
(G) ('30) AIR 1930 Bom 163: 31 Cri LJ 925 (Pr 10)
(H) ('42) AIR 1942 Sind 122: 44 Cri LJ 367 (Pr 12)
(I) ('40) AIR 1940 Lah 58: 41 Cri LJ 340 (Prs 12, 15)
(J) ('24) AIR 1924 Pat 142: 24 Cri LJ 831 (Pr 12)
(K) ('29) AIR 1929 All 914 (2): 30 Cri LJ 1155 (Pr 12)
(L) 8 Mys LJ 49 (Pr 13)
(M) ('01) 28 Cal 594 (Pr 15)
(N) ('25) AIR 1925 All 285: 47 All 147: 26 Cri LJ 575 (Pr 15)
(O) ('08) 31 Mad 131: 7 Cri LJ 425 (Pr 15)
(P) ('02) 26 Bom 418: 4 Bom LR 38 (Pr 15)
(Q) ('25) AIR 1925 Cal 411(1): 51 Cal 1044: 26 Cri LJ 384 (Pr 15)
(R) ('29) AIR 1929 Lah 23(2): 30 Cri LJ 814 (Pr 15)

ORDER: The petitioners 13 in number who were accused in the Court of the Second City Magistrate, Mysore, and who are all described as students, have been tried and convicted for an offence under S. 56(o), Mysore Police Act and sentenced to pay a fine of Rs. 10/- each and in default

to undergo S. I. for six days. The charge against them was that on 26-9-1952 at about 10-30 A.M. they were present at a meeting held to inaugurate the work of the Committee on Educational Reforms in Mysore in the Crawford Hall, Mysore City, and that there they behaved riotously and in a disorderly manner by shouting some slogans and throwing pamphlets and thereby caused a breach of the peace. The charge also mentioned that the accused's conduct amounted to offences by cls. (o), (q) and (r) of S. 56. Though the learned Magistrate has not chosen to make any reference to the offences under cls. (q) and (r) of S. 56 and does not say in his judgment whether he acquitted the accused of the offences under those clauses, there is no doubt at all that no case falling under those clauses has been made out against any of the accused. Section 56 (q) refers to wilfully pushing, pressing, hustling or obstructing any passenger in a street or disturbing the public peace or order by violent movements etc.; (r) refers to misbehaviour by using in any street any threatening, abusive or insulting words or behaviour; and it is not clear why a charge under these clauses was at all put in the charge sheet. We are, therefore, only concerned to see whether an offence has been committed under cl. (o) which reads as follows:

> "(Whoever) wilfully and indecently exposes his person, uses indecent language or behaves indecently or riotously or in a disorderly manner in a street or place of public resort, or in any public office."

and the only question of that clause which would apply to the present case would be that relating to behaving riotously or in a disorderly manner in a place of public resort.

(2) It is contended by Mr. A. Shamanna, learned Counsel for the petitioners, that it has not been shown by the prosecution that Crawford Hall was a place of public resort & the meeting convened there was a public meeting. To decide this point as well as other points, which I will refer to later, it would have been of great advantage if the conveners of the meeting at least had been examined It is represented that persons were invited to attend the meeting and that even passes were issued. P. W. 1 says that he does not know whether any such invitations were issued. But in this Court Mr. Shamanna sought to produce a printed invitation card said to have been given to the invitees by Mr. J. B. Mallaradhya Director of Public Instruction. This cannot of course be treated as evidence at this stage as it has not been formally proved to have been issued by him. No notice by which the meeting was called is produced by the prosecution; nor is it shown that Crawford Hall is a place of public resort and that anybody can walk in and attend any meetings conducted there and that all meetings held there are public meetings. The learned Magistrate appears to think that that meeting was a public meeting because loud speaker arrangements had been made for the public outside to hear what was going on inside the hall. It is now quite common to have such loud speaker arrangements even for musical and other performances and in purely private meetings conducted in enclosed premises, and that would surely not make those meetings public meetings or those premises places of public resort.

(3) It is not disputed that if the meeting was a private meeting and the Crawford Hall was not a place of public resort the Police could not have attended that meeting and sought to keep order in it without a special invitation by the conveners. Here again P. W. 1, the Police Inspector, says that he does not remember who asked him and the Sub-Inspectors, P. Ws. 2 and 3, to be present inside the hall and to preserve peace there. It has been suggested in the course of cross-examination that several members and scouts were in charge of seating arrangements in the hall and were expected to maintain quiet and orderliness and that the Police had no place in the meeting. Here too unfortunately the prosecution by not summoning the conveners and the learned Magistrate by refusing to summon them as witnesses for the defence, has deprived both the prosecution and the accused from placing that important piece of evidence on record.

(4) The learned Advocate-General has referred to a case reported in — '33 Mys CCR 176 (A)', where in a case of an affray it has been held by Plumer C. J. distinguishing — '25 Mys CCR 105 (B)', that a small piece of unfenced and open margin land by the side of the road which was freely accessible to the public and was being readily moved on by them though it belonged to a private owner, was a public place & to similar cases in — 'In re Musa', AIR 1917 Mad 124 (C) and — 'Emperor v. Govindarajulu', AIR 1916 Mad 474 (D), where what is a "public place" and what is a "place of public resort" have been considered. In — '25 Mys CCR 105 (B)', Plumer J. who later decided — '33 Mys CCR 176 (A)', held that the tennis court of a Tennis Club however great its publicity is not a public place, and that mere accessibility of the place or its being open to public view did not constitute it a public place. It is primarily a question of fact to be decided in each case whether a particular place is a place of public resort, i.e., one to which the public have free access or on which they have a right to enter. Obviously a hall like the Crowford Hall which presumably belonged to the Government or to the University cannot be described as a place of public resort or a public place and any meeting held within the confines of such a building cannot be described as a public meeting, without better proof which was easily available.

(5) Mr. Shamanna next contends that the prosecution has not made out by unimpeachable and clear evidence that the accused are guilty. He represents that the prosecution cited only four witnesses, viz., the Inspector of Police, P. W. 1, the Sub-Inspectors P. Ws. 2 and 3 and a Police Daffedar who was not examined. They did not cite a single other official or non-official witness though it is said that about 2 or 3 thousand people were present at the meeting. Even several volunteers or scouts were not cited or examined for the prosecution. He further urges that it is clear from the evidence of P. W. 1 that he may not have been present when the trouble started and must have come into the hall only much later and that the evidence of P. Ws. 2 and 3 shows clearly that they arrested the accused in the corridor, which was apparently after the disturbances. He has also referred to several discrepancies in the evidence. It must be admitted that P. W. 1 has exhibited rather a remarkable ignorance of what was going on in the hall. He has stated that he does not even know who was presiding at that meeting and who, if any, gave the music, in which parts of the hall the ladies were sitting and whether a picture of Mahatma Gandhi had been hung up and whether the Saraswathi picture, which was apparently hung up on the dais in the hall as appropriate to an Educational function on that Saraswathi Puja day was garlanded or not, that he did not notice the presence of the Chief Justice and some other persons on the dais and cannot state if there was an invocation or prayer before the meeting started.

(6) The learned Advocate-General has, however, urged that sitting in revision I should not ordinarily weigh the evidence. But here again the learned Magistrate by shutting out the defence from letting in evidence of persons who would be expected to speak to the incidents of that morning has made it impossible for himself to compare the prosecution evidence with the evidence let in by the accused; in such a case there can really be no proper appreciation of the evidence which appraisal has to be accepted.

(7) Mr. Shamanna has next urged that the mandatory provisions of S. 242, Criminal P. C. have not been complied with and has relied on a case in — '7 Mys LJ 144 (E)'. But I think there is no force in that contention because on 26-9-52 when the charge-sheet was presented, the learned Magistrate has made a note in the order sheet that the charge was read over and explained to the accused in Kannada and they pleaded not guilty, though in Col. 11 of the form in which the proceedings were to be entered, if the case had been tried in a summary way, there is no such record.

(8) It is next urged by Mr. Shamanna that the joint trial of all the accused was illegal. He urges that it is not shown that the accused persons had a common object or were acting with any common intention: P. W. 1 has admitted that he does not know the relationship between the various accused, i.e., whether they belonged to any particular group or association. They belong to different communities and apparently they have nothing in common with each other except their professed love of the Kannada language. He, therefore, contends that each of the accused should have been tried separately. But as pointed out by the learned Advocate-General I think this case is clearly covered by S. 239, Criminal P. C. The accused are persons charged with the same offence committed in the course of the same transaction and were rightly charged and tried together. The proximity of time, place and events is so apparent in this case that there is no doubt in my mind that what all the accused did was in the course of the same transaction.

(9) Mr. Shamanna has urged that the accused were entitled under Art. 19(1) relating to freedom of speech and expression in the Constitution, to insist that the proceedings at that meeting should take place in Kannada. I think there is no substance in that claim. The same freedom of speech and expression and the freedom to assemble peaceably under Cl. 19(2) (sic) should avail the conveners of the meeting to enable them to hold the proceedings in whatever language they liked and it would be no answer to a proper charge that the accused behaved riotously at a private or even a public meeting violently or in an indecorous manner or disorderly way by insisting on the same being held in a particular language or in a particular way. They were there by invitation or sufferance and could not take the conduct of the meeting into their own hands.

(10) It was also contended for the petitioners that the judgment of the learned Magistrate is not in accordance with law, i.e., the requirements of S. 367, Criminal P. C. as it does not discuss the action of each of the accused and how it is an offence; and reliance has been placed on cases reported in — 'Abdul Karim v. Emperor', AIR 1940 Sind 113 (F) and — 'Shanmukh Bosapa v. Emperor', AIR 1930 Bom 163 (G). It must be admitted that the judgment of the learned Magistrate does not at all discuss the evidence in detail and does not say what each of the accused is proved to have done. But it is, however, unnecessary to pursue this aspect of the matter further in the view I have taken that there are other and more serious objections against the conviction.

(11) It is next contended very strenuously for the accused by Mr. Setlur, their learned Counsel who argued this part of the case, that the trial is vitiated by the refusal of the Magistrate to summon the witnesses whom the accused had cited. Here I think the petitioners are on very firm ground. The case was sought to be tried in the first instance summarily and later on on an application made by the accused it was tried in the regular way. After the witnesses for the prosecution had been examined and before they were examined under S. 342, Cr. P. Code the accused made an application under S. 540, Criminal P. C. to examine some persons as Court witnesses. In that application they pointed out that the evidence on record clearly showed

> "that many important personages were present in Crawford Hall at the time of the incident, that the prosecution had not "strangely" cited them for fear that if they were summoned their evidence would not be favourable to the prosecution"

and that in the interests of justice it was necessary to summon the eleven witnesses whose names and addresses were given in that application in order to supply to the Court materials which would throw light on the reality of the affair. This application was opposed by the Prosecuting Inspector on the ground that that application was premature as the accused had not yet been examined & that the persons noted therein were "too big to be examined in a trivial case of the kind". On 12-12-52 the learned Magistrate passed an order and I think rightly rejecting the application. He thought that it was not either necessary or incumbent on the Court to examine witnesses as Court witnesses merely to fill up any lacuna for either party. It was not even a case where a person had been cited as a witness for the prosecution and had unreasonably been given up.

Later, on 8-1-53 after their statements were recorded and they had entered upon their defence, the accused again applied under S. 244, Criminal P. C. praying that 10 out of the 11 persons whose names and addresses had been mentioned in the earlier application may be summoned as witnesses for the defence. That application was apparently also opposed by the Prosecuting Inspector. No written objections appear to have been filed and there is no note as to on what grounds that application was opposed. On 12-1-53 the learned Magistrate passed an order refusing to issue summons to any of those witnesses except only one Veerappa, a scout. The learned Magistrate observed: that the witnesses mentioned in the list as S1. Nos. 1 to 4, viz., the Chief Minister, the Education Minister, the Director of Public Instruction & the Vice Chancellor could not have been on the balcony but must necessarily have been seated on the dais. None of them could have been in charge of the maintenance of law and order during the session. S1. Nos. 5 and 7, the Chief Justice and Mrs. Dhillon, could have been there only as invitees just as others: Merely because the accused may have seen those persons on the dais or heard that they were present, it could not be a sufficient basis for them to "pitch only upon those particular persons" as witnesses, and any one on the balcony could have been more properly cited as witness to speak to the fact as to whether there was disturbance or not: Furthermore the full addresses of all these witnesses were not furnished and the object of the accused could only be considered to cause unneces-

sary delay. Many of the witnesses were holding important positions in Government or Judiciary of the State and it would be nothing short of a sheer waste of public time to secure their presence for the purpose of this petty case. In the learned Magistrate's opinion the application was to be refused on the ground that it was made for the "purpose of vexation."

(12) Mr. Setlur has urged that the witnesses cited were all eye-witnesses: that their full addresses had been given in the application and nobody could say that with those addresses they could not be served; that the accused were taking a very responsible and serious step of summoning persons about whose position in life and whose credibility there could be no question and who would have been in the best position to say how the disturbances originated, what was the nature and extent or quantum of the disturbance, and whether there was provocation or insult from any of those witnesses, by which the situation was worsened as alleged or suggested by the accused and whether there was riotous conduct on the part of the accused. He has relied on some reported cases — 'Emperor v. Rasul Buse', AIR 1942 Sind 122 (H), — 'Vidya Parkash v. Emperor', AIR 1940 Lah 58 (I), — 'Debi Singh v. Emperor', AIR 1924 Pat 142 (J) and — 'Parbhu v. Emperor', AIR 1929 All 914 (2) (K), for the well recognised position that an application for summoning witnesses made by an accused person can only be refused if the Court is satisfied that such application is made vexatiously or in order to delay the proceedings; and he urges that it is not prima facie shown that the evidence is not relevant for the purpose of the defence. There is a good deal of force in these contentions.

(13) The learned Advocate-General has strongly relied on a case reported in — '8 Mys LJ 49 (L)', to contend that the Court has the discretion to refuse to issue summons in such cases. — '8 Mys LJ 49 (L)', was a case of a prosecution under S. 124A, I. P. C. in respect of an article published in a newspaper. The Court properly refused to issue summons to the Dewan of Mysore and the Members of Council and other high officers of Government as it rightly thought that their evidence would neither be relevant nor useful to determine whether a case of sedition had been made out or not in respect of the article in question. That case is entirely different from the present where eye-witnesses were sought to be summoned. Moreover the learned Magistrate has not considered the case of each of the witnesses separately; e.g. Mr. S. Chenniah, President of the City Congress Committee in Mysore, Mrs. Dhillon, who is a non-official, Mr. Shivananjappa, the City Magistrate, Mysore, Mr. Mahomed Ahmed, Deputy Commissioner, Mysore, cannot be said to be witnesses summoning of whom was likely to cause any great waste of public time. They are obviously respectable persons who would be expected to speak the truth and it cannot be said that their evidence would have been irrelevant. Similarly Mr. P Medapa, the Chief Justice in Mysore, and Mr. B. L Manjunath, the Vice Chancellor, and Mr. K. Hanumanthaiya, the Chief Minister, and Mr. A. C. Ramachandra Rao, the Education Minister, who were present at the meeting and who had seen and heard what took place there would have been able to give relevant evidence as to what happened and if the accused were prepared to pay their travelling expenses and the cost of summoning them I do not see why their presence could not have been secured.

(14) Mr. Shamanna has urged that the learned Magistrate's view that it was a petty case was not correct, that so far as his clients are concerned they are all students and a conviction in this case would brand them as rioters who had no respect for law and order and that the consequences of such a conviction would be much more serious than what the learned Magistrate seems to think. He represents that they were all arrested by P. W. 1, not allowed on bail immediately on their own self-bonds as usual in such cases, taken under armed escort to the Police Station and produced in Court under such armed escort and in Police custody. P. W. 1 says he did so because he thought there might be trouble from the accused though he admits that they were unarmed. This, Mr. Shamanna, argues, shows that the prosecution did not think that it was a trivial matter. He points out that it has been suggested to P. W. 1 that he might have been more enthusiastic than necessary and that he has stated that he did not consult either the Chief Minister who presided on the occasion or Mr. Mallaradhya, who was apparently responsible for convening the meeting, as to whether annoyance of sufficient gravity had been caused to them for launching these proceedings and that the conduct of the accused persons deserved the rather severe and drastic action that seems to have been taken against them.

(15) The learned Advocate-General has urged that in summons cases the requirements of law are not so imperative as is the case of warrant cases, in the matter of summoning witnesses for the accused. 'A. I. R. 1940 Lah 58 (I)' is an authority against that position and though it may be that the Court ought to be more careful in refusing such requests in warrant cases I do not think the Court can treat the case of the accused in summons cases so very lightly. I think in this case the learned Magistrate could have and ought to have issued summons at least to some of the witnesses mentioned in their list even if he felt that all of them need not be summoned on the ground that it would be vexatious or entail delay to do so. It might be remembered, that it is very important that Courts of justice should function in a way which will induce and foster respect and confidence towards them in the public mind. Nothing should be done, especially in cases where persons of influence and position may be said to be affected, which would give an impression that the trial will not be thoroughly fair.

Justice must not only be done but must be shown as being done. When the law vests in a Court certain discretion that discretion should be exercised so as not to give rise to any reasonable complaint of prejudice or bias: vide — 'Sheoprakash Singh v. Emperor', 28 Cal 594 at p. 595 (M) approved in — 'Pita v. Emperor', A. I. R. 1925 All 285 at p. 286 (N). The Magistrate is bound to record the reason why he refuses to issue summons to each individual witness and the failure to record reasons is an illegality and cannot be cured by Section 537; vide — 'Narayana Mudaly v. Emperor', 31 Mad 131 (O), — 'Emperor v. Purushottam', 26 Bom 418 (P) and — 'Manomohan Dastidar v. Bankin Behari', AIR 1925 Cal 411 (1) (Q). While the Court is fully justified in declining to accede to the request which would amount to an abuse of the process of the Court it should at the same time be careful not to do any act which would hamper the accused in his defence; — 'Sayad Habib v. Emperor', A. I. R 1929 Lah 23 (2) (R).

(16) In the result I allow this petition, set aside the conviction and sentence passed on the accused

and acquit them. The fine, if already recovered, will be refunded to the accused.

B/D.H.Z. Revision allowed.

A.I.R. 1954 MYSORE 16 (Vol. 41, C. N. 6)

MALLAPPA J.

Bore Gowda and others, Appellants v. Ramegowda and another, Respondents.

Second Appeal No. 418 of 1950-51, D/- 11-11-1952, against decree of Sub-J., Hassan, in R. A. No. 65 of 1949-50.

T. P. Act (1882), S. 46 — Mortgage by persons having distinct interests — (Hindu Law — Joint family — Mortgage by father).

Property belonging to joint family of father and four sons — Property hypothecated — Hypothecatee bringing suit against sons after death of father — Suit withdrawn against three sons but decreed against one who remained ex parte — Decree-holder gets one-fifth share of judgment-debtor in addition to one-fourth of one-fifth share of father, that is, in all one-fourth share in the property — He does not get one-fifth share of judgment-debtor and one-fifth share of the father that is in all two-fifth share in the property. 19 Mys LJ 310, Ref. (Para 3)

Anno: T. P. Act, S. 46 N. 2.

V. Krishnamurthy, for Appellants; R. V. Srinivasiah, for Respondent 1.

CASE REFERRED TO:
(A) 19 Mys LJ 310 (Pr 2)

JUDGMENT: The property in dispute belonged to the joint family of one Kalegowda alias Donasetty and his sons, defendants 1 to 4. Kalegowda hypothecated the suit property to the plaintiff. The plaintiff filed a suit in Original Suit No. 195 of 1944-45 on the file of the Munsiff of Hassan against defendants 1 to 4, after the death of Donasetty, their father. In that suit, defendant 3 was ex parte while defendants 1, 2 and 4 contended that the hypothecation was not for legal necessity and that it was not binding on them. Thereon, respondent 1 who was the plaintiff in that suit cleverly withdrew the suit against defendants 1, 2 and 4. The result was that a decree was passed against Ningegowda who was ex parte, in respect of the 2/5th share of the hypothecated property. This 2/5th share was purchased by the plaintiff-decree-holder in execution of that decree against the judgment-debtor, defendant 3 Ningegowda. Thereon he has filed the present suit for partition and possession of his 2/5th share.

(2) Both the Courts below have granted a decree for 2/5th share. This is clearly incorrect. Defendants 1, 2 and 4 are not bound by the decree passed against the 2/5th share as against defendant 3 Ningegowda. The impression of the learned Judge who passed the decree in the previous suit and the impression of the Courts below in this case appears to be that the plaintiff is entitled to a decree not only against the 1/5th share of defendant 3, but also against the 1/5th share of the father of defendants. The reasoning of the Courts below looks plausible at first sight. It is no doubt true that as held in — '19 Mys L J 310 (A)', relied on by Courts below, an alienation of an item of joint family property by a father when himself and his eldest son were the only members of the family binds the father's half share in the property and no later addition to the coparcenary can alter that position. In that sense it is true that the hypothecation is binding on the father's 1/5th share. A decree for 2/5th share could however have been passed only if father of defendants and defendant 3 were both parties to the suit but the fact that the father was dead and was not a party to the suit makes the position different. The Courts below should have not confused themselves between what plaintiff could have got if all the sons after their father's death were parties to the suit and what he should have got when he withdrew the suit against 3 out of 4 of them.

(3) It must be remembered that after the death of Kalegowda alias Donasetty, each of his 4 sons got 1/5th share free from hypothecation and 1/4th share in the 1/5th share of the father burdened with hypothecation. There is no decree against defendants 1, 2 and 4 who are the appellants in this case, not only as against their 3/5th share which was free from hypothecation but also in respect of their 3/4th share of the 1/5th share of their father burdened with hypothecation. The decree-holder got only such right, title and interest which the judgment-debtor defendant 3 had at the time the suit was filed. That share was his own 1/5th share which he had prior to the hypothecation and the 1/4th of the 1/5th share which his father had and which had been hypothecated by him in favour of the plaintiff. As regards 1/5th share of each of the defendants 1, 2 and 4, not bound by the hypothecation, the plaintiff could never have obtained a decree even if the suit had not been withdrawn against them nor has he obtained any such decree. As regards 1/4th share of each of these defendants in the 1/5th share of their father that was liable to be proceeded against for recovery of the hypothecation debt the plaintiff had the right to obtain a decree against these defendants in case he had allowed them to be parties to the suit, but by withdrawing the suit against defendants 1, 2 and 4, filed on the foot of the hypothecation deed executed by their deceased father, he disabled himself from getting a decree in respect of their three-fourths share in the 1/5th share of their father. Plaintiff should have obtained a decree against 3rd defendant's 1/5th share and his 1/4th share of his father's 1/5th share. In other words, in execution of the decree he obtained against defendant 3 the plaintiff gets 1/4th share in the entire property. He wrongly obtained a decree in the previous suit for 2/5th share and defendants 1, 2 and 4 who are not parties to the suit after the withdrawal of it against them can question his right to get 2/5th share in this suit.

(4) The result is that in modification of the decree of the Courts below there will be a decree for partition of the plaint schedule property into 4 shares and for plaintiff being put in possession of his 1/4th share. There will be a similar modification with reference to the property in respect of which he is entitled to mesne profits. Parties will bear their own costs in this appeal.

B/V.S.B. Decree modified.

AIR 1954 MYSORE 17 (Vol. 41 C. N. 7)

BALAKRISHNAIYA J.

K. Narayana Setty, Accused-Petitioner v. State of Mysore.

Criminal Revn. Petns. Nos. 8 and 9 of 1953, D/- 17-6-1953, against order of City Magistrate, Bangalore, in C. C. Nos. 2576 and 2575 of 1952-53.

Sales Tax — Mysore Sales Tax Act (46 of 1948), S. 22 — Objection to enforceability of assessment — (Income-tax Act (1922), S. 67) — AIR 1953 Mys 12; AIR 1953 Mys 19, Dissented from.

Where the grievance of the assessees merely is that the assessees are taxed under a provision resulting in a heavier burden than what ought to have been laid under the proper provision applicable to the commodity which the assessees are dealing in, such an objection against the enforceability of tax assessment cannot be raised before a criminal Court. The assessees should seek their remedy either before the appellate tribunal or the revision authority viz. the Government. Case law discussed. (Paras 6, 7, 8)

Anno: Income-tax Act, S. 67 N. 1.

P. Krishnappa, for Petitioner; A. R. Somanatha Iyer, Advocate General, for the State.

CASES REFERRED TO:

(A) ('53) AIR 1953 Mys 12: 1953 Cri LJ 125 (Prs 2, 3)
(B) ('53) AIR 1953 Mys 18: 1953 Cri LJ 529 (Pr 2)
(C) ('53) AIR 1953 Mys 19: 1953 Cri LJ 562 (Prs 2, 3)
(D) ('47) AIR 1947 PC 78: 74 Ind App 50 (PC) (Prs 2, 4, 5)
(E) 52 Mys CCR 455 (Pr 3)
(F) ('51) AIR 1951 Mys 37: 52 Cri LJ 440 (Pr 4)
(G) ('51) AIR 1951 Mys 70: 52 Cri LJ 325 (Prs 4, 6)

ORDER: The petitioners in both these cases were prosecuted under S. 20(b), Mysore Sales Tax Act for failure to pay the tax assessed and demanded; the trial Court found them guilty and sentenced to pay a fine of Rs. 100/- each, with a further direction for the recovery of the tax assessed respectively against each of them.

(2) Mr. P. Krishnappa, on behalf of the petitioners contended that the tax demanded is illegal and otherwise 'ultra vires' the Sales Tax Act. Both the petitioners are merchants dealing in cocoanuts and their defence is common. It is argued that the petitioners are taxed illegally on the turn-over basis of sales as if they were dealers in general commodities; whereas being dealers in cocoanuts, they should have been classed under the category of fruit merchants and dealt with on basis specially applicable to fruit merchants and taxed according to the rates fixed in the Government Notification issued in that behalf. In support of his contention Mr. Krishnappa relied upon the cases of this Court reported in — 'Kariappa v. Govt. of Mysore', AIR 1953 Mys 12 (A); — 'Venkatachala Chetty v. Govt. of Mysore', AIR 1953 Mys 18 (B); and — 'Subban Beigh v. Govt. of Mysore', AIR 1953 Mys 19 (C). The first of these cases relates to the question whether a merchant selling fried-gram could be brought under the purview of the Sales Tax Act; the next deals with the qualifications necessary for a "dealer" under the Sales Tax Act and the last case contains a discussion whether a commission agent is or is not a "dealer" within the definition of that term in the Act. The interpretation depends upon the particular circumstances of each case, and it does not appear to be relevant to deal with the merits of those cases for the purpose of the cases under consideration.

It is however contended that the principle laid down in these cases must be adopted, as a guide to the disposal of the present petitions. In the case reported in — 'AIR 1953 Mys 12 (A)', it is laid down that

> "it is only the assessment made under the provisions of the Sales Tax Act that is not liable to be questioned under S. 22; however, if an assessment made or an order passed, is ultra vires and is entirely outside the scope of the Sales Tax Act, the assessment or an order made can be challenged in the ordinary Courts, civil or criminal as it is an order made beyond the scope of the Sales Tax Act and not an order made under the Act which alone is contemplated under S. 22".

Almost similar is the interpretation laid down in — 'AIR 1953 Mys 19 (C)', by the same learned Judge. The main point for consideration in those two cases was whether a particular assessment was one made under the Act or not and involved the interpretation of the expression "assessment made under the Act". This expression also occurs in S. 67, Income-tax Act.

The learned Judge has discussed this point at length, quoting with approval a passage from the commentary under S. 67, Income-tax Act by Mr. A. C. Sampath Iyengar (III Edition) embodying the then prevailing judicial opinion that an assessment based on some provision of the Act which was being impugned as ultra vires was not within the bar of the section since no assessment which was ultra vires or in excess of jurisdiction, could be said to be one "made under the Act" and thus an assessment made by an Income-tax Officer contrary to the rules made under the Act, or without holding an enquiry whether as assessee was resident or not, or an assessment, which on the facts as found would be patently unjustified, were all held to be in excess of jurisdiction and could therefore be impugned in a civil Court. The learned author, Mr. Sampath Iyengar has revised his opinion in the light of the decision in — 'Raleigh Investment Co. Ltd. v. Governor-General-in-Council', AIR 1947 PC 78 (D) and expressed in his book (Income-tax Act IV Edition) thus

> "The result now is that all objections to assessment, however fundamentally erroneous or based upon an ultra vires provision of the Act ..... shall have to be raised before the appropriate authorities prescribed by the Act and be decided by them."

The decision of the Privy Council is therefore the guiding principle to be followed in the interpretation of this aspect of law. Lord Uthwatt who delivered the opinion of the Judicial Committee, after citing the provisions of the Income-tax Act relating to the remedies available to the assessee, observes at p. 81 that

> "effective and appropriate machinery is therefore provided by the Act itself, for the review, on grounds of law, of any assessment. It is in that setting that S. 67 has to be construed. In their Lordships' view, the construction of the section is clear. Under the Act, the Income-tax Officer is charged with the duty of assessing the total income of the assessee. The obvious meaning, & in their Lordships' opinion, the correct mean-

ing of the phrase "assessment made under the Act" is an assessment finding its origin in the activity of the assessing officer acting as such. The circumstances that the assessing officer has taken into account, an ultra vires provision of the Act, is in this view immaterial in determining whether the assessment is "made under the Act". The phrase describes the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test."

(3) In — '52 Mys CCR 455 (E)', Venkataramana Rao C. J., while citing the above Privy Council decision in connection with the consideration of the limits of jurisdiction of the Controller under the Mysore House Rent Control Act, observes thus:

"His Lordship does not in any way throw any doubt upon the principle because he found in that case that it was within the competence of the income-tax authorities to go into the question of assessment and there was no lack of inherent jurisdiction to deal with the matter, and in exercising that jurisdiction, if they committed an error of law by acting upon a provision which is ultra vires their decision does not render it one outside the Act" (p. 465).

In view of the Privy Council decision, referred to above and also the decision in — '52 Mys CCR 455 (E), the view expressed in — 'AIR 1953 Mys 12 (A)' and — 'AIR 1953 Mys 19 (C)', may require reconsideration.

(4) Ordinarily, where a Statute creating a liability gives a special and particular remedy, and also expressly bars the jurisdiction of Courts in regard to the enforcement of that liability the remedies that are provided in the Special Statute must be followed and the party aggrieved is not entitled to agitate the same in any of the Courts. In an earlier case decided by me, it was held that the validity of assessment by the assessing officer cannot be questioned in a criminal Court vide — 'Kotrappa v. Asst. Sales Tax officer', AIR 1951 Mys 37 (F). The opinion thus expressed was reiterated in a later decision reported in — 'Rama Iyer v. Govt. of Mysore', AIR 1951 Mys 70 (G). Following the decision in — 'AIR 1947 PC 78 (D)', I have held in the latter case that the criminal Courts have no jurisdiction to enter into an elaborate enquiry or question the validity of the assessment which must be done only through the appropriate machinery created by the Sales Tax Act itself. The principle laid down in these decisions conforms itself to the principle laid down by the Privy Council decision discussed above, and I find no reason to change that view.

(5) Section 22, Mysore Sales Tax Act is thus an express bar against calling the assessment into question in any Court. It runs thus:

"Save as provided in S. 16, no assessment made and no order passed under this Act or the rules made thereunder by any assessing authority shall be called into question in any Court and save as is provided in Ss. 14 and 15 no appeal or application for revision shall lie against any such assessment or order".

Section 14 referred to in the above section relates to appeals against the assessing authority and S. 15 provides for revision by Government of the order in appeal and S. 16 enables the assessee to require a reference to the High Court for decision on a question of law stated and hence in the language of the decision in — 'AIR 1947 PC 78 (D)':

"The Act contains machinery which enables an assessee to effectively raise the question whether or not a particular provision of the Act bearing on the assessment made upon him is ultra vires"

.....and

"jurisdiction to question assessment otherwise than by use of machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation under S. 45 (Income-tax Act) to pay the tax arising by virtue of the assessment."

(6) I have therefore to re-affirm my earlier view in — 'AIR 1951 Mys 70 (G)', that S. 22, Sales Tax Act is a bar to call in question, in a criminal Court, the validity of an order made by the assesssing authority so long as it is one made under the Act in the sense discussed above.

(7) In the present cases, the grievance merely is that the assessees are taxed under a provision resulting in a heavier burden than what ought to have been laid, under the proper provision applicable to the commodity which the petitioners are dealing in, and in the light of the foregoing discussion, such an objection against the enforceability of tax assessment cannot be raised, before a criminal Court.

(8) Mr. Krishnappa next contended that, on the application of some of the cocoanut merchants, the Notification relating to the concessional rate of tax in regard to the sellers of fruits, was modified by Government by the addition of an explanation as a result of which cocoanuts are removed from the category of fruits. The learned counsel argued that this subsequent amendment to the Government Notification implied that the Notification, as it stood before amendment, has led to much confusion resulting in protests by the petitioners that they are not liable to be taxed as dealers in commodities other than fruits. There appears to be some force in the contention inasmuch as the petitioners had reason to contend in the criminal Court that they are not liable for assessment as determined by the Sales Tax Officer; but in the view I have taken, the criminal Court cannot give any relief and the petitioners should seek their remedy either before the appellate tribunal or the revision authority viz., the Government.

In my opinion, as the petitioners were led to believe at the relevant time that they are not liable for the tax imposed and in consequence raised a contention before the criminal Court; the offence in default of payment of tax levied deserves to be viewed with sympathy, especially as the tax is represented to have been already deposited. The sentence of fine of Rs. 100/- each appears to be rather too heavy in the circumstances of the cases. While therefore confirming the conviction, I reduce the fine to Rs. 10/- each; the default sentence will stand. With this modification, the petitions are dismissed.

A/D.H.Z. Order accordingly.

AIR 1954 MYSORE 18 (Vol. 41 C. N. 8)

MEDAPA C. J. AND VASUDEVAMURTHY J.

M. S. Avadhani, Petitioner v. State of Mysore and others, Respondents.

Civil Petn. No. 22 of 1953, D/- 23-7-1953.

(a) Municipalities — Mysore Town Municipalities Act (22 of 1951), S. 14(1)(A) — Scope — Person duly elected Councillor and President — Objection on grounds of under-age not taken at any stage, provided for in Rules — He cannot be unseated by Government by order

under S. 14(1)(A) — Order quashed — (Constitution of India, Art. 226).

The proviso to Cl. (1), S. 14(1)(A) means that if a person, who is not qualified for being chosen as or being a councillor, is elected his seat shall be deemed to be vacant but that, however, under the proviso his election is not invalidated if the disqualification is such as could have been brought to the notice of the Returning Officer at the time or before the scrutiny of the nomination papers and is not so brought to his notice. Clause (2) can only apply to cases of any disqualification attaching to a councillor during the term for which he has been elected or appointed or to vacancies arising out of such disqualification which could not have been brought to the notice of the Returning Officer at the time or before the scrutiny of the nomination papers.

There was an election for choosing a President of the Council and the petitioner who was duly elected as councillor stood as a candidate and was declared duly elected. Subsequently three other Municipal Councillors made an application to the Government purporting to be under S. 14, Mysore Town Municipalities Act praying that the Government should declare that a vacancy had arisen in regard to a Municipal Councillorship of the 11th Division of the town out of which the petitioner had been elected and seeking his removal from the office of the President. On that application the Minister for Public Health and Local Self-Government passed an order on 19-1-1953 holding that the petitioner stands disqualified being less than 25 years of age. That order purported to have been passed under S. 14(1)(A)(c). It was undisputed that the petitioner's age was shown as 27 years in the preliminary as well as in the final electoral roll and that nobody then ever thought of disputing it. After he was declared duly elected no application was made contesting his election on the ground of under-age or any other ground. Later when he stood for Presidentship and was duly elected as such also no one took up the matter in appeal to the Deputy Commissioner as provided by R. 10 of the Rules framed for the election of a President and Vice-President of a Town Municipal Council, within 7 days of the election. The petitioner in an application under Art. 226 to the High Court complained that without resorting to any of the above remedies provided by the statute the Councillors made an application before Government months after all the abovementioned remedies were barred and that the order of the Government passed on such an application was entirely without jurisdiction and was wholly void:

Held after considering the relevant rules and the proviso to Cl. (1) of S. 14(1)(A) that the Government had nowhere in the Act been given such large and unfettered powers to interfere with the result of elections duly held and confirmed and that the order of the Government was without jurisdiction. (Order and the proceedings were quashed). (Paras 11, 14, 15)

(b) Constitution of India, Art. 226 — Quashing of executive order — Order under Proviso to Cl. (1) of S. 14(1)(A), Mysore Town Municipalities Act, nature of — (Municipalities — Mysore Town Municipalities Act (22 of 1951), S. 14(1)(A)).

The High Court has power to interfere in the cases of even so-called administrative orders which are made in defiance of the articles of Constitution or the mandatory provisions of law and without any jurisdiction. (Para 12)

Where orders are passed or action is taken under a statute or an Act of the Legislature by a Court or tribunal which is vested with the power to take and enforce decisions regarding the rights between rival parties who appear before the tribunal or between them and the State, then proceedings, orders and action cannot be said to be executive. (Para 12)

Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed. Therefore, wherever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially act in excess of their legal authority writ of certiorari may issue. (Para 12)

The order under Proviso to Cl. (1), S. 14(1)(A) of the Government or the Minister who has got to decide a question of so vital and valuable interest to the Councillor and the electorate, in pursuance of a statutory power or duty cast on the Government to do so under Mysore Town Municipalities Act is not one which is merely executive or administrative and incapable of correction under Art. 226 of the Constitution in appropriate cases. AIR 1953 SC 210, Relied on. (Para 12)

Nittoor Srinivasa Rao, for Petitioner; Advocate-General (for No. 1) and V. K. Gobindarajalu, (for Nos. 3, 4 and 5), for Respondents.

CASES REFERRED TO :

(A) ('53) AIR 1953 Mys 156: (Civil Petns. Nos. 98 of 1950-51; 155 and 163 of 1951-52, D/-30-3-1953) (FB) (Pr 12)

(B) ('52) AIR 1952 All 63: 1952 All LJ 342 (Pr 12)

(C) ('50) AIR 1950 SC 222: 1950 SCR 621 (Pr 12)

(D) ('53) AIR 1953 SC 210: 1953 SCJ 293 (Pr 13)

VASUDEVAMURTHY J. :

The petitioner offered himself as a candidate for election to the Town Municipal Council, Hiriyur, and was declared duly elected at the elections on 12-3-1952. On 5-5-1952 there was an election for choosing a President of the Council and the petitioner stood as a candidate and was declared duly elected then also. Thereupon he appears to have entered upon his duties as President.

Subsequently on 20-8-52 respondents 3 to 5 who are described as three other Municipal Councillors made an application to the Government purporting to be under Section 14, Mysore Town Municipalities Act, 22 of 1951, praying that the Government should declare that a vacancy had arisen in regard to a Municipal Councillorship of the 11th Division of the town out of which the petitioner had been elected and seeking his removal from the office of the President. On that application the Minister for Public Health and local Self-Government passed

an order on 19-1-53 holding that Sri M. S. Avadhani, the petitioner, stands disqualified being less than 25 years of age. That order purports to have been passed under Section 14 (1) (A) (e), Mysore Town Municipalities Act. This disqualification continued to exist and therefore his seat was to be declared vacant by the Government. The petitioner has therefore filed this petition under Article 226 of the Constitution of India praying for the issue of a 'Writ' of 'certiorari' quashing the Government Order dated 19-1-53 or such other proper 'writ' as the Court may deem fit.

(2) The petitioner has in his affidavit accompanying the petition described the procedure adopted in accordance with the relevant election rules and those facts are not disputed. The electoral roll of the Hiriyur Town Municipal Council was published on 25-1-1952. The final list of voters was published on 18-9-52.

Rule 2 of the Election Rules issued by the Government on 25-9-1951 and published in the Mysore Gazette dated 27-9-1951 provides that two months prior to the date of the expiry of the term of office of the municipal councillors, the Returning Officer, who is the Amildar of the Taluk in which the Municipal Council is situate, shall prepare for every division an electoral roll in which shall be included the names of all persons appearing to be entitled to be registered therein. It should be published in the Division together with a notice specifying the mode in which & the time within which claims for inclusion in the roll or objections to any names or particulars entered in the roll are to be preferred.

Under Rule 4 the electoral roll for each constituency should be prepared in Kannada in Form I, and under Rule 5 it shall contain the number and name of division, the name of each elector, the name of the father of each elector, or if the elector is a woman the husband's name, or other identifying particulars, and the sex, the 'age' of each elector and the number of the house at which he resides. The electoral roll is to be given wide publicity under Rule 6 by publication at the Municipal Office, Taluk Office and in such other conspicuous place in each division as the Returning Officer may deem fit, and any person whose name is not entered in the roll or is entered incorrectly, or any person who objects to the inclusion of his own name or the name of any other persons in the roll, has to prefer a claim or objection to the Returning Officer. All such claims and objections are to be made in writing and within 14 days from the date of the publication accompanied by any documents on which the claimant or objector relies.

Under R. 8 the Returning Officer is bound to hold a summary enquiry into the claims or objections preferred and has to record his decision in writing; and that rule provides expressly that for the purpose of the Returning Officer's enquiry, the roll as published, shall be presumed to be correct and complete until the contrary is proved. The Returning Officer will then decide on all claims and objections and the orders passed by him are declared to be final under R. 10. The Returning Officer has then to publish the final electoral roll with the said amendments in the same manner as is set out above and with the same publicity within 10 days from the last date of the receipt of objections, and a copy of the final electoral roll duly certified by the Returning Officer should be forwarded by him to the Deputy Commissioner for deposit in his office. Section 14 (1)(A)(e), Town Municipalities Act provides that no person shall be qualified for being chosen and for being a councillor who is less than 25 years of age.

(3) It is undisputed that the petitioner's age was shown as 27 years in the preliminary as well as in the final electoral roll and that nobody then ever thought of disputing it. After he was declared duly elected no application was made contesting his election on the ground of under-age or any other ground. Later when he stood for Presidentship and was duly elected as such also neither the respondents nor anybody else took up the matter in appeal to the Deputy Commissioner as provided by R. 10 of the Rules framed for the election of a President and Vice-President of a Town Municipal Council within 7 days of the election. The petitioner complains that without resorting to any of the above remedies provided by the statute respondents 3 to 5 made an application before Government months after all the abovementioned remedies were barred and that the order of the Government passed on such an application was entirely without jurisdiction and was wholly void.

(4) This petition is opposed by respondents 3 to 5 as well as by the learned Advocate-General on behalf of the State though the latter has not filed any formal objections to the petition as others have done. In the main the question is to be decided by a reference to S. 14, Mysore Town Municipalities Act. Section 14(1)(A) sets out certain general disqualifications for being chosen as and for being a councillor; and Cl. (1) concludes that if any person is elected as a councillor in contravention of those provisions his seat shall be deemed to be vacant, and to that a proviso is added that nothing in that section shall invalidate the election if the disqualification is such as could have been brought to the notice of the Returning Officer at the time of or before the scrutiny of the nomination papers and has not been so brought to his notice. Clause (2) provides that in the event of any councillor during the term for which he has been elected or appointed 'becoming subject' to any of those or other disqualifications he is disabled from continuing to be a councillor and his office shall become vacant. Clause (3) provides that if any question or dispute arises whether a vacancy has occurred under that section, the orders of the Government shall be final for the purpose of deciding such question or dispute; and it is on the interpretation and effect to be given to the proviso and to Cl. (3) that most of the arguments on behalf of both the petitioner and the respondents have been addressed.

(5) In our opinion the proviso means that if a person, who is not qualified for being chosen as or being a councillor, his seat shall be deemed to be vacant but that, however, under the proviso his election is not invalidated if the disqualification is such as could have been brought to the notice of the Returning Officer at the time or before the scrutiny of the nomination papers and is not so brought to his notice. Clause (2), in our opinion, could only apply to cases of any disqualification attaching to a councillor during the term for which he has been elected or appointed or to vacancies arising out of such disqualification which could not have been brought to the notice of the Returning Officer at the time or before the scrutiny of the nomination papers.

(6) It has been strenuously contended for respondents 3 to 5 that if they had no knowledge of the disqualification before at the time of scrutiny of the nomination papers and could not therefore bring it to the notice of the Returning Officer, they could later on raise it before the Government at any time during which the councillor

would be in office either as councillor or as President.

(7) Section 20 of the Act provides that within a very short time after the date of declaration of the result of an election, any candidate who stood for the election or any ten persons qualified to vote at that election may apply, together with a deposit of fifty rupees as security for costs to the Election Commissioner appointed by the Government in this behalf for the determination of the validity of the election. The Election Commissioner has large powers of summoning and enforcing the attendance of witnesses and to compel them to give evidence as if he were a civil Court and for confirming or amending the declared result of the election, or setting the election aside. An appeal lies to this Court from the order of the Election Commissioner provided it is only on a point of law and is preferred within one month from the date of such order. To accept the respondents' arguments would lead to a most uncertain state of affairs which could certainly have not been the scheme of the Act, much less of any notions of fairness and finality of elections. Unless one is compelled to accept such a construction one would be loath to do so. The proviso would then have no meaning at all.

(8) The learned Advocate-General could not say what in those circumstances would be the use of the proviso. But he suggested that if the disqualification was one which was known to the persons who challenged the election at or before the scrutiny of nomination papers and if they did not bring it to the notice of the Returning Officer they may be barred from raising it.

(9) Some disqualification may arise or come into being or be discovered between the date of the scrutiny of the nomination paper and the elections or the declaration of the result. Such disqualifications, it may be, could not be put forward as grounds of objection before the Returning Officer or the Election Commissioner. The disqualifications referred to in the proviso are not defined as such as were not within the knowledge of the objectors but subjectively such as could have been brought to the notice of the Returning Officer.

Those words refer to the nature of the disqualification and not the capacity of the objectors. If the question of knowledge of the objectors was to be the criterion or intention of the legislature the proviso would have been differently worded and we would have expected some stringent provisions such as periods of limitation, proof of the want of knowledge earlier, the nature and extent of the interest of the objector who is bringing the objection to the notice of the Government etc.

Moreover neither in their application to Government nor in their objections in this Court have the respondents stated that they came to know of this petitioner's disqualification only after the election and just before making their application to Government.

(10) There would really be no hardship or injustice if an interpretation is placed on that proviso and on Cl. (3) in the way canvassed for it for the petitioner. The objectors would have a chance of putting forward their objections before the Returning Officer at the time of or before the scrutiny of the nomination papers. They or any ten persons of the town could take up the matter in appeal to the Election Commissioner and from his decision appeal to this Court. To hold otherwise would give a handle to any person irrespective of any interest he may have in the election to move the Government by an application without any safeguard of deposit or further appeal to the High Court at any time he chooses to nullify a duly held election which he could and ought to have challenged before duly constituted authorities like the Returning Officer and the Election Commissioner and the High Court. This, in our opinion, would lead to injustice and absurd consequences. As pointed out in Maxwell's Interpretation of Statutes no interpretation should be put on a statute which would lead to such consequences if it could be avoided. See Maxwell's Interpretation of Statutes 1946 Edn., pp. 207-208 and 212-213.

(11) Mr. Govindarajulu, learned counsel for respondents 3 to 5, admitted that it may be so, but contended that if S. 14(3) vested in Government the sole and absolute power to declare finally that a vacancy had arisen it was not within the province of any Court to deny them that power.

As against this it must be pointed out that the whole scheme of the Act has been designed with a view to afford a very large measure of internal autonomy to the Municipal Councils and for non-officials to manage their own affairs and to foster and encourage local Self-Government. Stringent provisions like those embodied in S. 14, Cl. (1) A (3), i.e., holding an office of profit under the Government of India or the Government of State and Cl. B(a) being a subordinate officer or servant of Government, have been provided in the Act obviously with a view to avoid the Government or its officers or supporters having any hand in its day to day management though of course Government has been entrusted with certain powers of superintendence and control over the Municipal Councils to prevent the abuse of the powers vested in them or to provide for a break down of the administration of the Council.

The Government has nowhere in the Act been given such large and unfettered powers as is now sought for it by the respondents to interfere with the result of elections duly held and confirmed. Such a power, as urged for the petitioner, may tend to make the elections a meaningless farce and place the members of the Council who have been duly elected by their constituencies in ever present and constant danger of being unseated under the provisions of S. 14, Cl. (3) at the intervention of any person who may not have either cared or ventured to question it before the Returning Officer or the Election Commissioner.

(12) It is contended for the respondents that this is not a case in which a writ ought to or can be issued. It is urged that a writ like the one now sought cannot be issued against the Government. It has been recently held by a Full Bench of this Court in — 'Sampu Gowda v. State of Mysore', AIR 1953 Mys 156 (FB) (A), that a writ can be issued against Government in proper or appropriate cases under Art. 226 of the Constitution to cancel an order passed by them without jurisdiction.

It is next urged that while passing orders like the present one the Government or its Minister is not acting in a judicial or quasi-judicial capacity but is only making an executive or administrative order. It has been pointed out by the same Full Bench case of this Court that this Court has power to interfere in the cases of even so-called administrative orders which are made in defiance of the articles of Constitution or the mandatory provisions of law and without any jurisdiction. Where orders are passed or action is taken under a statute or an Act of the Legislature by a Court or tribunal which is vested with the power to take and enforce decisions regarding the rights between rival parties who appear before the tribunal or

between them and the State, then proceedings, orders and action cannot be said to be executive.

In — 'Avadesh Pratap Singh v. State of Uttar Pradesh', AIR 1952 All 63 at p. 67 (B), it has been observed:

> "It follows therefore that by the phrase 'acting judicially' what is meant is not merely strictly judicial acting but also quasi-judicial acting or in other words an acting analogous to judicial acting."

In that case the Government were acting under the Court of Wards Act.

In — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 (C), it has been pointed out that when the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari. When the law under which the authority is making a decision itself requires a judicial approach, decision will be quasi-judicial.

Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well recognised principles of approach are required to be followed. Therefore, wherever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially, act in excess of their legal authority a 'writ' of 'certiorari' may issue.

(13) It is very difficult to accept the argument that the order of the Government or the Minister who has got to decide a question of so vital and valuable interest to the petitioner, and the electorate, in pursuance of a statutory power or duty cast on the Government to do so under the Town Municipalities Act is one which is merely executive or administrative and incapable of correction under Art. 226 of the Constitution in appropriate cases.

In — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (D), one Saka Venkata Rao had been convicted by the Sessions Judge of East Godavari and sentenced to a term of seven years' rigorous imprisonment in 1942. He offered himself as a candidate at a by-election to a reserved seat in the Kakinda constituency of the Madras Legislative Assembly in June 1952. But realizing that he was disqualified under S. 7(b), Representation of the People Act, 1951 as five years had not expired from the date of his release on the Independence Day, 15-8-1947, he applied to the Election Commissioner for exemption. No reply to his application having been received till 5-5-1952, the last date for filing nominations, he filed his nomination on that day. No objection was taken to it either by the Returning Officer or any other candidate at the scrutiny of the nomination papers. The election was held on 14-6-1952 and Venkata Rao who secured the largest number of votes was declared elected on 16-6-1952. The result of the election was published in the Fort St. George Gazette (Extraordinary) on 19-6-1952 and he took his seat in the Assembly on 27-6-1952. Meanwhile, the Commission had rejected his application for exemption and communicated such rejection to him by a letter dated 13-5-1952, which, however, was not received by him. On 3-7-1952 the Speaker of the Assembly read out to the House a communication received from the Commission bringing to his notice for such action as he may think fit to take the fact that Venkata Rao's application for exemption had been rejected.

A question was then raised as to his disqualification and the matter was referred to the Governor of Madras who forwarded the case to the Commission for its opinion as required under Article 192 of the Constitution. Venkata Rao thereupon challenged the competency of the reference and the action taken by the Governor. Nevertheless, the Commission notified Venkata Rao that his case would be heard on 21-2-1952. Accordingly the Chief Election Commissioner went down to Madras and partly heard the matter and adjourned it to 28-8-1952. On the same day (21-8-1952) Venkata Rao applied to the High Court under Art. 226 of the Constitution contending that Art. 192 of the Constitution applied only where a member became subject to a disqualification after he was elected but not where, as in his case, the disqualification arose long before the election, in which case the only remedy was to challenge the validity of the election before the Election Tribunal.

The Madras High Court issued a 'writ' as prayed for. But on appeal the Supreme Court while setting aside the 'writ' on the ground that the Madras High Court had no territorial jurisdiction to issue such a 'writ' to the Election Commissioner at Delhi observed that Art. 191 of the Constitution which lays down the same set of disqualifications for election as well as for continuing as a member, and Art. 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications. It did not, however, necessarily follow that Arts. 190(3) and 192(1) must also be taken to cover both. In their opinion those two articles went together and provided a remedy when a member incurred disqualification after he was elected as a member. "Not only do the words 'becomes subject' in Art. 190 (3) and 'has become subject' in Art. 192(1)", they said,

> "indicate a 'change in the position' of the member 'after' he was elected, but the provision that his seat is to become 'thereupon' vacant, that is to say the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the Article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in Art. 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and far-fetched construction and cannot be accepted".

In Art. 190(3)(a) the words are "becomes subject to any of the disqualifications mentioned in cl. (1) of Art. 191" In Art. 192(1) also the words are "has become subject to ....." The words in S. 14(1)(A), Mysore Town Municipalities Act, 1951 "No person shall be qualified for being chosen as, and for being, a councillor .....(e) who is less than twenty-five years of age" and in S. 14(2) "If any councillor during the term for which he has been elected or appointed ....(a) 'becomes' subject to any disqualification specified in sub-s. (1).....(d) A councillor whose office 'has become vacant' under this sub-section shall, if his disability has ceased, be eligible for re-election or re-appointment" are very similar to the words found in Arts. 190(3)(a) and 192(1) of the Constitution. We therefore think that that decision fully supports the petitioner.

(14) It was urged for the respondents that according to the order of the Government which was passed on a report of the Deputy Commissioner,

the age of the petitioner was less than 25 years on the date when the Government passed their order and this circumstance should disentitle the petitioner to the relief of a 'writ'. If the Government had no jurisdiction at all to embark about this particular disqualification any materials which might have been tendered by the respondents or even by the petitioner, may be under protest, cannot be looked into or taken into account for the purpose of determining the right of the petitioner to have those proceedings themselves quashed as being without jurisdiction.

It is also urged that neither the report, nor the order of the Government, have taken into consideration some evidence which the petitioner placed before the Deputy Commissioner in obedience to a notice issued to him and the finding of the Deputy Commissioner is therefore wrong. The Government themselves have recorded no evidence and there is no provision in Section 20 of the Act or elsewhere for any report of the kind to be made to them by the Deputy Commissioner or the same to be acted upon by the Government in such a matter. The point at issue is whether the Government had jurisdiction to consider the present disqualification with which we are concerned in this case and if they had no such power the proceedings would have to be quashed.

(15) In the result we direct that the order of Government No. L. 17867-71/ML. 65-52-2 dated 19-1-1953 declaring that the petitioner was disqualified from being chosen or acting as a Councillor and that, therefore, there is a vacancy under Clause (3) of Section 14 be quashed. Respondents 3 to 5 will pay the costs of the petitioner (Advocate's fee Rs. 100/-). Respondent 1 will bear his own costs.

A/R.G.D. Order quashed.

AIR 1954 MYSORE 23 (Vol. 41 C. N. 9)

VASUDEVAMURTHY J.

Bathalur Naranappa, Plaintiff-Appellant v. Uppacharla Gurappa and others, Defendants-Respondents.

Second Appeal No. 427 of 1949-50, D/- 13-10-1952, against decree of Addl. Sub-J., Kolar, in R. A. No. 222 of 1948-49.

Accounts — Accounts stated — What is — (Limitation Act (1908), Art. 64).

There can be an account stated although the balance of indebtedness is throughout as it must be at the end in favour of one side. The essence of an account stated is the fact that there are cross items of accounts and that the parties mutually agree to the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side 'pro tanto', go on to agree that the balance only is payable. Such a transaction is in truth bilateral and creates a new debt and a new cause of action; and involves mutual promises, the one side agreeing to accept the amount of the debts as true and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent so that there will be complete satisfaction on payment of the agreed balance.

An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it amounts to a promise and the existence of a debt may be inferred, the same can be rebutted; and it may very well turn out that there is no real debt at all and in that case there would be no consideration and no binding promise. AIR 1934 PC 144 and AIR 1934 PC 147, Rel. on. AIR 1938 Cal 861; AIR 1921 Pat 29 and AIR 1929 Cal 444, Distinguished. (Para 3)

Anno: Lim. Act, Art. 64 N. 2.

K. P. Muddappa, for Appellant; V. Krishna Murthy, for Respondents.

CASES REFERRED TO:

(A) ('38) AIR 1938 Cal 861: 182 Ind Cas 368 (Pr 2)
(B) ('34) AIR 1934 PC 144: 151 Ind Cas 90 (PC) (Prs 2, 3)
(C) ('34) AIR 1934 PC 147: 56 All 376 (PC) (Prs 2, 3)
(D) ('21) AIR 1921 Pat 29: 60 Ind Cas 514 (Pr 3)
(E) ('29) AIR 1929 Cal 444: 57 Cal 394 (Pr 3)

JUDGMENT: The plaintiff brought a suit for the recovery of Rs. 272-8-0 principal, Rs. 11/- interest and Rs. 2-8-0 notice charges, in all Rs. 286/- due on accounts in respect of certain transactions carried on by defendants 1 and 2 with the plaintiff from 29-10-1938 to 16-8-1947. Defendant 3 is also sought to be made liable on the ground that he was a member of the joint family with the other defendants and it was expressly pleaded that defendants 1 and 2 were the managers of the family. Defendant 1 was ex parte. Defendants 2 and 3 totally denied that they had any transactions with the plaintiff and defendant 2 pleaded that he was an agriculturist which plea was upheld by the learned Munsiff. They also pleaded that the plaintiff's suit was barred by limitation. The learned Munsiff who heard the suit believed plaintiff 1 and his witness P. W. 2 and held that the transactions had been proved and that all the defendants were liable. He also found that the suit was in time. But on appeal by the defendants the learned Subordinate Judge reversed the judgment of the learned Munsiff and dismissed the plaintiff's suit. The plaintiff has come up in second appeal.

(2) I think the learned Subordinate Judge's judgment is not correct and cannot be supported. The learned counsel for the respondents has strongly relied on a case in — 'Satis Chandra v. Rampada Chattapadhya', AIR 1938 Cal 861 (A), which has also been relied upon by the learned Subordinate Judge. But it is found in that case that the defendant was working under the plaintiff as a tahsildar during the concerned period and that at the end of that period he signed a document admitting his liability for a certain sum. 'Siqueira v. Noronha', AIR 1934 PC 144 (B) and — 'Bishun Chand v. Girdhari Lal', AIR 1934 PC 147 (C) were expressly distinguished in that case and it was observed that in the latter of the Privy Council cases, the account was drawn up by the creditors in their own account book and below the entry there was a writing by the debtor containing a statement that the sum as found was due after adjustment of accounts. There were cross items of accounts between the parties and the parties had agreed to set off those items against each other and to have the balance paid. On the other hand in the case in — 'AIR 1938 Cal 861 (A)', it was found that though the plaintiff had made some attempt to show that certain cross demands of the defendant were also considered in settling the figure due by the defendant he had failed to prove that allegation. 'AIR 1938 Cal

861 (A)', therefore, cannot help the respondent as the facts there are quite different.

(3) In — 'Ram Bahadur Singh v. Damodar Prasad Singh', AIR 1921 Pat 29 (D), the question which arose was whether the words of a certain acknowledgment amounted to a promise to pay within the meaning of S. 25, Contract Act. In that case also it was sought to be argued that there was "an account stated" but on the facts their Lordships who decided it were of the view that there were no cross demands between the parties and that therefore there was nothing by way of settlement of account. 'Sasi Kanta v. Sonaulla', AIR 1929 Cal 444 (E) which has been of a promise to pay will not bring an acknowledgment of debt under S. 25, Contract Act. In that case also the defendant was a gumastha under the plaintiff and some time after the agency terminated he signed below an entry saying that he was liable to his employer in a certain sum. That case therefore was not one relating to a suit on 'account stated'. 'AIR 1934 PC 144 (B) and — 'AIR 1934 PC 147 (C) clearly apply to the facts and circumstances of this case. As pointed out in — 'AIR 1934 PC 144 (B)', an account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it amounts to a promise & the existence of a debt may be inferred the same can be rebutted; and it may very well turn out that there is no real debt at all and in that case there would be no consideration and no binding promise. But in a case of transaction evidenced by entries on both sides in the plaintiff's account and in which the parties who have "stated the account between them" have agreed that the items on one side should be set off against the items on the other and only the balance should be paid, their Lordships held that

> "From such an account there arises a promise made for good consideration to pay the balance shown on the account."

In — 'AIR 1934 P C 147 at p. 151 (C)', their Lordships pointed out that there can be an account stated although the balance of indebtedness is throughout as it must be at the end in favour of one side; that the essence of an account stated is the fact that there are cross items of accounts and that the parties mutually agree to the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral and creates a new debt and a new cause of action; it was not material whether the only payments made by one party were simply payments in reduction of an indebtedness or were payments made in respect of other dealings. In any event items must be ascertained and agreed on each side before the balance can be struck and settled. Such a transaction involves

> "mutual promises, the one side agreeing to accept the amount of the debts as true and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent so that there will be complete satisfaction on payment of the agreed balance."

In — 'AIR 1934 PC 144 at p. 145 (B)', their Lordships found fault with the Courts below observing that they had dealt with the matter before them upon the footing that the transaction between the parties which was alleged to be an account stated, amounted to an implied promise to pay without consideration, and, having got that in mind, they then began to consider (in that light) questions that arose under the Indian Contract Act and the Indian Limitation Act. I think that is just what the learned Subordinate Judge has done in this case.

(4) If we examine the accounts in this case we find that there are items of debt as well as some items of credit i.e., cross items. Defendant 1 has signed Ex. A-1 on 12-7-1943. Defendants 1 and 2 have signed B-1 on 12-9-46 and B-2 on 12-2-47 clearly showing and acknowledging that as a result of examining the accounts between them and the plaintiff certain stated balances were due by them on those dates. They have signed and affixed their thumb impressions on one anna stamp. It is rather difficult to understand what the learned Subordinate Judge means by suggesting that because they were "practically illiterate" different considerations should govern the application of the law of limitation. This is particularly so as they have not pleaded any fraud or to have signed by mistake in ignorance of the contents and in fact they have not even chosen to step into the box.

(5) I do not think defendant 3 is liable as he has not signed any of the entries and it has not been shown how he can be bound by them. The plaintiff's suit is therefore dismissed as against him but without costs.

(6) The judgment of the learned Subordinate Judge is set aside; the appeal is allowed and the judgment and decree of the learned Munsiff are restored but there will be a decree only against defendants 1 and 2 with costs throughout.

B/D.R.R. Appeal allowed.

AIR 1954 MYSORE 24 (Vol. 41 C. N. 10)

VASUDEVAMURTHY J.

Hussain and another, Defendants-Appellants v. Rahim Khan, Plaintiff-Respondent.

Second Appeal No. 432 of 1949-50-D/- 13-10-1952, against decree of Sub-J., Mysore, in R. A. No. 76 of 1948-49.

Muhammadan Law — Dower — Transfer of property charged with.

A widow of a Mahomedan who is lawfully in possession of her husband's estate can retain such possession until her dower debt is paid or satisfied. That right is heritable, and may be transferred along with her share provided the same is done by a proper and valid deed of conveyance. The transfer must include the right to remain in possession also and the transferee must also be put in possession. If the widow or her transferee is out of possession they cannot sue for possession on the basis of the right to retain possession. Case law discussed. (Para 12)

Held that the transferee was entitled to remain in possession until the dower debt was discharged. (Para 13)

V. Krishnamurthy, for Appellants; C. N. Ramamurthy, for Respondent.

CASES REFERRED:

(A1) 31 Mys CCR 56 (Pr 5)
(A) ('85) 7 All 353 (Pr 5)
(B) ('10) 32 All 551: 6 Ind Cas 376 (Pr 5)
(C) ('15) AIR 1915 Bom 214: 40 Bom 34 (Pr 5)
(D) ('43) AIR 1943 Bom 372: 210 Ind Cas 502 (Prs 5, 9)
(E) ('27) AIR 1927 All 534: 50 All 86 (Prs 5, 12)
(F) ('20) AIR 1920 Mad 666: 43 Mad 214 (FB) (Prs 6, 7)

(G) ('16) AIR 1916 PC 46: 38 All 581 (PC) (Prs 6, 9)
(G1) ('95) 17 All 77: 1895 All WN 7 (Pr. 6)
(H) ('43) AIR 1943 Mad 550: ILR (1944) Mad 37 (Pr 7)
(H1) ('25) AIR 1925 PC 63: 47 All 250 (PC) (Pr. 7)
(I) ('52) AIR 1952 Pat 123 (Pr 8)
(J) ('23) AIR 1923 Pat 72: 2 Pat 75 (Pr 8)
(K) ('42) AIR 1942 Pat 210: 20 Pat 798 (Pr 10)
(L) ('49) AIR 1949 Pat 427: 27 Pat 218 (Pr 11)

JUDGMENT: The plaintiff is the brother and defendant 1 is the widow of one Dilawar Khan to whom the plaint schedule house belonged. The plaintiff sued defendant 1, and defendant 2 who has purchased it from her, for partition and possession of his ¾th share in it. Defendant 1 pleaded that her husband had settled 39 tolas of gold on her as her mahar or dower; she had borrowed and spent some monies for meeting the medical charges and funeral expenses of the deceased. She had also paid some arrears of Municipal assessment due on the property. In order to pay off those debts and for her maintenance she had sold and conveyed all her rights in the suit property including her right to retain possession till she was paid off, to defendant 2 for Rs. 1000/- and delivered over possession of the same to him. She, and therefore, her alienee defendant 2 were entitled to retain possession till the plaintiff was paid off his proportionate share of the dower debt. Defendant 2 also raised the same defence.

(2) The plaintiff denied the amount of the mahar as well as the other items claimed by defendant 1.

(3) Both the Courts below have however found that the mahar fixed was 39 tolas of gold and that it has remained unpaid. That finding is binding on me in second appeal. The learned Munsiff fixed the amounts due to defendant 2 for medical charges and funeral expenses at Rs. 150/- and Rs. 250/- respectively. The Subordinate Judge has fixed them at Rs. 50/- each and has made the same a first charge on the suit property. The amounts fixed by the learned Subordinate Judge appear to be more probable considering the status of the parties and the paucity of the evidence and I see no reason to differ from his finding in this matter.

(4) The learned Munsif made a decree for partition and possession of the ¾th share in favour of the plaintiff conditional on his paying his share of the mahar debt to defendant 2. The learned Subordinate Judge has vacated that direction and held that defendant 2 had no right to remain in possession till he was paid the ¾th share of the mahar debt.

(5) The defendants have come up in second appeal. It is contended by Mr. V. Krishnamurthy, learned Counsel for the Appellants, that the learned Subordinate Judge ought to have held that the sale deed Ex. 4 dated 6-10-1947 executed by defendant 1 in favour of defendant 2 operated by its terms to convey the right of retention of possession of the suit property until the plaintiff had paid his proportionate share of the dower debt. He argues that there is no doubt that the widow of a deceased Mahomedan who is actually in possession of her husband's property has a right to retain possession of the same. He relies for that position on a case decided by this Court in 31 Mys. CCR 56 (A1) where it has been laid down that a Mahomedan widow who was in lawful possession of her husband's house was entitled as against the other heirs of her husband to retain that possession until her dower was paid. He was also referred to passages in Mulla's Mahomedan Law 12th Edn., page 237 para 224 and Ameer Ali's Mahomedan Law, VIII Edn. page 490. He urges that the right to retain possession has been held to be heritable also and that there is nothing in Mahomedan or other law which would prevent her from transferring that right along with the property in favour of another by a valid conveyance nor would such transfer be opposed to any other principle of law. That such a right of a Mahomedan widow to retain possession of her husband's estate in lieu of her mahar debt is a heritable right has been recognized in — 'Aziz Ullah Khan v. Ahmad Ali Khan', 7 All 353 (A); — 'Ali Bakhsh v. Allahabad Bank', 32 All 551 (B); and — 'Majid Mian Baxu Mian v. Bibi Saheb Jan', AIR 1915 Bom 214 (C). The same principle has been recognized even in — 'Coovarbai Nasarwanji v. Hayatni Budhanbhai', A. I. R. 1943 Bom. 372 (D) on which respondent relies. See also — 'Mashal Singh v. Ahmad Husain', A. I. R. 1927 All 534 (E) and Mulla's Mahomedan Law, 12th Edn. page 242, para 225 (a).

(6) In — 'Beeju Bee v. Moorthuja Saheb', A. I. R. 1920 Mad 666 (FB) (F) it has been held, after an exhaustive discussion of the case law on the point, that a Mahomedan widow whose dower remains unpaid is entitled to retain possession of the properties of her husband which she obtained lawfully, without force or fraud, but without the consent of or any agreement with the husband or his heirs as to the payment of her dower; nor can such properties be divided among the heirs until the dower debt is satisfied. Though the sale by such widow to satisfy the dower debt is not binding on the other heirs of her husband, the vendee is entitled to retain possession of the property sold to him against the other heirs until the dower debt is satisfied. That reference to the Full Bench was necessitated by the conflict of decisions as to whether the widow's right to hold possession is transferable as well as heritable. Abdur Rahim, C. J. after a detailed examination of the law on the point observed that there is no express text of Mahomedan Law so far as one could see dealing with the question whether the right of the widow in possession of her husband's property in lieu of her dower to retain such possession until the same is satisfied, is transferable at all or whether it is purely a personal right. But it was a well settled law that a person in peaceable possession of land as against every one but the true owner has interest capable of being inherited, devised or conveyed. The sale by the widow would not bind her husband's heirs but she could transfer her right to possession along with the dower debt and the alienation must be held binding on the heirs to that extent. He was of the opinion that in — 'Hamira Bibi v. Zubaida Bibi', AIR 1916 PC 46 (G) the Privy Council had not been invited to consider the question relating to the circumstances under which the widow's right to remain in possession for satisfaction of the dower debt arose; and that neither that decision nor — 'Amanat-un-nissa v. Bashir-un-nissa', 17 All 77 (G1), had settled the controversy with respect to the question before him.

(7) In — 'Bhavadasan Nambudripad v. Narayana Nayar', A. I. R. 1943 Mad 550 (H) Leach C. J. and Lakshmana Rao J. were of the opinion that the judgment of the Privy Council in — 'Mt. Maina Bibi v. Ch. Vakil Ahmed', 47 All 250 (H1), had not the effect of overruling the decision of the Full Bench in — 'AIR 1920 Mad 666 (F). They observed that there was considerable divergence of opinion between the various High Courts on the question whether a widow is entitled to transfer her right to dower and if she does so transfer whether the transferee is entitled to remain in possession until that debt is satisfied. They naturally followed the Full Bench decision of their own Court

and held that each co-sharer in such circumstances is entitled to his or her share on payment of his or her share of the mahar.

(8) In — 'Yusuf Mian v. Gafoor Mian', A. I. R. 1952 Pat 123 (I) following — 'Abdur Rahman v. Wali Mahomed', AIR 1923 Pat 72 (J) a transfer of property of a widow who has been holding the property in lieu of her dower debt has been held to be valid during her lifetime.

(9) For the Respondent strong reliance has been placed on a case reported in — 'AIR 1943 Bom. 372 (D). In that case relying on — 'AIR 1916 PC 46 (G)' it has been observed that the right of a widow is no greater than that of any unsecured creditor. But if she is lawfully in possession she is entitled to retain such possession until her claim is satisfied. That right to retain possession in lieu of her dower is a heritable right but, they held, though that right is a heritable right neither the widow nor her heirs can bring a suit for possession on the basis of the lien which gives no title to the property and the only maintainable suit is one based on possession and dispossession. They pointed out that the widow's right is essentially a right to retain possession which she has obtained and not to obtain possession in the exercise of that right. In the case before them the widows were, it was found, not in possession of the property belonging to their husband and could not therefore sue for possession based on that right.

(10) 'Mahomed Zobair v. Mt. Bibi Sahidan', AIR 1942 Pat 210 (K), is the next case relied on for the respondent. In that case also, the widow made a gift of her husband's property of which she was in possession purporting to convey it as an absolute estate by a registered deed of gift. The donee was not put in possession. In a suit by the heirs to recover possession of their shares it was held that the donee could not resist their claim by relying on the widow's right to recover her mahar and to be put in possession of the property. That case has been decided on the basis that the donee was not put in possession of the property by the widow, and the question whether he could put forward the widow's right to retain possession did not arise. The sale or gift deed in that case, which was also impeached as invalid for want of registration, did not also purport to convey the widow's right to retain possession till her dower debt was paid.

(11) In — 'Aminuddin v. Ram Khelawan', AIR 1949 Pat 427 (L), it was observed that the right to hold possession does not give a widow any title to the property. The widow had therefore no right to alienate the property except to the extent of her own share and if the widow gives up possession she loses her right to remain in possession. A contention was raised before that Court that the widow had been in possession before she transferred the property and that the transferee had become entitled to her rights. On an examination, however, of the deeds of gift, it was held that the widow had described herself as absolute owner of the property of her deceased husband and purported to convey that absolute ownership to the donee. Those deeds failed to effect a transfer of the absolute interest and there was no mention in the document of any transfer of the widow's rights to retain possession till the dower debt was paid.

(2) There are a very large number of cases dealing with this point but I think the general principle of law which may be deduced from them would amount to this: A widow of a Mahomedan who is lawfully in possession of her husband's estate can retain such possession until her dower debt is paid or satisfied. That right is heritable, and may be transferred along with her share provided the same is done by a proper and valid deed of conveyance. The transfer must include the right to remain in possession also and the transferee must also be put in possession. If the widow or her transferee is out of possession they cannot sue for possession on the basis of the right to retain possession. See — 'AIR 1927 All 534 (E)'. The terms of the sale deed Ex. IV in this case become therefore important for consideration.

(13) Exhibit IV clearly purports to convey the entire defendant 1's rights in the property including her right to retain possession in lieu of her dower. The relevant words are. (The original clause in Kannada is omitted — Ed.) The widow was admittedly in possession on the date of the sale and defendant 2 is now in possession. In those circumstances I think defendant 2 is entitled to remain in possession until the dower debt is discharged. In this view the decision of the learned Munsiff appears to be correct.

(14) In the result this appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside and those of the learned Munsiff restored parties bearing their own costs throughout with the modification that instead of Rs. 400/- awarded in respect of the funeral charges and medical expenses only Rs. 100/- will be payable to defendant 1, the same being a first charge on the plaint schedule property.

B/D.R.R. Appeal allowed.

AIR 1954 MYSORE 26 (Vol. 41 C. N. 11)

VASUDEVAMURTHY J.

Earamma, Appellant v. Nathegowda and another, Respondents.

Second Appeal No. 343 of 1949-50. D/- 5-9-1952, against decree of Addl. Sub-J., Mysore, in A. No. 60 of 1948-49.

Transfer of Property Act (1882), S. 52 — Suit for maintenance.

Where during the pendency of a collusive maintenance suit by a wife against her husband a person bona fide purchases property of the husband, the charge subsequently created in favour of the wife on such property cannot be allowed to prevail over the purchaser's superior rights. (Para 10)

Anno: T. P. Act, S. 52 N. 20.

M. Sadanandaswamy, for Appellant; E. Kanakasabapathy, for Respondents.

CASES REFERRED:

(A) ('42) AIR 1942 Mad 67: 201 Ind Cas 307 (Pr 5)
(B) ('41) 19 Mys LJ 266 (Pr 6)
(C) ('51) 1951 Mad WN 78 (Pr 6)
(D) ('27) AIR 1927 Mad 502: 101 Ind Cas 806 (Pr 6)
(E) 34 Mys CCR 62 (Prs 7, 8)
(F) ('39) AIR 1939 Bom 403: 185 Ind Cas 81 (Pr 8)
(G) ('40) AIR 1940 Bom 395: ILR (1941) Bom 1 (Pr 8)
(H) 50 Mys HCR 39 (Prs 8, 10)
(I) ('44) AIR 1944 Bom 50: 212 Ind Cas 291 (Pr 9)
(J) ('39) AIR 1939 Cal 655: 184 Ind Cas 518 (Pr 10)
(K) ('51) AIR 1951 Pat 613 (Pr 12)

JUDGMENT: Defendant 2, who is the appellant in this second appeal, is the wife of defendant 1, and defendants 3, 4 and 5 are her brothers. The plaintiff brought a suit against all the defendants for recovery of possession of three items of the plaint schedule property and for mesne profits claiming that he had purchased those items under two registered sale deeds dated 6-3-45 and 13-7-45 from defendant 1 and that by those purchases he couid claim priority over a charge for maintenance which had been created in a maintenance suit which defendant 2 had filed against her husband. The suit was dismissed by the Munsiff and on appeal has been decreed as prayed for except for mesne profits.

(2) So far as item 1 of the plaint schedule property is concerned, its sale in favour of the plaintiff was on 6-3-45 and that was before defendant 2 filed her in 'forma pauperis' suit in Misc. 159 of 44-45 on 18-5-45, as well as the attachment which was also before these miscellaneous proceedings i.e. on 7-7-45 as per Ext. V. The ground on which the learned Munsiff found against the plaintiff even as regards that sale deed was that defendant 1 had purported to sell the same in favour of one Nanjappa by an earlier sale deed. It is not now seriously disputed that the item sold to Nanjappa was not item 1 but some other property as found by the learned Subordinate Judge and moreover defendant 2 did not plead that Nanjappa was the owner of the suit properties. Nanjappa was not examined and defendant 2 has let in no evidence that he had any substantial right, title and interest in item 1.

(3) As regards items 2 and 3 the matter is not so simple. Those items were conveyed by defendant 1 in favour of the plaintiff under Ext. F on 13-7-45 for Rs. 1,000/-. The sale was in pursuance of a prior agreement of sale Ext. D dated 15-5-45 entered into by defendant 1 in favour of the plaintiff. Under that agreement defendant 1 agreed to sell those two items to plaintiff for Rs. 1,000/- in order to pay off one Junjappa alias Puttaswamiah, the holder of an earlier mortgage decree against defendant 1 in O. S. No. 108/37-38. After receiving that amount, the decree-holder in that suit filed a memo on 15-5-1945 reporting receipt of the full decree amount with solatium; and full satisfaction was accordingly entered against that decree and the court sale was cancelled.

Earlier defendant 1 had paid in court Rs. 200/- towards the same decree on 6-3-45 and secured postponement of the sale which was to be held in execution of that decree. This sum of Rs. 200/- was obviously the amount raised by the sale of item 1 under Ext. B. It cannot, therefore, be urged that the sale under Ext. F was in any way not bona fide or supported by consideration. It was clearly made with a view to save not merely items 1 to 3 but several other properties which had been mortgaged by defendant 1 in favour of Junjappa and in respect of which he had filed a suit O. S. 108/37/38. He had taken out execution earlier in Exn. 564 of 41-42 and had subsequently filed Exn. 496 of 43-44, on 19-6-44 and applied for sale of the mortgaged properties.

On 6-3-45 defendant 1 had paid Rs. 200/- as already noticed and got the sale adjourned to 27-3-45; on 27-3-45, he offered a sum of Rs. 80/- towards the decree and prayed for further time. The Court rejected his application and directed the sale to proceed on 31-3-45. On 31-3-45, the sale was held and the decree-holder purchased all the items of mortgaged properties for the decree amount with the permission of the Court. By the deposit of the decree amount and solatium, and the cancellation of the sale, items other than items 1 to 3 also were saved for defendant 1 and the plaintiff has been able to secure a charge on those items.

(4) But nevertheless, it is contended for the appellant that as the sale in favour of the plaintiff was after the filing of the suit in 'forma pauperis' in Mis. 159 of 48-49 and after the attachment was effected on 7-7-45 the sale cannot take precedence over the charge in favour of the plaintiff. The question of attachment cannot be seriously pressed for two reasons. First it is doubtful if an attachment before judgment could have been ordered in the forma pauperis proceedings; secondly the attachment would be subject to the legal rights created in favour of the plaintiff under the prior agreement of sale Ex. D.

If defendant 1 had received Rs. 1,000/- and had agreed to sell the property to the plaintiff, the attachment which took place subsequently could not avail either defendant 1 or defendant 2 so as to defeat the rights of the plaintiff to ask for the enforcement of that agreement. It is not even alleged that the sale was for any low consideration, nor is it contended before me that the sale was unnecessary or collusive. Without such sale of the two items of properties, all the rest of family properties including their dwelling house would have been irretrievably lost and the defendant 2 would have been thoroughly unable to enforce her rights to maintenance against them.

(5) It has also been contended for the plaintiff that he was a bona fide purchaser for value without notice of the attachment and even of the suit. Apart from the legal results which may or may not follow on account of that circumstance, there is no doubt that the plaintiff has apparently acted in a perfectly 'bona fide' way and it is very doubtful if he had any notice of the impending suit or attachment at the time of Ext. D.

It is also doubtful if he had any such notice of those proceedings even at the time of the sale under Ext. F though if he had entered into an agreement and had parted with Rs. 1,000/- to defendant 1 under Ext. D it is difficult to see how or why he should have refrained from taking a sale deed Ext. F. The learned Subordinate Judge has in this connection relied on a case reported in — 'Athinarayana Konar v. Subramania Ayyar, AIR 1942 Mad 67 (A), where it has been held under similar circumstances that an attaching creditor can proceed against the attached property only subject to a prior obligation incurred by his debtor.

(6) Mr. Sadanandaswamy, learned Counsel for the appellant, has strenuously contended that the sale under Ext. F is subject to the rule of lis pendens. For the position that in such a case the rule of lis pendens will apply when there is a transfer of property over which a charge has been sought in a suit for that purpose initiated in 'forma pauperis', he has relied on a case of this Court reported in —

'Andanappa v. Kenchavva', 19 Mys LJ 266 (B). He has also relied on a recent case of the Madras High Court reported in — 'Subbayya v. Rama Laxmi', 1951 MWN 78 (C), where it was held by a single Judge of that Court that whether the suit for maintenance is by a widow or by a wife if a charge is asked for in respect of a specified property and a decree is made creating a charge, S. 52, T. P. Act would apply so as to protect the plaintiff against transfers effected pendente lite.

In that case he has refused to follow an earlier case of the same Court in — 'Pattamma v. Seshachalam', AIR 1927 Mad 502 (D), on the ground that it has been subsequently dissented from by other later Bench decisions. The question whether under S. 39, T. P. Act, the right of a Hindu wife may be enforced against a transferee from a husband or whether her right to claim maintenance from her husband is only a personal right for which there is no lien or a charge against his property has been the subject of some conflicting decisions.

It is, however, unnecessary on this occasion to decide that question though the view in — '1951 Mad WN 78 (C)', appears to be, if I may say so with respect, a reasonable one. Though a wife may have a personal claim against her husband for maintenance there appears to be no reason, based on any principle, why if she does ask in a proper and 'bona fide' and not a collusive suit and is found entitled to obtain a charge on certain specified immovable properties that charge should not be treated as being on a par with a charge created under similar circumstances in favour of a widow of the family. But nevertheless, in my opinion, the plaintiff in this case is bound to succeed on another ground.

(7) There is no doubt that the debts contracted by a Hindu take precedence over the maintenance of his wife or widow; see Mayne's Hindu Law, 11th Edn., page 835. In — 34 Mys CCR 62 (E), at page 65 Doreswamy Iyer J. observed that debts binding on the family estate take precedence over a right to maintenance and consequently where there is both obligation to pay a binding debt and to pay maintenance, until either of them assumes the shape of a definite charge on the property the obligation to pay the debt must take precedence over the other. In that case, the right to maintenance was made a specific charge on the property only subsequent to the impugned transfers made by the husband and which transfers had been found to be for consideration and with no intention to defeat the right of the wife for maintenance. In that case the transfers were upheld as against the charge for maintenance.

(8) In this connection, Mr. Sadanandaswamy has relied on a case in — 'Gangubai v. Pagubai', AIR 1939 Bom 403 (F), which was confirmed in appeal in — 'Gangabai v. Pagubai', AIR 1940 Bom 395 (G). In that case, the plaintiff to whom the properties had been mortgaged was impleaded as a defendant in the maintenance suit and during the pendency of that suit the plaintiff purchased the property, the consideration for the sale being the amount due on the mortgage deed plus a small amount paid in cash. Subsequently, a decree for maintenance was passed and a charge was created on the properties in suit. But before the decree was actually passed the plaintiff's name was struck off from the file.

Lokur, J. observed that there was no doubt that when the plaintiff purchased the property the maintenance suit was pending and that the doctrine of lis pendens itself applied to a suit for maintenance by a Hindu widow in which she claims to have her right to maintenance made a charge on specific immoveable property and a decree is passed creating a charge on such property and he observed that though it may be stated as a general proposition that binding debts would take precedence over mere claims for maintenance, a charge bona fide created for maintenance could not be defeated by a creditor who has lent money for family purposes. The sale in favour of the plaintiff in that case was therefore held subject to the result of the maintenance suit.

That was not a case of a Hindu wife suing her husband; though according to the Bench which decided AIR 1940 Bom 395 (G) that circumstances need not make any difference, I think in 34 Mys CCR 62 (E) and 50 Mys HCR 39 (H) our Court has taken a somewhat different view. The transferee in that case was a party to the widow's suit when the transfer was effected. The collusive charge obtained on these three suit items in favour of defendant 2 without contest behind the back of the present plaintiff and of Junjappa, the previous mortgagee decree-holder auction purchaser, cannot be said to be a bona fide charge. These considerations distinguish that case from the present.

(9) In — 'Radhabai Gopal v. Gopal Dhondo', AIR 1944 Bom 50 (I), Divatia and Lokur JJ. recognized that under Hindu Law the debts contracted by a Hindu takes precedence over the right to maintenance by his wife and the purchaser of property sold to discharge the debts of a husband acquires a good title against a wife who seeks to charge it with her maintenance unless it has been already done.

(10) In 50 Mys HCR 39 (H) also, a Full Bench of this Court has held that under the Hindu Law the debts of the husband take precedence over the right of maintenance of his widow and the creditor is entitled to seize and sell his share in the joint family property. According to the facts of the present case, the mortgagee had purchased the properties himself in Court auction. By such sale the rights both of the mortgagor and the mortgagee had vested in him; see — 'Ramkabala Dasi v. Nagendra Das', AIR 1939 Cal 655 (J). Only by depositing the decree amount and solatium into Court the sale was cancelled and the properties became available for creating a charge in favour of the plaintiffs. The amount required for doing so was got by the sale in favour of the plaintiff.

If the present plaintiff had at least been impleaded in that suit he might have easily been able to represent these facts and got defendant 2's charge restricted to the other items. The Court directing such a charge was not bound to create one on all the items of defendant 1's properties. Defendant 1 though he was made a party in that in 'forma pauperis' suit appears to have consented to defendant 2 being allowed to sue as a pauper and then merely filed some defence and subsequently absented himself; he took no steps to contest her suit, became ex parte and allowed an ex parte decree to be passed.

The plaintiff has alleged that he fraudulently got the maintenance suit filed by his wife. It

is difficult to resist the conclusion that he was colluding with her in the later stages of that suit, and had ceased to contest his wife's claim and allowed all the items of properties to be charged after he had himself secured full benefit under Exts. D and F. In these circumstances, the charge which was created subsequently in favour of defendant 2 cannot be allowed to prevail over the plaintiff's superior rights.

(11) The plaintiff as a person who had sufficient interest to claim redemption under S. 91, T. P. Act could, it may well be argued, by reason of the payment made by him, claim a right by way of subrogation under S. 92 and defendant 2's charge could only be subordinated to those rights. Defendant 2 has not offered to pay even the amount due under the mortgage decree which was one clearly binding on the properties subject only to which her charge to maintenance could have been made and she did not implead even Junjappa the mortgagee decree-holder auction purchaser in her suit for maintenance which clearly shows a lack of bona fides.

(12) The learned Counsel for the respondent contends that his client is entitled to succeed on another ground also. He urges that though the sale under Ext. F was subsequent to the maintenance suit, the agreement Ext. D under which defendant 1 received the full amount of consideration for the proposed sale and agreed to convey the properties — items 1 and 2 — was prior to that suit. He argues that the operation of the 'lis' could only be subject to the prior rights — it may be 'in personam', created by that agreement in favour of the plaintiff; defendant 2 could not have attacked that agreement in any way and its genuineness and bona fides is beyond question as the consideration was directly to Junjappa the decree-holder in O. S. 108 of 37-38.

In this connection, he has referred to a Patna case — 'Narayana Prasad v. Raj Kishore', AIR 1951 Pat 613 (K). In that case under an unregistered agreement A agreed to grant a lease to B of certain premises and B entered into possession and effected the necessary repairs to make it fit for a cinema theatre which, it had been agreed upon, B should make. During the pendency of a suit which was subsequently filed by one C who had notice of this contract for specific performance of a rival agreement which he claimed A had entered into to lease the same premises to himself, A executed a registered lease deed in favour of B.

On a contention that that lease in favour of B was subject to the rule of 'lis pendens' it was held that under S. 52, Transfer of Property Act protection is given only to the rights of the parties as they existed when the suit was commenced and find embodiment in the decree in the suit; while nothing done by a party during the pendency of a suit could affect the rights of the other party, still if a right existed in a stranger from before in relation to the property it could not be affected merely because the title to the property in pursuance of that right was perfected during the pendency of the suit.

It was held further that if B had been impleaded in C's suit for specific performance B could have been able to rely on S. 53A. T P. Act, and the fact that while standing in this position B took a lease from A could not worsen his position; and that he could therefore resist the execution of the decree obtained by C. I think that case has been decided mainly on its facts and is based on a clear finding that B was in possession, that C had notice of his rights and that B could in any case rely on S. 53A of the Transfer of Property Act; and it cannot be applied to the present case.

In my opinion, however, too wide a recognition of a mere contract to sell which the Transfer of Property Act has specifically declared does not of itself create any interest in or charge on such property might be engrafting a rather too extensive an exception and making a rather dangerous inroad into the beneficial and vitally necessary operation of the rule of 'lis pendens' as defined in S. 52, T. P. Act, and may not be justified by the wording of that section. That section lays down that no property concerned directly in a suit can be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto except under the authority of the Court on such terms as it may impose.

(13) In the result this appeal fails and is dismissed with costs.

B/V.R.B. Appeal dismissed.

AIR 1954 MYSORE 29 (Vol. 41 C. N. 12)

MALLAPPA J.

Hutchegowda, Plaintiff-Appellant v. H. M. Basaviah, Defendant-Respondent.

Second Appeal No. 263 of 1949-50, D/- 9-10-1952, against decree of Sub. J., Hassan, in R. A. No. 27 of 1948-49.

(a) Limitation Act (1908), Art. 113 — Date fixed for performance.

Article 113 contemplates two kinds of cases. In one kind, the time of performance is fixed in the contract itself and in the other it is not so fixed. Though the word 'date' is used in the Article, it should not be taken that a particular date should specifically be stated in the agreement. In fact, even if the time of performance cannot be ascertained at the time of the agreement itself, but can be ascertained at the time of performance, it may be said to be a case where the date is fixed for the performance of the contract. AIR 1950 Mad 820, Rel. on.

Held that an agreement to execute a sale deed after 'Saguvali chit' was given was a contract in which date was fixed. (Para 2)

Anno: Lim. Act, Art. 113, N. 7

(b) Contract Act (1872), S. 23 — Agreement not to bid against each other.

Where two persons enter into an agreement not to raise the bids in revenue sales but to divide the property purchased between themselves, the effect of which is to prevent the land from being sold for its real value, such agreement is void as its object is fraudulent and unlawful. AIR 1933 Oudh 124, Rel. on. (Para 3)

Anno: Contract Act, S. 23 N. 27.

R. V. Sreenivasaiya, for Appellant; K. P. Muddappa, for Respondent.

CASES REFERRED TO:

(A) ('50) AIR 1950 Mad 820: 1950-2 Mad LJ 163 (Pr 2)
(B) (1875) 10 QB 371: 44 LJ QB 216 (Pr 2)
(C) ('33) AIR 1933 Oudh 124: 8 Luck 233 (Pr 3)

JUDGMENT: The case of the plaintiff-appellant is that the defendant-respondent agreed to sell an acre cut of the land purchased by the latter in a revenue sale and executed the agreement produced along with the plaint. That agreement is dated 1-8-1942. It is also alleged in the plaint that in June 1945 there was a panchayathi in which the defendant received Rs. 82/- being the consideration amount for the land which had to be sold, and agreed again to sell the property to him. The defendant admitted that he executed the first agreement but denied the second agreement and also pleaded that the suit is barred by time. It will be noticed that neither the learned Munsif nor the learned Subordinate Judge has found that the second agreement set up by the plaintiff is true. It will also be noticed that while according to the plaint the sum of Rs 82/- was paid to the defendant, the notice issued by the plaintiff before the suit was filed, makes it clear that no such money was paid to the defendant. This oral agreement is said to have taken place on the land itself and as pointed out by the learned Subordinate Judge this is highly improbable. Moreover by the time the agreement came into existence, the defendant had converted the land into a garden land and had already planted cocoanut trees, and under such circumstances it will be difficult to accept that the defendant would have agreed to take the money and execute a sale deed. If there was really any such agreement and the plaintiff paid the money, as he and his witnesses have stated, he would not have failed to take a written agreement then and in fact there is no reason why a sale deed itself was not executed if both parties really agreed that the said land should be conveyed to the plaintiff.

(2) The suit, however, is based mainly on the written agreement itself, and this agreement, as already stated, is not denied. The date of the agreement is 1-8-1942 and the suit has been filed on 14-6-1947, about five years after that date. According to the agreement the sale deed had to be executed after the 'Saguvali chit' was given to the defendant. It is not disputed that the defendant got the 'Saguvali chit' and got possession of the property more than three years prior to the date on which the suit was filed. It is in fact to avoid the plea of limitation that an attempt has been made in the plaint to show that there was a later agreement. It was, however, seriously contended in the lower appellate Court as is now done in this Court, that the suit is in time as what is applicable is the second part of Art. 113 of the Limitation Act. According to that Article, for specific performance of a contract, the period of limitation is fixed as three years and the time from which the period begins to run is the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. It is contended by the plaintiff that no date was fixed for the performance of the contract and it is no doubt true that no specific date is mentioned in the agreement itself. But the date is clearly ascertainable though it may not have been possible to ascertain it on the date of the agreement. The Article contemplates two kinds of cases. In one kind the time of performance is fixed in the contract itself and in the other it is not so fixed. Though the word 'date' is used in the article, it should not be taken that a particular date should specifically be stated in the agreement. For instance, if it is stated in an agreement that performance of the agreement should take place on the next Gowri feast day, it would be a clear case where the date of performance is fixed, though no actual date is specifically mentioned in the agreement itself. That is because the date can in such cases be ascertained with certainty. In fact, even if the time of performance cannot be ascertained at the time of the agreement itself, but can be ascertained at the time of performance, it may be said to be a case where the date is fixed for the performance of the contract. As observed in — 'Muniswami Goundar v. Shamanna Gouda', AIR 1950 Mad 820 (A):

> "The question is, what is the meaning to be attached to the words "date fixed" in the first part of Col. 3. Do they mean the date by calendar or are they comprehensive enough to include a date which can be ascertained with reference to an event certain to happen? The principle applicable is the doctrine of 'Id certum est quod certum reddi potest'. This doctrine is stated in Broom's Legal Maxim, p. 423 (10th edn).
>
> That certainly need not be ascertained at the time, for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first, when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty."

The language used in the aforesaid passage is at the time when the contract was made was not known but could be ascertained by an event which subsequently was certain of happening. In — 'Duncombe v. Brighten Club and Norfolk Hotel Co.', (1875) 10 QB 371 (B), the learned Judges had to construe the words "if such debt be payable by virtue of some written instrument at a certain time." Under S. 28 of 3 and 4 Wm. 4, Chap. 42, a creditor would be entitled to interest only if the written instrument fixed a certain time for payment. Mellor J. says at p. 377:

> "it does not seem to be material whether, that is done with reference to a named event on which payment is to be made, or by naming the day."

The following maxim found in Broom's Legal Maxims (5th edn. p. 623) is approved:

> Although every estate for years must have a certain beginning and a certain end, albeit there appears no certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth".

In this case, the agreement clearly says that the sale deed has to be executed after the 'Saguvali chit' is granted. The date on which the 'Saguvali chit' was given is more than three years prior to the date on which the suit was filed, and this is clearly a case in which the suit is barred by time under the first part of Art. 113 of the Limitation Act.

(3) Even on merits, I do not think the plaintiff has a good case. It will be noticed according to the allegations in the plaint itself that the plaintiff and the defendant came into an agree-

ment not to raise the bids in the revenue sale, but to divide the property purchased between themselves. In — 'Ramlal v. Rajendra Nath', AIR 1933 Oudh 124 (C), it is observed that

"An agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy. But where such agreement is not merely a case of an honest combination between two bidders to purchase the property at an advantageous price but goes further by resorting to a secret artifice for the purpose of defrauding a third person.....it is void as its object is fraudulent and unlawful."

It is not unusual for persons like the plaintiff to combine in the revenue sales and prevent the land being sold for its real value.

(4) Then again, it will be noticed that the plaintiff had no idea of enforcing his rights till the defendant raised a cocoanut garden on the land purchased by him and it is only after the defendant improved the land at considerable expense and labour and more than three years after the date fixed for performance of the contract that the plaintiff thought of filing this suit. The suit of the plaintiff was therefore rightly dismissed.

(5) The appeal stands dismissed with costs.

B/D.R.R. Appeal dismissed.

AIR 1954 MYSORE 31 (Vol. 41 C. N. 13)

VASUDEVAMURTHY J.

B. Rajeswariamma, Petitioner v. K. M. **Viswanath**, Respondent.

Criminal Revn. Petn. No. 87/1952-53, D/- 19-2-1953, against order of City Magistrate, Bangalore, D/- 23-6-1952.

(a) Criminal P. C. (1898), S. 488(3) — Second marriage by husband — ((Mysore) Hindu Law Women's Rights Act (10 of 1933), S. 23).

An order awarding separate maintenance to the first wife is correct and proper where the husband has married again and his offer to take the first wife back and treat her well cannot be said to be sincere : AIR 1950 Mad 357, Rel. on. (Para 6)

Anno: Cr. P. C., S. 488 N. 2, 17, 21.

(b) Criminal P. C. (1898), S. 488 — Rate of maintenance.

If a man has the luxury of more wives than one his liability to maintain them is not lessened thereby. Under S. 488, Criminal P. C. the husband is under a personal obligation to maintain his wife and the rate to be fixed depends on the needs and requirements of the person who is to receive the maintenance as well as on the present means and the earning capacity of the person who is bound to pay the same. AIR 1926 Mad 59, Rel. on.

(Husband getting Rs. 100 p. m. with allowances and having mother, two younger brothers, a sister and second wife to support — First wife still very young — Maintenance allowed at Rs. 30 per month.) (Para 7)

Anno: Cr. P. C., S. 488 N. 7, 8, 13.

H. V. Narayana Rao, for Petitioner.

CASES REFERRED:

(A) ('50) AIR 1950 Mad 357: 51 Cri LJ 775 (Pr 6)

(B) ('26) AIR 1926 Mad 59: 49 Mad 891: 26 Cri LJ 1597 (Pr 7)

ORDER: This is a revision petition which has been filed against the order of the City Magistrate, Bangalore, dismissing the petitioner's application for maintenance against her husband under section 488, Criminal P. C. The respondent though served is absent and unrepresented.

(2) I think this is a clear case in which the respondent is bound to give maintenance to the petitioner. Admittedly the respondent has been writing letters to the petitioner's brother asking for money. The learned Magistrate has tried to make some distinction between requests for money and demands for the same which is really of no substance where the person asking is a son-in-law of the family who is postponing taking his wife to live with him. In Ex. p-6 the respondent has "cautioned" the petitioner's brothers not to be "beggarly" and "ridiculous" when arranging for nuptials and that if they do not spend "a few hundreds" "the consequences will be very undesirable". In Ex. p-8 he has written a registered letter to his wife that if within 15 days after its receipt her parents and guardians do not come to settlement after satisfying all the conditions of premarriage promises he will be at liberty to marry again after treating the marriage of the petitioner as completely cancelled and he has referred her to some earlier letter in which he had set out what the terms of the premarriage were. He has not even stated in Court what those promises were and he has admitted in his evidence that "no financial promises were made before marriage".

(3) Apparently the respondent has not taken the petitioner to live with him as he feels that some pre-nuptial promises between himself and the girl's mother were not fulfilled. If the petitioner's mother had made such promises before the marriage it was for him to have claimed them from her and not made it a pretext for neglecting or refusing to take the petitioner to live with him and to maintain her as his wife. The learned Magistrate appears to have viewed this conduct of the petitioner rather lightly which I am not prepared to do. The respondent has married a second wife thereby ruining the life and prospects of the petitioner, a young girl who has no father. She appears to be a girl of some education and the respondent has made her an innocent victim of some mercenary differences between her mother and himself. He has not even suggested anything against the petitioner or her behaviour and had no complaint at all to make about her. The offer of the respondent to take back the petitioner and live with her appears to me in the circumstances of this case to be thoroughly wanting in bona fides.

(4) Moreover under S. 488 Cl (3), Criminal P. C. as amended in 1949 and now in force in Mysore, if a husband contracted a marriage with another wife it shall be considered to be a just ground for the first wife's refusal to live with him. Even in Mysore S. 23 of the Hindu Law Women's Rights Act provides that if a man marries a second wife he is bound to maintain his first wife separately and pay her

maintenance. I think in these circumstances the respondent is clearly liable to pay separate maintenance.

(5) A reference has been made in these proceedings to a suit pending between the parties and probably some of these matters will have to be gone into again in that suit. I do not therefore wish to go in greater detail into the facts and the circumstances of the case.

(6) In a case reported in — 'Senapathi Mudaliar v. Deivandi Ammal', AIR 1950 Mad 357 (A), Panchapakesha Ayyar J. has held that an order awarding separate maintenance to the first wife is correct and proper where the husband has married again and his offer to take the first wife back and treat her well cannot be said to be sincere. He has observed:

"Even if he takes her back, he will only make her an unpaid cook and maid for all work of himself and his second wife, an intolerable position and one to which no Court should drive a married woman."

(7) As regards the rate of maintenance the petitioner has claimed Rs. 75/- a month which is clearly excessive. The respondent appears to be getting a basic salary of Rs. 80/- and is according to himself getting Rs. 100/- including allowances. The petitioner who is still very young must have a sufficient amount awarded to her monthly to maintain herself without at the same time too heavily burdening the respondent. In his evidence he has stated that he has a mother and two younger brothers and a sister and the second wife to maintain. The existence of the second wife cannot be a good reason to cut down the first wife's maintenance. As pointed out in — 'E. C. Kent v. E. E. L. Kent', AIR 1926 Mad 59 (B) if a man has the luxury of more wives than one his liability to maintain them is not lessened thereby and under S. 488, Criminal P. C. the husband is under a personal obligation to maintain his wife and the rate to be fixed depends on the needs and requirements of the person who is to receive the maintenance as well as on the present means and the earning capacity of the person who is bound to pay the same. I would fix Rs. 30/- a month which I think is reasonable in this case taking into account all the circumstances. The same shall be payable from the date of the application for maintenance.

(8) In the result this petition is allowed and the order of the lower Court is set aside and there will be an order directing the respondent to pay the petitioner maintenance at Rs. 30/- per month from the date of her application before the City Magistrate.

B/D.R.R. Application allowed.

AIR 1954 MYSORE 32 (Vol. 41 C. N. 14)

MALLAPPA J.

Singri minor by guardian mother Rangamma, Petitioner v. Doddiah and another, Respondents.

Civil Revn. Petn. No. 74 of 1952-53. D/- 4-12-1952, against order of Sm. C. C. J., Bangalore, D/- 10-1-1952.

Civil P. C. (1908), S. 146, O. 9, R. 13 — Application by legal representative to set aside ex parte decree.

An application under O. 9, R. 13 is not exempted from the general provision relating to procedure contained in S. 146. A legal representative can therefore file an application to set aside an ex parte decree passed by a Small Cause Court before he is actually brought on the record. AIR 1925 Oudh 370, Rel. on. (Para 1)

Anno: C. P. C., S. 146 N. 7, 8; O. 9, R. 13 N. 16.

B. V. Rama Rao, for Petitioner; D. Srinivasaiya, for Respondent 1.

CASE REFERRED TO:

(A) ('25) AIR 1925 Oudh 370: 85 Ind Cas 529 (Pr 1)

ORDER: This is a revision petition against the order passed by the Judge, Court of Small Causes, Bangalore, in Mis. No. 231/49-50. An ex parte decree was obtained against the deceased father of the petitioner in S. C. 1335 of 1948-49, and after the death of father the petitioner has filed an application under O. 9, R. 13, C. P. C. for setting aside the ex parte decree. Petitioner is a minor and his mother is her next friend. The petitioner's contention is that the petitioner's mother came to know of the decree only when a notice was served on her in the Execution Case on 22-2-1950. The learned Subordinate Judge (Court of Small Causes) has rightly come to the conclusion that the service on the petitioner's father was not sufficient and that the petitioner's guardian came to know of the petition within thirty days from the date on which the application to set aside the ex parte decree was filed. But he has dismissed the petition on the ground that an application by a legal representative of a deceased defendant against whom an ex parte decree has been passed cannot be filed under O. 9, R. 13. C. P. C. It is not clear why it is so. Section 146, Civil P. C. is as follows:

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken on application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

It is clear that, as stated in the section, it is a case where an application could have been made by the deceased father of the defendant and as such, the Section authorises the petitioner who is claiming under him to make the application which could have been filed by his deceased father. If any authority is needed, I may refer to the decision in — 'Mst. Deoki v. Jugal Kishore', AIR 1925 Oudh 370 (A), in which it is held that:

"An application under O. 9, R. 13 is not exempted from the general provision relating to procedure contained in S. 146. A legal representative can therefore file an application to set aside an ex parte decree before he is actually brought on the record."

(2) This revision petition is, therefore, allowed. The ex parte decree passed against the deceased father of the petitioner is set aside; and the small cause case will be taken on file and proceeded with bringing the petitioner as the legal representative of the deceased defendant.

B/D.R.R. Revision allowed.

A.I.R. 1954 MYSORE 33 (Vol. 41, C.N. 15)

MALLAPPA J.

K. T. Abdul Badsha Saheb and another, Plaintiffs-Appellants v. Century Wood Industries (A. S. C. U.), Defendant-Respondent.

Second Appeal No. 290 of 1949-50, D/- 14-11-1952, against decree of Addl. Sub-J., Bangalore, in R. A. No. 32 of 1948-49.

(a) Partnership Act (1932), S. 4 — Essentials of partnership.

In order to constitute a partnership (1) there should be a relationship between two or more persons; (2) those persons must run a business; (3) the business must be run with the intention of realising profits; (4) every one of the partners should share the profits and (5) the business should be run by all or any one of them acting for all. (Para 3)

Anno: Partnership Act, S. 4 N. 1.

(b) Partnership Act (1932), S. 4 — Agreement to share profits.

What the section requires is not actual division of profits; but parties agreeing to share the profits. (Para 3)

Anno: Partnership Act, S. 4 N. 3.

(c) Partnership Act (1932), S. 4 — Co-owners and partners — Distinction.

The distinction between co-owners and partners is that in the case of co-ownership the co-owners do not intend to carry on a business, still less do they intend to share the profits realised. On the other hand, in case of partnership concern the partners intend to carry on business with money or property which belongs to both of them. They intend to realise profits and share the same. (Para 4)

Anno: Partnership Act, S. 4 N. 1.

(d) Partnership Act (1932), S. 4 — Property belonging to two Mahommedan brothers sold by them — Sale proceeds invested for running business with idea of realising profits to be shared by both — Both to carry on business — Association held to be partnership. (Para 4)

Anno: Partnership Act, S. 4 N. 8.

(e) Partnership Act (1932), S. 4 — Agreement between persons.

An agreement of a partnership need not be express. It can arise out of a mutual understanding evidenced by a consistent course of conduct, and indeed, by the express admission of the parties concerned. AIR 1938 Nag 324, Rel. on. (Para 5)

Anno: Partnership Act, S. 4 N. 2.

A. Viswanatha Iyer, for Appellants; D. Srinivasiah, for Respondent.

CASES REFERRED:

(A) (1883) 26 Ch D 107: 53 LJ Ch 1025 (Pr 4)
(B) ('31) AIR 1931 Mad 553: 54 Mad 543 (Pr 5)
(C) ('38) AIR 1938 Nag 324: 177 Ind Cas 831 (Pr 5)

JUDGMENT: The plaintiffs styling themselves as K. T. A. Rasheed & Coy.' by partners K. T. Abdul Badsha Saheb and K. T. Abdul Rasheed filed a suit against the defendant-respondent for recovery of some money due in connection with their having supplied some poles. Among other grounds the defendant contended that the firm of the plaintiffs was not registered in the books of the Registrar of Firms as required under the Partnership Act and that the suit is, therefore, not maintainable under S. 69 (2), Partnership Act. The plaintiffs on the other hand contend that they are the sole-proprietors of the business which is not a firm in the strictest sense of the word and that though their company is not registered the suit filed by them is tenable. Both the Courts below have dismissed the suit on the ground that the plaintiffs' company is a firm and that it ought to have been got registered and as the same is not registered the suit is not maintainable.

(2) The main point for consideration is whether the concern run by K. T. Abdul Badsha Saheb and his brother K. T. Abdul Rasheed under the name and style K. T. A. Rasheed & Coy., is a firm of partners or not. According to the evidence of K. T. A. Rasheed, the two brothers are living together and have not divided the properties which jointly belong to them. The two brothers sold a garden of theirs for Rs. 5,000/- and invested this sum in business. He states that there is no partnership agreement between them, but he admits that if he and his brother have to divide the profits, each of them will get half the profits. They have been acquiring properties jointly for the benefit of both of them. In cross-examination it has been elicited that either one or the other brother might take a loan and that payment may be made by either of them.

(3) What has to be considered in this case is whether under the circumstances referred to above, it could be said that the concern run by K. T. Abdul Badsha Saheb and K. T. Abdul Rasheed is a partnership concern. According to S. 4, Partnership Act,

> "'Partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

The first point to be noticed in this definition is that before we think of partnership there should be a relationship between two or more persons. The second point that will be noticed is that these persons must run a business. Thirdly, the business must be run by them with the intention of realising profits. Fourthly, it is not sufficient if the profits are intended to be taken exclusively by one of the partners. The agreement must be that every one of the partners should share the profits. The last but not the least of the points that have to be borne in mind is whether there was an agreement between the parties that the business should be run by all or any one of them acting for all.

In this case it will be noticed that the concern is run by more than one person. Admittedly the plaintiff-company is running a business. It is not disputed that their intention is to realise profits. What is contended is that they have at no time divided the profits and that it is possible they may never divide in their lifetime. But it is admitted that in case they divide, each will get half a share in the profits. As regards the last point, the evidence referred to above shows that one of the two is acting for both either in borrowing money for the concern or in discharging the loan. In fact it will be noticed that the suit transaction was entered into by one of the partners and the other brother K. T. Abdulla examined as third witness for

the plaintiffs clearly admits that he does not know anything about the suit transaction.

It is thus clear that all the conditions referred to above are fulfilled and if at all the only point in respect of which there is some difference of opinion between the parties is that there was at no time division of profits. It may happen that they never divide profits; but it has to be remembered that what the section requires is not actual division of profits; but parties agreeing to share the profits. It is not contended that the profits of the business have to be taken exclusively by one of the brothers; and it is clear that the profits have to be shared by both and that at such a time as the parties might think of dividing, however remote that time might be, the two brothers are entitled to divide the profits.

(4) Sri Viswanatha Iyer, the learned counsel for the appellant could only say that the relationship between the two brothers is that of joint proprietors and it does not amount to one of partners. The distinction between co-owners and partners is that in the case of co-ownership the co-owners do not intend to carry on a business, still less do they intend to share the profits realised. On the other hand, in case of partnership concern they intend to carry on business with money or property which belongs to both of them. They intend to realise profits and share the same. If two or more persons buy a land on joint account with the intention of having an interest according to the amounts invested by them they are merely co-owners. They do not become partners merely because they are entitled to share the income they get according to their shares.

On the other hand if two or more persons put together certain amounts of money in certain shares for the purpose of purchasing properties and selling them for profits for common benefit, it has to be said that such a business amounts to a partnership concern. That is if two or more persons expressly acquire property for the purpose of joint business they bring the property into partnership stock and they become partners. If, however, by the agreement the parties merely intend to acquire the properties in shares leaving each of them to do whatever he liked with his share, that will not amount to partnership. In this connection it is useful to notice the following observations made in the decision reported in — 'London Financial Association v. Kelk', (1883) 26 Ch. D. 107 at p. 143 (A):

"One of the charges pressed by the plaintiffs was that the directors, by entering into the agreement of August 1865 had committed the Association to a partnership with Mr. R, and Messrs. Kelk & Lucas, and that they had, in this respect violated and exceeded the terms of the memorandum, and had exposed the assets of the Association to the risks attendant upon a partnership. It does not appear to me that either in law or in fact any kind of partnership was created. Each of the three parties was entitled under the contract to an undivided share in the subject. Each paid for that share with individual separate money. The three had, no doubt, in a sense, a common interest in the subject, but no one of the essential elements of a partnership was found to exist in the case, for no one of them could interfere with either of the others in whatever disposition the other might make of their separate shares, nor could the death or bankruptcy or transfer or devolution of the shares of any one of the parties affect the rights of the others; neither of them could object to the introduction of any other person, or be liable in respect of any debt or engagement of the others.

Nor can it be truly said that any analogy exists between this case and the well-known cases in bankruptcy where, one partner, a trustee, having employed trust moneys with the knowledge and consent of his co-partners in the partnership business, joint debt is contracted by all the partners. Here the only money furnished by the directors was for the purchase of the separate share acquired by them, while each of the parties dealt only with their own moneys and each of them acquired rights and interests wholly distinct from those of the others."

In this case a property which belonged to the two brothers was sold for Rs. 5,000/-. This sum was invested for running a business with the idea of realising profits to be shared by both. They were co-owners of the property sold and in the amount realised, but when the amount which belonged to both of them was invested in a business with the intention of realising and sharing the profits and when they agreed that both of them should carry on the business and that each of them should carry it on behalf of the other, as is clear by the evidence of the two brothers, their association or concern is one of partnership.

(5) A contention was raised that the brothers are carrying on business as in the case of a joint Hindu family and that it is not unusual in these parts that Muslim brothers behave like Hindu brothers. But there is no evidence to show that by custom, Hindu Law is applicable to the plaintiffs. As observed in — 'Mahomed Abdul Rahim v. Mahomed Abdul Hakim', AIR 1931 Mad 553 (B), relied on in the course of arguments:

"It is not an uncommon thing in the Madras Presidency where members of a Mohamedan community live surrounded by Hindus that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. It is very common in the Madras Presidency for descendants of Mahomedans to live and trade together and the property of the ancestor is then held by the several members of the family in the shares to which they are entitled under the Mahomedan law.....

Where the descendants of a deceased Mahomedan live and trade together and the property is held by the several members according to their shares under Mahomedan law, the Court in a suit for profits by the other members of the family will not obviously apply Hindu Law, but that is not the proper way to decide cases of such kind though it may be the way of least resistance. Such cases are not problems of law nor does their decision depend upon the ideas of law which the parties have put in their pleadings but are concerned with questions of fact and have to be decided on the facts."

In this case no question of any family property arises and no question of the property of minors or persons who have not actually come to an agreement to run the business for purposes of trade is involved. This is a case of two brothers

agreeing to use their joint funds for purposes of running a business for profit for the benefit of both. It may or may not be true that there was no express agreement between the brothers but there is hardly any doubt that there was implied agreement between them to run a business for profit to be shared by both, each acting for the other in running the business. As observed in — Haji Isa Haji Noor Firm v. Saru Bai', AIR 1938 Nag 324 (C) by Vivian Bose J. which was a case in which two members of a Mohamedan family were found to be running a business as in this case;

> "An agreement of partnership need not be express. It can arise out of a mutual understanding evidenced by a consistent course of conduct, and indeed, by the express admission of the parties concerned."

It is also observed in that case as follows:

> "When more than one businessman associate together for the purpose of carrying on a business, it is legitimate to infer that they are not doing it for philanthropic purposes but intend to make a profit out of it; also that they all intend to share in the benefit of the proceeds. The person who actually conducts the business acts on behalf of all his associates, that is to say, on behalf of all who are joint proprietors with him. He does not act for his own separate and exclusive benefit. His intention is obviously to further the business as a whole for the benefit of all who own the concern."

These observations are clearly applicable to the facts of the present case and it is clear that the concern of the plaintiffs is one of partnership. The lower Courts were therefore right in dismissing the suit on the ground that the suit is not maintainable as the plaintiffs' firm was not registered in the books of the Registrar of Firms, as required under the Partnership Act.

(6) During the course of the suit the plaintiffs who filed the suit as partners applied for amendment and this was allowed and with the amendment the name of the plaintiffs' concern was changed as K. T. A. Rasheed & Coy., by its proprietors K. T. Abdul Badsha Saheb and K. T. Abdul Rasheed. It is clear even here that the suit continued to be by K. T. A. Rasheed & Coy., by its proprietors. It need hardly be said that partners of a firm are also its proprietors. However when this appeal had to be filed it was realised that the suit should have been filed in the name of the two brothers, if necessary, by describing them as proprietors of the company, and in fact the appeal was filed by "K. T. A. Abdul Badsha Saheb and K. T. Abdul Rasheed, proprietors of K. A. Rasheed & Coy.".

If it was intended that the suit should be filed by the two brothers & not by the company, this is no doubt the correct form in which they should have described themselves in the plaint. It is rather strange that an amendment was not sought for in the form in which the appeal is now filed. However, though the suit has been filed in the name of the firm the appeal has been filed by the two brothers in their individual capacity and a question was raised that the appeal is not maintainable as it was not filed by the company who was the party to the suit and the regular appeal filed in the first appellate Court.

To rectify this defect an application has been filed to restore the name of the company by its proprietors as the plaintiff-appellant. The proper thing for the appellants to do was to file the appeal in the name of the company as it stood after amendment in the trial Court and then to seek for the amendment to substitute the names of the brothers as plaintiffs. No purpose is gained by allowing the amendment now sought for and after all irrespective of the amendment the main question is whether the two brothers are partners of a firm and it has been held that they are. Therefore no useful purpose is served by any amendment as even if the amendment is allowed it would be of no help to the plaintiffs.

(7) In the circumstances, the appeal stands dismissed with costs. The application for amendment is also dismissed.

B/V.R.B. Appeal and application dismissed.

A.I.R. 1954 MYSORE 35 (Vol. 41, C.N. 16)

VASUDEVAMURTHY J.

Periera, Plaintiff-Appellant v. H. K. Siddalingappa and others, Defendants-Respondents.

Second Appeal No. 362 of 1949-50, D/- 22-10-1952, against decree of Addl. Sub. J., Mysore, in R. A. No. 44 of 1948-49.

Limitation Act (1908), S. 15 and Art. 109 — Injunction restraining purchaser in revenue safe from taking delivery of possession — Suit for mesne profits by purchaser.

Plaintiff purchasing property in revenue sale — Defendants filing suit for declaration of their rights and obtaining temporary injunction restraining plaintiff from taking delivery of possession — Suit of defendant's ultimately failing — Plaintiff obtaining delivery of possession and suing defendants for mesne profits — S. 15 does not apply — Plaintiff is entitled to mesne profits only for a period within three years prior to suit: AIR 1933 Lah 615; AIR 1949 Mad 279 and 48 Mys HCR 1, Foll.

(Paras 7 and 10)

Anno: Lim. Act, S. 15 N. 6.

V. Krishnamurthy, for Appellant; D. Puttaswamy, for Respondents (Nos. 2 and 3).

CASES REFERRED:

(A) ('33) AIR 1933 Lah 615: 146 Ind Cas 939 (Pr 7)
(B) ('27) AIR 1927 All 446: 49 All 565 (Pr 7)
(C) ('49) AIR 1949 Mad 279: ILR (1948) 2 Mad LJ 314 (Pr 8)
(D) ('42) 48 Mys HCR 1 (Pr 9)

JUDGMENT: The plaintiff's suit for damages by way of loss of rent occasioned to him by the defendants who were in unlawful possession of the plaint schedule property which he had purchased at a Revenue sale was decreed partially by the Second Munsiff, Mysore. On appeal the Additional Subordinate Judge, Mysore, dismissed the suit and the plaintiff has come up in second appeal.

(2) The suit was originally brought against two defendants who were brothers of one H. K. Sivanna who is now dead. The suit property was sold by the Revenue authorities for recovery of the balance of the House Building Advance which had been borrowed to put up the suit house by the deceased Sivanna who was an employee in the

Mysore Government Electrical Department. After purchasing the property the plaintiff applied for delivery of possession but he was prevented from taking possession on account of obstruction caused by the defendants, who had also filed a suit for declaration of their rights and for permanent injunction and had also obtained orders of temporary injunction in the course of those proceedings. Defendant 2 died subsequent to the suit and defendants 2(a) & 2(b) and defendant 1 were brought on record as his legal representatives. In this appeal only defendants 2(a) and 2 (b) are represented by Counsel on behalf of a guardian appointed by Court. Defendant 1 though served has not appeared.

(3) The learned Munsiff found that the defendants did obstruct the plaintiff and prevented him from taking possession of the suit propetry or recovering any rents from the tenant Srinivasa Iyer. He was of the opinion that there was no substance in the contention that as the plaintiff had failed to prove that the defendants were actuated by any malice in filing their suit and obtaining orders of temporary injunction he was not entitled to recover rents by way of damages. He also found that the plaintiff was entitled to such damages by way of rent from 19-5-41 to 3-10-45 at Rs. 15/- per month as against a somewhat larger claim which had been made by the plaintiff. The learned Subordinate Judge was, however, of the view that the plaintiff had not made out either malice or want of reasonable and probable cause on the part of the defendants and that he had also failed to make out that the defendants obstructed him in obtaining possession.

I think it is quite clear from the evidence in this case, documentary and oral, that the defendants did obstruct the plaintiff and prevent him from recovering possession. The plaintiff as P. W. 1 had deposed that after obtaining Ex. B, the sale certificate, he applied for possession through Revenue authorities and they directed him to approach the Civil Court. He then filed a petition for delivery of possession in the Court of the First Munsiff, Mysore, and that Court ordered such delivery. The defendants then filed O. S. No. 9-42-43 in the Subordinate Judge's Court, Mysore, and applied for and obtained an ad interim order of temporary injunction on 1-8-42 restraining the plaintiff from taking delivery of possession of the propetry in suit, pending disposal of the application. Later on, on that order being vacated by the learned Munsiff they filed Misc. Appeal No. 25 of 42-43 before the District Judge & secured an order in their favour by which the ad interim order was restored. O. S. No. 9/42-43 was later on dismissed after trial and the defendants filed an appeal against that judgment in R. A. 90/43-44. Along with their appeal they applied for and again obtained an order of temporary injunction from the District Judge which was in force till the appeal was ultimately disposed of against them. In support of their application for temporary injunction before the District Judge they filed an affidavit Ex. H wherein it was expressly stated that the properties belonged to a joint family of themselves and deceased Sivanna and that though the appellants were residing in the premises of the suit property, if the present plaintiff was not restrained from taking possession of the property, substantial and incalculable injury would result to them and they would be wrongfully deprived of possession of the property by virtue of proceedings which were not binding on them.

The learned Munsiff has properly given considerable weight to Ex. H but the learned Subordinate Judge was of the view that even assuming that the facts stated in it were true they were insufficient to hold, in the absence of proof of malice and want of reasonable and probable cause, to entitle the plaintiff to recover damages for use and occupation and that, in spite of the statement in Ex. H, the plaintiff had to make out affirmatively that the defendants did obstruct the plaintiff. I think that this is not at all the proper way in which this matter has to be viewed. The defendants had, on oath, admitted in Ex. H that they were in possession of the property and in the absence of very clear evidence to the contrary they could not ask the Court to treat Ex. H so lightly. The plaintiff has sworn that when he went to take possession defendant 1 obstructed him, that the other defendant was also present and that the Taluk authorities drew up a mahazar and made a report. Mr. Puttaswamy, learned Counsel who appears for the defendants, says that the plaintiff should have summoned the mahazar. But I fail to see why it was necessary for him to do so in view of their repeated statements in the course of the proceedings in O. S. No. 9 of 42-43 and R. A. No. 90/43-44 and Mis. A. No. 25/42-43 that they were in possession.

(4) Mr. Puttaswamy next contends that the plaintiff has admitted that defendant 2 was not residing in the suit house at any time and that the property might have been in the possession of one Srinivasa Iyer who has been examined on commission as a lessee under Puttabasamma, widow of Sivanna. Srinivasa Iyer no doubt says that defendant 1 was not residing in the house during the period when he was occupying it and that he was a tenant of one Puttabasamma in the house. He obstructed the delivery of possession being made to the plaintiff as per Ex. I(a) on 12-9-45 but he was ejected. It is difficult to believe his evidence. He says there was a lease deed executed by him in favour of Puttabasamma written on an ordinary plain paper. The defendants have not summoned even that paper. The witnesses has no references to show that he ever paid rent to Puttabasamma. He says he sent some of the rents by M. O. but he has not preserved any of the M. O. coupons. He says Puttabasamma had written a letter as per Ex. IV(a) on 9-7-42 in which she asked him not to pay rents to anybody else except to herself and also to pay the taxes due on the house directly to the Municipality. That letter is said to have been delivered 'muddam' to him and there is no other proof that it was written by Puttabasamma. No taxes appear to have been paid by the witness as required by Ex. IV-a. The witness has not produced any receipts for having paid any rents or taxes nor does he even say that he acted according to the terms of Ex. IV-a and accounted for the balance of rents to Puttabasamma.

Puttabasamma who is a close relation of the defendants has not been examined and though defendant 1 says that she is not well disposed towards him it is not likely that she would not have supported the defendants as against a stranger like the plaintiff.

(5) A person must be held liable for the natural and probable consequences of his conduct and action and if the defendants persisted in making claims which have now turned out to be false about their ownership of the property and have kept away the plaintiff from securing the benefits of the Revenue sale in his favour they are bound to compensate him by way of damages. He would be entitled to recover from them by way of mesne profits or damages the loss he has sustained by their conduct. In my opinion it is

immaterial if defendant 2 was not living in the house or if only defendant 1 was living in it. If they successfully kept the plaintiff out of possession they cannot complain that the tenant did not pay them any rents or paid someone else the rents when the Court has accepted their statement and issued temporary injunctions in their favour. Defendant 2 has made common cause with defendant 1 in all those proceedings and is a joint tort feasor with him.

(6) The learned Subordinate Judge erred in considering that this was a suit for damages for obtaining injunction orders wrongfully. He thought that it was necessary in a suit like the present for the plaintiff to make out want of bona fides on the part of persons obtaining those orders. But the present suit is for damages by way of mesne profits by an owner who has been kept out of possession by the defendants. The injunctions were obtained in the course of legal proceedings merely with the object of keeping the plaintiff out of such possession and the defendants must compensate the plaintiff if it is found that they were responsible for keeping the plaintiff wrongfully out of possession.

(7) Mr. Puttaswamy has next urged that the learned Munsiff erred in making a decree for mesne profits for a period earlier than three years before suit. He urges that the plaintiff's suit if one for recovering mesne profits by way of damages falls under Art. 109, Limitation Act which prescribes a period of three years for such suit time begins to run when the profits are received; and that S. 15, Limitation Act on which reliance has been placed by the Munsiff to award a decree for a longer period has no application. That position appears to be correct. Section 15, Limitation Act in terms does not apply to the facts and circumstances of this case as the injunction was not against the institution of any suit or any execution application for recovery of rents or mesne profits but only against taking possession of the property. Mr. Puttaswamy has in this connection referred to a case in — 'Basheshar Das v. Diwan Chand', AIR 1933 Lah 615 (A), which fully supports him. In that case the plaintiff purchased certain property at an auction sale. Objections were raised by the defendant on the execution side that the plaintiff was entitled to get only a 1/3rd share in the house. Both parties then filed declaratory suits to establish their rights and ultimately the plaintiff was declared the sole owner of the house by virtue of the auction sale and the suit of the defendant failed. In the course of the litigation the defendant had obtained stay of delivery of possession twice. After the plaintiff obtained possession of the property he brought a suit to recover mesne profits and contended that the running of limitation for the recovery of mesne profits was suspended when execution was stayed. It was held by the Lahore High Court that the stay order merely related to delivery of possession and was no bar for the institution of a suit for mesne profits. The cause of action for recovery of those profits was accruing every time those profits were received by the defendants and the only way by which the plaintiff could keep the claim within limitation was apparently by instituting suits for recovery of the profits within three years of the receipt of the same by the defendants. It was observed that those suits would probably have been stayed pending the decision of the question of title but that course though inconvenient was under the circumstances necessary to save limitation. It was pointed out that the plaintiff cannot be allowed any extension of time to save limitation merely on equitable considerations unless the extension is provided by statute.

In — 'Ram Charan Sahu v. Goga', AIR 1927 All 446 (B), which is referred to in the Lahore case it was held that even before a claim to mesne profits is in dispute the starting point of limitation for a suit for mesne profits would be the date when the profits are received, and the limitation cannot start instead, from the date of adjudication of the rights between the parties. In such cases the proper practice is for the plaintiff to institute a suit for mesne profits before the time expires and allow it to be stayed pending disposal of the former litigation.

(8) In — 'Ramaiya v. Suryanarayana', AIR 1949 Mad 279 (C); the plaintiff purchased certain property in execution of a mortgaged decree. Some of the defendants then filed a suit impugning the mortgage, which was dismissed both in the trial Court and ultimately on appeal in the High Court. Pending disposal of the appeal the defendants had obtained an order of temporary injunction restraining the plaintiff from interfering with their possession. After the plaintiff obtained possession he sued for and was granted a decree for mesne profits for four years and for doing so reliance was placed on S. 15, Limitation Act. On appeal Horwill, J. held negativing that contention that that section did not apply as the institution of the suit for mesne profits was not stayed by any order of injunction and that the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation.

(9) In — '48 Mys H. C. R. 1 (D)', it was observed that the stay of execution of a decree for delivery of possession in a suit between two rival claimants to a jodi village did not serve to extend time under S. 15, Limitation Act in respect of a suit for rent against the kadim tenant as the order of stay of execution made by the appellate Court in that case did not stand in the way of the successful claimant filing a suit earlier against the latter for such recovery.

(10) In the light of these decisions the mesne profits due and payable to the plaintiff can only be for a period within three years prior to the suit. The plaintiff obtained delivery of possession on 3-10-1945 and as his suit was filed on 28-11-45, the plaintiff can recover mesne profits only for 34 months less 5 days.

(11) Mr. Krishnamurthi has urged that his client is entitled to recover interest on these mesne profits from the dates when the claims to them accrued. The learned Munsiff, however, did not grant him that relief and the plaintiff did not take up the matter in appeal. I think in the circumstances of this case the plaintiff may be awarded interest only from the date of suit till date of payment on the aggregate amount of mesne profits found due to him.

(12) In the result this appeal is allowed, the judgment and decree of the lower appellate Court are set aside and there will be a decree in favour of the plaintiff for mesne profits for a period within three years before suit at Rs. 15/- per mensem, i.e., for Rs. 510/- with interest thereon at 6 per cent per annum from date of suit till payment with proportionate costs against defendant 1 and against the assets of defendant 2 in the hands of his legal representatives. The plaintiff will get his costs from the defendants in this Court as well as in the lower appellate Court.

C/G.M J. Appeal allowed.

A.I.R. 1954 MYSORE 38 (Vol. 41, C.N. 17)

MEDAPA C. J. AND VASUDEVAMURTHY J.

Rajammal, Appellant v. Mariyammal and another, Respondents.

Misc. Appeal No. 20 of 1952-53, D/- 15-1-1953, against order of Commr. for Workmen's Compensation (Oorgam), D/- 10-6-1952.

(a) **Workmen's Compensation Act (1923) S. 8 — Compensation to co-widows — Marriage of one not disputed by relations but treated as valid by parties and the caste — Commissioner cannot declare it invalid but must apportion compensation.** **(Para 3)**

Anno: Workmen's Comp. Act, S. 8 N. 1.

(b) **Hindu Law — Marriage — Proof — Factum valet.**

Marriage treated as valid by relations and others for long time — Court cannot declare it null & void when it was accepted by caste & relatives as valid. (Para 3)

(c) **Hindu Law — Marriage — Parties not belonging to twice-born caste — Strict injunctions of law of marriage are not applicable.** **(Para 3)**

(d) **Hindu Law — Marriage — Sudras — Hindu law does not forbid marriage between Sudra and non-Hindu.** **(Para 4)**

C. B. Motaiya, for Appellant; T. V. Nathamuni Iyer, for Respondents.

CASES REFERRED TO: Paras

(A) ('10) 33 Mad 342: 5 Ind Cas 42 4

(B) ('51) AIR 1951 All 529: 1950 All LJ 932 4

JUDGMENT: The appellant and respondent 1 in a joint petition applied under the provisions of the Mysore Silicosis Rules for the award of compensation to them for the death of their husband B. Periathambi from the Mysore Gold Mining Company of India Ltd., Kolar Gold Fields. The petition which contained a clear and unambiguous averment that each of them was the married wife of the deceased was jointly signed by the appellant and respondent 1. The Commissioner for Workmen's Compensation, K. G. F. recorded the evidence of the appellant and respondent 1 and the sister of the deceased and pronounced his order dated 10-6-1952 awarding the amount deposited by the Mysore Gold Mining Company as compensation for the death of Periathambi to respondent 1 and her son, respondent 2. He disallowed the claim of the appellant for apportionment of the compensation on the ground that being a Christian, her marriage with the deceased Periathambi who at the time of the marriage was a Hindu, was invalid and could not be recognized according to law.

(2) The learned Counsel for the appellant contends: (1) that the Commissioner was wrong in going into the validity of the marriage inasmuch as no one disputed the validity of the marriage, and (2) that in any event, the conclusion of the Commissioner that the marriage was invalid according to law is opposed to law and therefore incorrect. The learned counsel for the respondents, however, supported the decision of the Commissioner on the ground that under Hindu Law, no marriage between a Hindu and a Christian can be valid or recognized.

(3) The order of the Commissioner does not make it clear how or why or under what circumstances he came to consider the validity of the marriage when neither respondent 1 nor anyone else raised that question before him and when, as already stated, both the appellant and respondent 1 admitted in the joint petition they filed their respective status as married wives of the deceased Periathambi. Respondent 1 reiterated and affirmed this status of the appellant in her evidence before the Commissioner. The sister of the deceased also in her evidence specifically stated that the appellant is the married wife of the deceased. The materials on record thus make it clear that apart from the averments and admissions in the petition and the oral evidence in the case that the appellant is the wife of the deceased Periathambi, the conduct of the relatives of the deceased and their treatment of the appellant point to the conclusion that she is the wife of the deceased. The presumptions of law are also in favour of legitimacy and the validity of marriages.

It is conceded that Periathambi does not belong to the twice-born classes and it therefore follows that the strict injunction of Hindu Law that marriages must be within caste is not applicable to him. The doctrine of 'factum valet' viz. the proposition 'that which ought not to be done, if done, is valid will be applicable to the facts of this case and one of the effects of that doctrine is that when the factum of marriage is admitted every presumption should be made in favour of the validity of the marriage. It would be unjustifiable interference for the Courts to declare a marriage null and void when it is accepted by the members of the caste as valid.

(4) It must be noted in this connection that the evidence of the appellant is to the effect that she was married to the deceased according to Hindu rites. The observation of Sankaran Nair J. in — 'Muthusami Mudaliar v. Masilamani', 33 Mad 342 (A) that:

> "A marriage contracted according to Hindu rites by a Hindu with a Christian woman who, before marriage, is converted to Hinduism, is valid when such marriages are common among and recognized as valid by the custom of the caste to which the man belongs, although such marriage may not be in strict accordance with the orthodox Hindu religion"

is therefore apposite. It may also be mentioned that succession and inheritance in Hindu Law do not exclude illegitimate children & their mothers, more particularly among the Sudras. There is, besides, no rule of Hindu Law which forbids the subsistence of a marriage one of the parties to which is a non-Hindu, that is to say, Hindu Law does not refuse to recognize a conjugal union merely by reason of a difference of religion see — 'Mrs. Chandramani v. Ramashankar', AIR 1951 All 529 (B). This position received statutory recognition in India Act 21 of 1949, though that Statute is limited in its scope to Hindus, Jains and Sikhs, and is in consonance with the prevalent trend of public opinion in a secular State.

(5) We therefore set aside the order of the Commissioner for Workmen's Compensation and direct the Commissioner to apportion the compensation between the appellant and the respondents according to law. The costs of this appeal will be paid by the respondents.

B/R.G.D. Appeal allowed.

A.I.R. 1954 MYSORE 39 (Vol. 41, C.N. 18)

MEDAPA C. J. AND VASUDEVAMURTHY J.

Nagappa Gowda and others, Defendants-Appellants v. Doddamane Gurupadappa and another, Plaintiffs-Respondents.

Appeal No. 184 of 1949-50, D/- 6-11-1952, against decree of Dist. J., Shimoga, in O. S. No. 11 of 1948-49.

(a) Civil P. C. (1908), O. 21, R. 63 and O. 38, R. 8 — Attachment before judgment.

Order 21, R. 63 also applies to orders passed on claims preferred to property attached before judgment. 4 Mys CCR 146; 51 Mys HCR 448; AIR 1931 Rang 183; AIR 1918 Mad 26 (FB) and AIR 1945 Cal 449, Foll. (Para 6)

Anno: Civil P. C., O. 21, R. 63 N. 6; O. 38, R. 8 N. 1.

(b) Civil P. C. (1908), O. 21, R. 63 — Subject to the result of the suit the order is conclusive.

The words "subject to the result of such suit the order shall be conclusive" in Rule 63 mean that unless the suit is brought as provided in that rule the party against whom the order is made cannot assert either as plaintiff or as defendant in any other proceedings the right denied to him by the order. (Para 6)

Anno: Civil P. C., O. 21, R. 63 N. 16.

(c) Limitation Act (1908), Arts. 120 and 11 — Order on claim in respect of attachment before judgment — (Civil P. C., O. 21, R. 63).

Article 120 and not Art. 11 applies to a suit to set aside an order made on a claim in respect of an attachment before judgment though such claim or objection was preferred after decree in the course of execution proceedings. 51 Mys HCR 448 and AIR 1945 Cal 449, Foll. (Para 8)

Anno: Limitation Act, Art. 11 N. 19; Civil P. C., O. 21, R. 63 N. 6.

(d) Mysore Land Revenue Code, S. 54 — Effect of restoration of forfeited land to defaulter.

A mere forfeiture of land followed by the restoration to the defaulting "holder" does not wipe out all the earlier rights and equities that may be subsisting as between private parties. 18 Mys CCR 76 and 30 Bom 466, Rel. on. (Para 9)

V. Krishnamurthy, for Appellants; M. Sadanandaswamy, for Respondent No. 1.

CASES REFERRED:

(A) ('47) S. A. No. 356 of 1946-47 (Mys) (Pr 3)
(B) 4 Mys CCR 146 (Pr 6)
(C) 51 Mys HCR 448 (Prs 6, 8)
(D) ('31) AIR 1931 Rang 183: 131 Ind Cas 727 (Pr 6)
(E) ('18) AIR 1918 Mad 26: 41 Mad 849 (FB) (Pr 6)
(F) ('45) AIR 1945 Cal 449: 49 Cal WN 111 (Prs 6, 8)
(G) 44 Mys HCR 589: 18 Mys LJ 166 (Pr 6)
(H) ('24) AIR 1924 Sind 97: 17 Sind LR 63 (Pr 6)
(I) ('98) 22 Bom 640 (Pr 6)
(J) ('35) AIR 1935 Rang 161: 156 Ind Cas 586 (Pr 6)
(K) ('82) 4 Mad 302 (Pr 6)
(L) (1900) 27 Cal 714 (Pr 6)
(M) ('06) 29 Mad 225: 16 Mad LJ 136 (Pr 6)
(N) ('18) AIR 1918 Mad 693 (1): 41 Ind Cas 684 (Pr 6)
(O) ('43) AIR 1943 Mad 36: ILR (1943) Mad 40 (Pr 6)
(P) ('45) AIR 1945 Pat 485: 24 Pat 408 (Pr 6)
(Q) 18 Mys CCR 76 (Pr 9)
(R) ('06) 30 Bom 466: 8 Bom LR 360 (Pr 9)

VASUDEVAMURTHY J.:

The plaintiff's suit for declaration of title, possession and mesne profits of a garden land has been partly decreed by the District Judge, Shimoga and defendants 1 to 4 and 6 have appealed. Defendant 5 has been formally impleaded as respondent 2 and the plaintiff is respondent 1. The plaintiff has also filed cross-objections regarding the ¼ share of the garden which has not been decreed in his favour.

(2) According to the plaintiff, the suit property belonged to a joint Hindu family of one Benavanna Gowda and his three undivided brothers. For failure to pay land revenue it was forfeited to Government in or about the year 1937, but it could not be disposed of in revenue auction for want of bidders and it was resumed or taken under Government "phada"; subsequently as Benavanna Gowda paid up all the dues it was granted to him. For some monies due by him and his brothers the plaintiff filed a suit O. S. No. 27 of 35-36 in the Court of the Subordinate Judge at Shimoga, and in execution of that decree purchased the suit property along with some other items in Court sale on 1-10-42. After the sale was confirmed he was put in possession in Mis. No. 11 of 43-44 . At that stage the father of defendant 6, one Chennabasappa now dead and who was the then Manager of the family of the defendants filed a suit O. S. No. 160/43-44 in the Shimoga Munsiff's Court for a declaration of his title and for permanent injunction against the plaintiff alleging that he was in possession, and obtained an order of temporary injunction restraining the plaintiff from entering the suit garden. Under colour of that order he then removed the areca and paddy crop for the year 1943-44. Chennabasappa's suit was decreed in his favour by the Munsiff but, on appeal, was dismissed by the Subordinate Judge of Shimoga and the dismissal was confirmed in the High Court. In spite of that decision the deceased Chennabasappa and after him defendants 1 to 6 his legal representatives have been continuing in unlawful possession of the land and were liable to deliver up possession and mesne profits.

(3) The defendants pleaded that the suit property belonged solely to Benevannagowda and was his self-acquisition. One Krishnappa filed a suit against him for some monies due by him in O. S. No. 336/26-27 in the Shimoga Munsiff's Court and brought it to sale in Ex. Case No. 191 of 31-32 when it was purchased in Court auction by one Sundarasastry. After the sale was confirmed in his favour on 24-12-1934, Sundarasastry was put in possession through Court on 1-1-35 in Mis. No. 121/34-35. He subsequently sold the garden to Chennabasappa, father of defendant 6, on 30-6-43. Sundarasastry and after the sale by him Chennabasappa and the defendants were all along in possession and enjoyment of the suit property. The plaintiff had got the suit property attached before judgment in O. S. 27/35-36 which he had brought against Benavannagowda and his brothers. Sundarasastry had then put in a claim objecting to the attachment in Mis. Case No. 207 of 35-36. That claim had been allowed in favour of Sundarasastry as far back as on 14-8-1937. The plaintiff had not got that order set aside and the same had become conclusively binding on him. Nevertheless he had played a fraud on the Court by getting the suit property sold subsequently in execution in the Subordinate Judge's Court at Shimoga without disclosing to that Court the fact

that Sundarasastry's claim against the attachment had been allowed as aforesaid & he could not acquire any right under such a fraudulent sale.

The Suit O. S. No. 160/43-44 filed by Chennabasappa in the Munsiff's Court at Shimoga for a declaration of title and permanent injunction was decreed in his favour by the Munsiff, Shimoga, as admitted in the plaint. But on appeal in R. A. No. 16/45-46 the Subordinate Judge rejected the plaint only on a technical ground that an extract from the Record of Rights had not been filed along with the plaint, and in — 'S. A. No. 356 of 1946-47 (Mys) (A)' that order was confirmed. There had been therefore no decision on the merits against the defendants in those appeals and three criminal complaints filed by the plaintiff against the defendants complaining of trespass and theft in respect of the produce of this suit garden had ended in orders of discharge. The defendants had considerably improved the garden and in the event of the plaintiff succeeding they were entitled to be reimbursed the value of the same. The plaintiff had brought this suit on account of ill-will as a counter blast to some other litigation between the parties.

(4) The District Judge, Shimoga, found that the suit property was the joint family property of Benavannagowda and his brothers and that it did not belong to Benavannagowda alone. He held that the order in the claim case could only affect Benavannagowda's share as Sundarasastry had bought only his right, title and interest. He did not think that the plaintiff was entitled to claim any enlargement of his rights on account of the forfeiture and other revenue proceedings. He did not also believe that the defendants had improved the suit garden. He, therefore, made a decree in favour of the plaintiff for a 4th share of the garden and mesne profits.

(5) Mr. Krishnamurthi, learned counsel for the appellants, has contended before us that the order of the Subordinate Judge in the claim case was that the plaintiff could not validly attach before judgment the suit property as belonging to his judgment-debtors Benavannagowda and his brothers; that as that order had not been set aside within the time allowed by law, as required under O. 21, R. 63, Civil P. C., it had become conclusive. The plaintiff could not in this suit put forward or claim the identical right which had been negatived in the miscellaneous case. Mr. Sadanandaswamy, learned counsel for respondent 1, has urged that the attachment effected by his client was one before judgment and not in execution of a decree, and that consequently neither O. 21, R. 63 which requires a suit to be filed to have an order made in a claim case set aside nor Art. 11, Limitation Act which prescribes a period of one year within which such a suit must be filed applied in terms to bar the plaintiff's present suit. Moreover this suit was one for declaration of title and possession and not for setting aside the order in the claim case and it was really governed by Art. 138 which gives his client 12 years from the date of confirmation of sale to bring such a suit.

(6) It has been held so far back as in — '4 Mys C C R 146 (B)' that an order passed under S. 487 of the old Code of Civil Procedure corresponding to O. 38, R. 8 of the present Code allowing a claim to property attached before judgment in a suit is subject to the provisions of S. 283 (O. 21, R. 63 of the present Code) and that the plaintiff's remedy to have it set aside is a suit under that section. This decision has been followed with approval in — '51 Mys H C R 448 (C)', where reference has also been made to — 'Pyaw Gyi Ma v. Latchmanan Chettiyar', AIR 1931 Rang 183 (D) and — 'Malikharjuna v. Virayya', AIR 1918 Mad 26 (FB) (E). See also — 'Dhan Bibi v. Mrinalini Ghosh', AIR 1945 Cal 449 (F). Order 21, R. 63, Civil P. C. declares that where a claim or an objection is preferred to an attachment the party against whom the order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

It has been held in — '44 Mys HCR 589 (G)', while dealing with a similar provision under O. 22, R. 103 that the effect of the failure to file a suit within one year of an order made under O. 21, R. 97 to set aside that order and to establish his right to present possession of the property in dispute, the claim to such possession is concluded and even as a defendant he cannot resist the recovery of possession by the opposite party. It was observed in that case that as between the parties to that order there was a bar provided under O. 21, R. 103 and as between themselves the unsuccessful party lost his right to possession. He could not also resist the claim of the plaintiff for recovery of possession as a defendant in the suit for the same reasons as would preclude him from suing as plaintiff to recover possession. It was further pointed out in that case that any other way of construing those provisions would be to allow the unsuccessful party to circumvent the law. See also — 'Azizullah Khan v. Ghulam Hussein', AIR 1924 Sind 97 at p. 99 (H); — 'Nema Gauda v. Paresha', 22 Bom 640 (I); — 'Ma Sein-Htay v. Maung Mya', AIR 1935 Rang 161 (J), and Mulla's Code of Civil Procedure, 11th Edn; page 848 where it is observed that "subject to the result of such suit the order shall be conclusive" in R. 63 of O. 21 means that unless the suit is brought as provided in that rule the party against whom the order is made cannot assert either as plaintiff or as defendant in any other proceedings the right denied to him by the order; vide — 'Bailur Krishna v. Lakshmana', 4 Mad 302 (K); 22 Bom 640 (I); — 'Surnamoya Dasi v. Ashutosh Goswami', 27 Cal 714 (L); — 'Kayyana Chittemma v. Dossy Gavaramma', 29 Mad 225 (M); — 'Yarakayya v. Venkata Krishnamaraju', AIR 1918 Mad 693 (1) (N); — 'Akkammal v. Komarsami Chettiar', AIR 1943 Mad 36 (O); — 'Premsukh Das v. Satyanarain Singh', AIR 1945 Pat 485 (P).

(7) We have therefore to see what in this case is the nature and effect of the order passed in the claim preferred by Sundarasastry against the plaintiff who had attached the suit property as belonging to his debtors Benavannagowda and his three brothers. That order has been marked as Ex. I in this case. In his application under O. 38, R. 8 Sundarasastry had claimed the property attached in the plaintiff's suit O. S. No. 27 of 35-36 as his own and as being in his possession and enjoyment. The plaintiff contested the claim and after recording evidence, during the course of which Sundarasastry examined himself and his tenant Nagabhatta and produced copies of the sale certificate issued in his favour, after the Court confirmed the sale in his favour a receipt evidencing delivery of possession by Court on 1-1-1935 (sic). The plaintiff examined himself, and he and a witness whom he examined gave evidence that the property belonged to the joint family of Benavannagowda and his brothers. The Subordinate Judge held that the evidence disclosed that possession of the property was with Sundarasastry and that the copy of the sale certificate showed that the same had been sold sub-

ject to a hypothecation in favour of the plaintiff. The latter and Benavannagegowda had unsuccessfully tried to have the Court sale set aside and both in the Subordinate Judge's Court and on appeal it was held that the attachment which was challenged was apparently got effected merely to harass the petitioner & could not be sustained. That order clearly recognized Sundarasastry's prior purchase under the Court sale in Ex. 191/31-32 in O. S. No. 336/26-27 to attach the property as still belonging to Benavannagowda and his brothers. After this order has become conclusive under O. 21, R. 63, it would be idle for the plaintiff to contend that he can again put forward the same contention, viz., that the property belonged to the joint-family of Benavannagowda and his brothers in this suit between himself and the defendants who claim under Sundarasastry merely because he has chosen to frame it as a suit for declaration of title and possession.

(8) Mr. Sadanandaswamy has urged that Art. 11 does not in terms apply to the present suit as it refers to a suit to set aside or avoid the effect of an order passed in respect of an attachment in execution of a decree and not an attachment before judgment. That question has been, however, set at rest so far as our Court is concerned, and it has been held by a Bench of this Court in — 51 Mys HCR 448 (C)', that Art. 120 and not Art. 11, Limitation Act applies to a suit to set aside an order made on a claim in respect of an attachment before judgment though such claim or objection was preferred after decree in the course of execution proceedings. The same view has been taken in a recent decision of the Calcutta High Court in — 'AIR 1945 Cal 449 (F)'. The plaintiff's suit which was filed on 11-12-48 is long after even the six years prescribed by Art. 120 from the date of the order in the claim case, viz., 14-8-37 even if it can be construed as one to set aside that order.

(9) Mr. Sadanandaswamy has next urged that as the suit land had been forfeited to Government under the provisions of the Mysore Land Revenue Code and transferred to "Government Phada" in the year 1937 for non-payment of land Revenue, whatever rights Sundarasastry acquired under his purchase in Court sale were lost. He represents that the khata of the land stood in the name of a deceased man Krishnabhatta when the land was forfeited; that it was restored to Benavannagowda and that the latter must be deemed to have become its absolute owner again after Sundarasastry lost his rights by the forfeiture. Section 54, Land Revenue Code is, however, clear and a mere forfeiture followed by the restoration to the defaulting "holder" Benavannagowda does not wipe out all the earlier rights. It has also been held by this Court in — '18 Mys CCR 76 (Q)', that neither the Mysore Land Revenue Code nor the rules thereunder contemplate the purchase on behalf of Government land which has been "forfeited" by reason of non-payment of the land revenue; and a mere forfeiture, while it no doubt operates, so far as Government is concerned, as a resumption of the holding, does not, unless it is followed by a sale, necessarily extinguish rights and equities that may be subsisting as between private parties. There an exactly similar contention that the restoration of the khata to the defaulter was equivalent to a new and absolute grant of the land freed from all previously existing rights and equities was negatived. There is therefore no substance in this contention which has been rightly held against Respondent 1 by the District Judge. See also — 'Amolak v. Dhondi', 30 Bom 466 (R).

(10) Mr. Krishnamurthi has urged that the plaintiff had deliberately suppressed the order against the appellants in the claim case while obtaining an order for sale of the property as belonging to all the brothers and had got even Benavannagowda's right, title and interest sold up and that he cannot be permitted to come to Court to enforce such a tainted claim under a sale based on a fraud practised on the Court. It is not necessary for us to go into that question or to consider whether the suit property belonged to Benavannagowda alone or his brothers also in the view we have taken that the plaintiff is concluded by the order in the claim case and is precluded from bringing the present suit.

(11) In the result this appeal is allowed and the plaintiff's suit is dismissed with costs throughout. The cross-objections are also dismissed but without costs.

B/G.M.J. Appeal allowed; cross objections dismissed.

A.I.R. 1954 MYSORE 41 (Vol. 41, C.N. 19)

MALLAPPA J.

K. H. Kapiniah, Appellant v. Fatimabi, Respondent.

Second Appeal No. 399 of 1950-51, D/- 30-10-1952, from decision of Sub-J., Mandya, D/- 30-8-1950.

(a) Civil P. C. (1908), S. 11 — Constructive 'res judicata' — Execution proceedings.

Sale of non-hypothecated property in execution of mortgage decree — Judgment-debtor served with notice in execution, not raising objection on the ground of absence of personal decree — Application by widow, claiming under sale-deed from judgment-debtor executed after sale of property in execution, to set aside the execution sale on the ground of absence of personal decree is barred by 'res judicata.' (Para 2)

Anno: Civil P. C., S. 11 N. 23, 35, 48.

(b) Civil P. C. (1908), O. 34, R. 6 — Absence of personal decree — Effect on execution sale.

Mortgage decree — Sale of other property in execution — Case one where decree-holder is entitled to personal decree — Absence of such decree does not render sale void and no prejudice is caused to judgment-debtor by sale. 18 Mys LJ 333, Foll. (Para 3)

Anno: Civil P. C., O. 34, R. 6 N. 3.

G. R. Ethirajulu Naidu, for Appellant; K. R. Gopivallabha Iyengar, for Respondent.

CASES REFERRED:

(A) ('51) AIR 1951 Mys 118: ILR (1952) Mys 24 (Pr 2)
(B) 42 Mys HCR 190 (Pr 2)
(C) ('40) 18 Mys LJ 333 (Pr 3)

JUDGMENT: The appellant obtained a final decree against one Peer Sab on the foot of a hypothecation deed and thereafter filed an execution application for attachment and sale of the property now in dispute. He sought to proceed against it, though it was not one of the hypothecated properties, as the hypothecated properties had all been sold in execution of a decree obtained by a previous hypothecatee. The judgment-debtor was served with a notice, and it is clearly noted in the order-sheet that he had no objection to the attach-

ment. Property was thereafter sold and the sale was confirmed on 9-1-1948. The respondent, who claims to be the widow of the judgment-debtor, states that a sale deed has been executed by him in her favour on 6-5-1948, which is long after the property was sold in execution of the decree against him. Her contention is that as no personal decree was obtained, the sale is invalid.

(2) Her application to set aside the sale has been filed on 7-7-1948. It is difficult to see how such a belated application is maintainable, though the judgment-debtor himself did not file any such application while he was alive within time allowed by law. Moreover, it has to be noticed that the application is barred by principles of res judicata. The judgment-debtor was served with a notice in the execution case when the property was sought to be attached and sold. It was up to the judgment-debtor to have raised any objection he had at the time of attachment and sale, but he has failed to do so. It is, therefore, not open to him or to any other person claiming under him to raise the point over again. Even in respect of a failure to take notice under O. 21, R. 22, which goes to the root of the jurisdiction of the executing Court, a judgment-debtor may be barred from taking the objection by principles of res judicata. As observed in — 'Chenne Gowda v. Venkatachala Setty', AIR 1951 Mys 118 (A):

> "There are a large number of decisions which support the view that a person who was not served with a notice under O. 21, R. 22, Civil P. C. but was served subsequently in the execution case and failed to take the objection of his not having been served with notice under O. 21, R. 22, cannot be allowed to take that objection at a later stage."

I may also refer to the decision in — 42 Mys H C R 190 (B)' relied on in the above case as an authority for holding that a judgment-debtor who could have taken an objection at an earlier stage in execution proceedings, but had failed to do so is prevented by principles of res judicata from raising the point over again.

(3) Further, the mere fact that a personal decree has not been obtained does not necessarily make the sale void. No prejudice is caused to judgment-debtor in such cases when the decree-holder was entitled to personal decree if he had applied for it as in this case. As observed in — 'Venkatasamy v. Subba Rao', 18 Mys L J 333 (C) it may be here stated:

> "the failure to obtain a formal personal decree under O. 34, R. 6, Civil P. C., did not render the subsequent execution proceedings void and that the sale could not be set aside on that account. The Court which was competent, to grant a personal decree had allowed execution to proceed and had jurisdiction to execute it. An irregularity in procedure in the exercise of its jurisdiction did not vitiate the sale."

It is therefore clear that both the Courts below were wrong in allowing the application filed by the widow of the judgment-debtor.

(4) In the result, this appeal is allowed with costs, and the application filed by the respondent to set aside the sale stands dismissed with costs.

C/M.K.S. Appeal dismissed.

A.I.R. 1954 MYSORE 42 (Vol. 41, C.N. 20)

MEDAPA C. J. AND VASUDEVAMURTHY J.

P. R. Chikka Subba Rao and others, **Appellants** v. Nama Ramaswami Setty and others, **Respondents.**

Appeals Nos. 151 to 156 of 1949-50, **connected** with Second Appeals Nos. 239 and 240 of **1949-50,** D/- 27-11-1952, against decrees of Addl. **Sub-Judge,** Kolar, in Appeals Nos. 88 and 89 of **1947-48.**

(a) **Will — Construction — (Succession Act** (1925), **S. 82).**

Provision in will that each of testator's **sons** should make proper supervision of **Anna** Chatram, each for a period of **3 years in the** order of seniority — Held the **plaintiff in** whose favour the other brothers had **executed** lease deeds had no right to question the **plaintiff's** right to management after expiry **of the** 3 years which was a matter of **internal** arrangement as between the brothers **'inter se'.** **(Paras 2, 8)**

Anno: Succession Act, S. 82 N. 1.

(b) Civil P. C. (1908), O. 20, R. 12 — Scope.

A final decree without a preliminary **decree** can be made fixing the enhanced **future rates** of rents or mesne profits after suit. **7 Mys LJ** 262, Distinguished; AIR 1938 Mad **727; AIR** 1937 All 36, Rel. on. **(Para 10)**

Anno: Civil P. C., O. 20, R. 12 N. 2.

(c) **Transfer of Property Act (1882), S. 105 — Power to fix rent by way of damages.**

While fair rent may have been **fixed by** raising rents by a maximum limit of **150 per** cent. if the tenants had approached the **House** Rent Controller in a 'bona fide' and **proper** way the same standards may not **be applied** when the Court is granting a decree for **eviction** and is fixing rent by way of damages **or** compensation. **(Para 12)**

Anno: T. P. Act. S. 105 N. 40, 70.

V. Krishna Murthy, for Appellant (in **Nos. 151** to 156 of 1949-50) and for Respondents **(in Nos.** 239 and 240 of 1949-50); Mirle N. Lakshminaran-appa, for Respondent (in Nos. 151-156 of **1949-50),** for Appellants (in Nos. 239 and 240 of **1949-50).**

CASES REFERRED:	**Paras**
(A) ('41) 20 Mys LJ 194 (200)	**5, 8**
(B) ('47) 52 Mys HCR 405 (414, 415)	**8**
(C) 7 Mys LJ 262	**10**
(D) (V25) AIR 1938 Mad 727 (729): ILR **(1938)** Mad 1050	**10**
(E) (V24) AIR 1937 All 36 (39): 166 **Ind Cas** 897	**10**

VASUDEVAMURTHY J.:

These six Regular Appeals and two **Second** Appeals relate to as many suits filed by one **Nama** Ramaswamy Setty in the Court of the **Munsiff** of Kolar for ejectment and enhanced rents **by** way of damages for use and occupation till **pos**session of the premises concerned in each of **them** is delivered by their respective tenants **who are** defendants in those suits. All those suits **were** decreed by two different Munsiffs who heard **them,** Messrs. Hanumanthegowda and Thimmapparaj Urs. On appeals in Regular Appeals Nos. **88 and** 89 of 47-48 two of the earlier of those judgments in Original Suits Nos. 135 and 136 of **46-47 were** reversed by the Subordinate Judge of Kolar. **The** two Second Appeals by the plaintiff arise **out of** a common judgment in those two appeals. **Six** regular appeals which were filed against the **judg**ments in the other six suits were got transferred to this Court and have been heard as **Regular** Appeals in this Court. They can all be disposed of by a common judgment.

(2) The plaintiff is the second of three brothers who are sons of one Rangiah Setty who is now dead. The premises concerned in these suits are shops which are attached to a choultry or Dharma Chatram. The deceased who admittedly was the owner of the choultry and the shops, left a registered will dated 1-7-1922 under which he has directed that out of the rents realized from these shops, the maintenance expenses of the choultry such as kandayam, lighting, cleaning and other charges should be met and the surplus utilized for feeding people free. There is a further provision in the will which runs as follows :

"I have three sons 1st Chinnappa, 2nd Ramaswami Setty, 3rd Naraniah. As long as they remain in a single family harmoniously they should jointly undertake proper supervision of the Anna Chatram..... In case they fail to be on good terms with one another and get themselves separated, each one of them should make proper supervision of this Anna Chatram, each for a period of 3 years in the order of seniority."

It is this portion of the will that has been mainly relied upon by the defendant to defeat the plaintiff's suits.

(3) It is admitted that each of the defendants who were already in occupation as tenants executed in favour of the plaintiff lease deed dated 7th, 8th and 9th July 1943 agreeing to pay rents at Rs. 8-5-4 per month and to vacate and deliver possession of the premises after 11 months. That the plaintiff was then in sole management of the choultry is not disputed and the lease deeds themselves recite that the shops are appurtenant to the choultry. The defendants appear to have paid some rents and then fallen into arrears. The plaintiff issued notices to them terminating the leases and calling them to vacate and deliver over possession of the premises and to pay damages at the rate of Re. 1/- per day.

The defendants pleaded more or less uniformly. They alleged that the lease deeds were nominal and that they were not meant to be acted upon; they had come into possession as tenants earlier, before the plaintiff took up the management and were not liable to vacate and deliver over possession of the premises to him as this term of 3 years for which he was authorized or was entitled to manage the choultry had expired; on account of quarrels between the plaintiff and his younger brother Naranappa and his elder brother's son Ramadevasetty regarding the management of the choultry, proceedings had been initiated and were going on before the Sub-Division Officer, Kolar, and the defendants had received notice from that officer not to pay rents to the plaintiff; the plaintiff's suit was not maintainable as his other two brothers had not joined with him in bringing this suit and as his period of management had expired; the notices issued for eviction also, it was pleaded, were not in accordance with law.

(4) The learned Munsiffs who tried the suits held on an appreciation of the evidence and probabilities that the notices terminating the tenancy were valid; that the plea of the defendants that the lease deeds were nominal, & that the condition in them about delivering back possession of the premises to the plaintiff, was not meant to be acted upon was neither true nor tenable. The defendants had not shown that the Sub-Division Officer had issued notices to them not to pay rents to the plaintiff and the plaintiff who was managing the choultry both when he took the lease deeds from the defendants and when he brought the suits was fully entitled to sue the defendants and ask for their eviction and rents. They therefore decreed the plaintiff's suits as prayed for.

(5) The learned Subordinate Judge who decided R. As. 88 and 89 of 47-48 and whose decision is sought to be upheld before us for the tenants took the view that the plaintiff's suits were not maintainable. He observed that though the question of the plaintiff's right to sue or maintainability of the suits as brought had not been expressly raised in their pleadings by the defendants, it was a question of law relating to the locus standi of the plaintiff and relying on — 'K. M. A. Venkiah v. T. V. R. Gupta', 20 Mys LJ 194 (A), thought that that plea could be raised at any time. He also thought that those pleas had been impliedly raised in the pleadings. He, however, did not believe or accept the plea of the defendants that the Sub-Division Officer could in law, or did in fact, demand the tenants to pay the rents, not to their lessor but into the Treasury. He did not record any findings on the other points raised for the defendants, viz., the validity of the notices to quit, the nominal nature of the lease deeds and the condition in it regarding vacating the premises.

(6) In this Court no attempt has been made to challenge the findings of the Munsiffs on those points. They moreover appear to be quite correct and the learned Munsiff who decided the later batch of suits has observed that the defendants are all literate persons and experienced businessmen but none of them appear to have much regard for truth. They had given evasive answers but ultimately had admitted execution of the lease deeds and were clearly liable to act according to their terms. There is considerable force in these observations, which are well founded, and we accept as correct the findings of the Munsiffs on all those questions.

(7) Of the only questions which were strongly pressed before us for the tenants by their learned Counsel Mr. V. Krishnamurthi, the first is regarding the maintainability of the plaintiff's suits. It is really difficult to see how the learned Subordinate Judge could have come to the conclusion that the plaintiff's suits were not maintainable. The lease deeds purported to be in favour of the plaintiff and contained a reference to the choultry. Admittedly the plaintiff was in management when he got them executed. D. W. 1 his younger brother Naranappa has not deposed that either he or his eldest brother Chinnappa had taken over the management subsequently, nor has he stated that the plaintiff cannot bring these suits as he is not the present manager and that he or his brother alone could do so. He does not appear even to object to the plaintiff getting a decree though he says that there have been differences of opinion between the plaintiff and his two brothers regarding the management.

The clause in the will prescribing that each of the 3 brothers should manage for 3 years in order of seniority is not apparently pressed even by him. He admits that after the plaintiff took up the management he enhanced the rents consulting all the tenants including himself as he had also taken one of the shops for rent; and that with a view to increase the income of the chatram they all agreed. He says that the rents are being collected and utilized for the benefit of the poor students' hostel and for feeding of the travellers. Naranappa D. W. 1 also makes another significant statement in his evidence:

"We 3 brothers are managing the Dharma Chatram..... I managed it for 7 years successively. After my 3 years time, my brother Chinnappa raised takrar to take charge. So I had to manage for his 3 years. I managed one more year on account of this takrar."

This shows that the provision in the will about the rotational management could only have been merely a directive given for the due, proper and peaceful administration and management of the affairs of the choultry and to avoid misunderstandings between the sons and was treated as such and that they are not such "vested rights" or irrevocable substantive rights in the nature of title to hold immovable property or to possess and enjoy it.

It was quite within the competence of the brothers to allow one of them to manage if he himself did not choose, or find it inconvenient to do so. It is very difficult to accept or even follow the arguments of the learned Counsel for the tenants that the brothers had each a vested right to manage which would automatically come to an end after the expiry of the three years allotted to him. This is not even a case of owning and enjoying for personal benefit the income of any property. An arrangement laid down by the father in his will for the guidance of his sons could not be utilized by the tenants to defeat the very object of the donor that there should be an harmonious understanding and arrangement between the brothers in the matter of the continuous and unbroken management of this choultry. In his generosity their father had brought into being this charity and it is to be expected all his sons and descendants are interested in maintaining it efficiently for the sake of the reputation of their family and the respect due to their father's charitable intention.

It could be no concern of the defendant which of the brothers is actually managing the charities. Mr. Krishnamurthi's clients who are only tenants cannot by reason of that fact have any right to question the management of the choultry by the plaintiff or his brothers. If the latter did not choose to take over the management from him after his period was over either with his consent, or by means of some legal proceedings, his management and his powers as manager cannot come to an end or much less be questioned by strangers like the tenants. The learned Subordinate Judge is, in our opinion, entirely wrong in construing the matter as if it is one involving some vested rights or title and treating the plaintiff as a person who had automatically become functus officio and who had ceased to have any sort of jurisdiction to manage immediately his three years period was over whether or not there was any one able or willing to take charge from him or even before he actually handed over such charge to anyone else.

(8) Mr. Krishnamurthi has cited some cases and relied specially on — '20 Mys LJ 194 (A)' and — 'Parsee Zorastrain Anjuman v. Chief Secy., Govt. of Mysore', 52 Mys HCR 405 (B), referred to by the Subordinate Judge and has urged that in a suit like the present unless all the brothers who are trustees are joined as plaintiffs or as defendants one or more of them cannot by themselves bring a suit to recover possession of property. He has also urged that even as joint executors or administrators under the will one of the brothers could not bring these suits and he has relied on Sec. 90, Probate and Administration Act in support of that latter argument, and on — '20 Mys LJ 194 (A)', that this objection could be taken at any stage of the proceedings. There is no need to consider in detail any of these cases in the view we have taken that the plaintiff is merely suing as a manager. He must be deemed merely to be acting for and on behalf of his brothers also, in pursuance of authority impliedly left or given or conceded to him by them. The plaintiff in whose favour the defendants (sic) have executed lease deeds have no right to question the plaintiff's right to management which is a matter of internal arrangement as between the brothers inter se.

The brothers are not described in the will either as trustees or as executors whatever may be their legal position with reference to their legal rights under the will. This matter of periodical management cannot, in our opinion, in the terms in which it is put and the context in which it appears, amount to anything more than a mere arrangement or direction given by the testator for the purpose of efficient and peaceful management and does not clothe the brothers with any special title or vested rights which are automatically to come into being immediately after the previous three periods are over and so as to put an end to the rights of management of a present manager even if the successor does not in fact choose or is unable or unwilling to take over charge himself. Such a construction would, far from giving effect to the testator's intentions, lead to an impossible deadlock and vacancy and encourage people like the defendants to take advantage of the impasse to benefit themselves and for their own ends. We must therefore hold that there is neither substance nor merit in that contention and that the finding of the learned Subordinate Judge that the plaintiff's suits are not maintainable is wrong.

(9) The next contention on behalf of the tenants is that the plaintiff's suit for ejectment must fail as the Mysore House Rent Control Order, 1948, was extended to Chintamani in respect of non-residential premises also sometime in 1949. This was long after the present suits were filed. We think from a reading of Rules 9 and 16, Mysore House Rent Control Order there is no substance in this contention either. Rule 16 declares that

"Nothing in this Order shall prevent a landlord from filing a suit for eviction of a tenant before a competent Civil Court, provided that no decree or eviction of a tenant, passed by a Civil Court shall be executed unless a certificate to that effect is obtained from the Controller",

and Rule 9 Cl. (1) says that a tenant in possession of a house shall not be evicted therefrom whether in execution of a decree or otherwise except in accordance with the provisions of this clause. The conjoint effect of the two rules would merely mean that while there is nothing to prevent a suit being filed for ejectment against a tenant and the Court granting a decree therefor, the same cannot be executed and the defendant evicted except on the production of a certificate from the House Rent Controller that he is so liable to be evicted which must be for one or more of the reasons given under Rule 9(1).

(10) The next contention put forward on their behalf is that a decree could not have been made fixing the enhanced future rates of rents or mesne profits after suit. Reliance is placed for this argument on a case in — '7 Mys LJ 262 (C)', where it has been held that in a suit for possession or rent or mesne profits the Court should, under O. 20, R. 12, Civil P. C., pass a preliminary decree with regard to mesne profits subsequent to the institution of the suit, direct-

ing an enquiry to be made as to the amount thereof; and thereafter a final decree has to be passed in accordance with the result of such enquiry and that a decree fixing the mesne profits subsequent to the institution of the suit at a certain amount is not in accordance with law. There is no discussion in that judgment and it seems to have been "practically admitted" that the decrees of the lower Courts awarding mesne profits at a fixed rate from date of suit till date of delivery of possession was not correct and could not be supported. So that the order is more like one based on consent of parties. It is not clear whether in that case there was also an issue as in this case which required determination by the court in the suit itself, viz. "Is the claim for future rent unconscionable and excessive?" There is apparently nothing in O. 20, R. 12 which requires that the determination of such an issue must be left to proceedings after a preliminary decree for possession and past mesne profits are passed or bars a finding being made in the suit itself, the word used being 'may' in that rule. In — 'Vellaveeran Chetty v. V. Veeran Chetty', AIR 1938 Mad 727 at p. 729 (D), it has been held that it is perfectly competent to a court without directing an enquiry to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit, if it is made out that it is not necessary to make such an enquiry and that it cannot be said that such a decree is not final or is incapable of execution nor would it be in contravention of the provisions of O. 20 R. 12, Civil P. C. A preliminary decree becomes necessary where the exact amount is to be ascertained after the examination of fresh evidence; see — 'Bagchi, A. P. v. Mrs. F. Morgan', AIR 1937 All 36 (E).

(11) Another contention raised for the tenants is that the rate of Rs. 30/- per month awarded by the Munsiffs is excessive. There is no clear evidence let in on either side as to the rate of rent or mesne profits for which the premises could have been let. It is not however denied that the premises are situated in an important business locality in Chintamani Town.

(12) It is urged for the tenants that if the standards prescribed by the Mysore House Rent Control Order relating to fair rents are applied to this case the rents may be raised by a maximum limit of 150 per cent in which case about Rs. 21/- would be the maximum which could be allowed. While fair rent may have been fixed in that way if the tenants had approached the House Rent Controller in a bona fide and proper way it is difficult to see why the same standards should be applied when the Court is granting a decree for eviction and is fixing rent by way of damages or compensation. It is also represented before us that some other tenants have entered into agreements to pay rent at Rs. 30/- per month. There is no evidence for it and we are not inclined to allow some lease deeds said to have been subsequently executed by some other tenants in favour of the plaintiff and now sought to be put in for the plaintiff by way of additional evidence in support of that statement. Taking into account all the facts and circumstances of this case we think that Rs. 25/- a month would be a reasonable rate and we order accordingly.

(13) In the result Second Appeals Nos. 239 and 240 of 1949-50 are allowed, the judgment and decrees of the Subordinate Judge in Regular Appeals 88 and 89 of 1947-48 are set aside. Regular Appeals Numbers 151 to 156 of 1949-50 are dismissed. The judgments and decrees of the Munsiffs are restored but with the modification that the plaintiff will be entitled to recover rents by way of damages from date of suit till date of delivery of possession at Rs. 25/- per month from the defendants in each of the cases.

(14) The Plaintiff will have his costs from the Defendants in all the Courts.

B/D.H. Order accordingly.

A.I.R. 1954 MYSORE 45 (Vol. 41, C.N. 21)

MALLAPPA J.

Nandipuram Sreerangachar and others, Appellants v. R. Chakravarthi, and others, Respondents.

Second Appeal No. 506 of 1948-49, D/- 23-6-1952, against decree of Addl. Sub. J., Mandya, in R. A. No. 6 of 1947-48.

Civil P. C. (1908), S. 11 — Identity of subject matter and cause of action — (Evidence Act (1872), S. 115).

A owning two properties X & Y mortgaging Y to B — B obtaining mortgage decree and purchasing property Y in execution — B then bringing a suit against C under a mistaken belief that C had purchased property Y in execution of his own money decree, in order to give him opportunity to redeem the property as he was not impleaded in prior suit — Real fact however was that C had purchased property X — Decree passed against C without any contest — D who had purchased property X from C bringing suit against B for declaration of his title to X and for possession — Decree in prior suit between B and C does not operate as res judicata as subject matter in dispute was different — C's failure to plead in previous suit that what he had purchased was not property Y but X cannot also operate as estoppel against him or D from contending that he was owner of property X. (Paras 2, 3)

Anno: C. P. C., S. 11 N. 72; Evi. Act, S. 115 N. 1.

V. Krishnamurthy, for Appellants; Nittoor Sreenivasa Rao and K. R. Gopiballabha Iyengar, for Respondent (No. 1).

JUDGMENT: The property in dispute in this case is the eastern half of Survey No. 2 in Hullamballi a village in Malavalli Taluk. Both the eastern half and the western half of this survey number have got the same boundaries and in fact each of them is two acres in extent. They belonged to one Venkatanarasimhachar. It is in evidence that he got the eastern half of it under the release deed Ex. G in 1897. No title deed has been produced to show how he acquired the western half. But it is in evidence that he executed the hypothecation deed Ex. P hypothecating the western half of Survey No. 2 measuring two acres and one other land and it has been stated in that document that he acquired them in a revenue sale. It is therefore clear that while he got the eastern half of Survey No. 2 under the release deed Ex. G, he got the western half in a revenue sale. On 22-2-1927 half of Survey No. 2 was hypothecated to the appellant and though it is not clearly stated whether it is the eastern or western half that has been hypothecated to him it is clear that what was hypothecated is the western half, as it is stated in the hypothecation deed that that hypothecated portion had been purchased by the hypothecator in a revenue sale.

The appellant filed a suit on the foot of the hypothecation deed in O. S. No. 28 of 36-37 on the file of the Second Munsiff, Mysore, and obtained a de-

cree. In execution of that decree he purchased the property and obtained delivery. It is clear from the plaint as well as the delivery receipt that the property purchased and put in possession is that portion of Survey No. 2 which had been purchased under a revenue sale. He, however, came to know that one Sreenivasa Tatachar had purchased the same property in execution of a decree obtained against Venkatanarasimhachar though the property purchased by him was not that property. In order to give an opportunity to this person to pay the hypothecation amount, as he had not been impleaded in the previous suit, he filed the suit in O. S. 274 of 39-40 on the file of the Second Munsiff's Court, Mysore. Sreenivasa Tatachar, however, did not contest the suit, though it is not clear whether he was under the impression that the suit was in respect of the land purchased by him in execution of the decree obtained against Venkatanarasimhachar or a different land.

Anyway, it is found that the suit filed in O. S. No. 274 of 39-40 ended in a decree with the consent of Srinivasa Tatachar but it has to be said that the suit was in respect of the western half of Survey No. 2 which is the property purchased under the revenue sale, as the plaint in O. S. No. 274 of 39-40 itself says that the land in respect of which the suit was filed had been purchased by Venkatanarasimhachar in a revenue sale. The plaintiff who has purchased the eastern half of Survey No. 2 from Srinivasa Tatachar claimed possession of the property on the ground that the appellant is in wrongful possession of it. Since no suit has been filed by the defendant in respect of the property now in dispute, i. e. the eastern half of Survey No. 2, it cannot be said that anything comes in the way of the plaintiff getting a declaration of his right in respect of the plaint schedule property.

(2) What is seriously contended is that the decision in O. S. No. 274 of 39-40 operates as res judicata against the plaintiff. In that suit filed by the defendant, against Sreenivasa Tatachar the predecessor in title of plaintiff, it was alleged in the plaint that the latter had purchased the two acres of land hypothecated to the former. Sreenivasa Tatachar did not deny those allegations and allowed a decree to be passed against the interest if any he had in that land. In fact he had no interest in those two acres of land and it is the other two acres of land that is now in dispute, that he had purchased. The previous suit was not in respect of the two acres of land now in dispute. So the title of plaintiff or Sreenivasa Tatachar his predecessor in title to the lands now in dispute, was not the subject matter of dispute in the previous suit. The decision in the previous suit may operate as res judicata against Sreenivasa Tatachar or his successor in interest claiming any interest in the property which was in dispute in that suit, but not in any other property such as the two acres now in dispute.

(3) It is contended that it is only two acres of land that had been purchased by Sreenivasa Tatachar and that, as he did not contend in the previous suit that what he had purchased was not the two acres which was the subject matter of the previous suit, he is estopped from now contending that what has been purchased by him are the two acres now in dispute and not the two acres which were in dispute in the previous suit. It may be that he is estopped from saying that the two acres of land which was the subject matter of the previous suit had not been purchased by him; but he at no time said that the two acres of land now in dispute was not purchased by him and neither he nor plaintiff who claims under him is estopped from saying that he is the owner of two acres of land, now in dispute.

(4) The property now in dispute is the eastern half of Survey No. 2 and it belongs to plaintiff. It was not in dispute in O. S. 274 of 39-40 and nothing said or done in that suit comes in the way of Sreenivasa Tatachar, or plaintiff who claims under him, establishing his title to the suit land. Both the Courts below are right in decreeing the plaintiff's suit as prayed for. This appeal, therefore, stands dismissed with costs.

B/K.S. Appeal dismissed.

A.I.R. 1954 MYSORE 46 (Vol. 41, C.N. 22)

MEDAPA C. J. AND MALLAPPA J.

Commander, Bangalore Area and another, Appellants v. Armugam Nagarthnam & Co, Respondent.

R. A. Nos. 4 to 6 of 1949-50, D/- 28-11-1952; against order of Dist. J., Civil Station, Bangalore, D/- 4-2-1949.

(a) **Arbitration Act (1940), S. 33 — Dispute found to be within scope of arbitration clause — Court cannot enter into merits of dispute. AIR 1951 S. C. 9, Foll.** **(Para 4)**

Anno. Arbitration Act, S. 33 N. 1.

(b) **Arbitration Act (1940), S. 30(c) — Contract with Military Department— Agreement to refer differences to arbitration of military officer — Arbitrator cannot be said to have secret interest in subject matter of submission or in any party.** **(Para 6)**

Anno. Arbitration Act, S. 30 N. 5.

(c) **Arbitration Act (1940), S. 2(a) — Dispute.** An arbitrator acts without jurisdiction if the parties have not agreed that the matters in dispute should be decided by arbitrator. **(Para 6)**

Anno. Arbitration Act S. 2(a) N. 2.

(d) **Arbitration Act (1940), S. 2(a) — Cl. 35 in contract providing that any dispute not provided for under any other clause shall be referred to arbitration — Dispute regarding payments to be made in pursuance of contract — Cl. 18 providing for rectification in bills — Cl. 18 held did not exclude Cl. 35.** **(Para 6)**

Anno. Arbitration Act, S. 2(a) N. 2.

(e) **Arbitration Act (1940), S. 30(a) — Misconduct.**

Award can be set aside on ground that arbitrator improperly rejected to receive evidence. The evidence must be tendered to the arbitrator and it is not his duty 'suo motu' to fix a date for evidence. **(Para 7)**

Anno. Arbitration Act, S. 30 N. 10.

A. R. Somanatha Iyer, for Appellants; B. Shankara Rao, for Respondent.

CASES REFERRED: Paras

(A) (V38) AIR 1951 SC 9 (Pr 9): 1950 SCR 792 (SC) 4

(B) (1916) 1916-2 Ch 86 (101, 102): 84 LJ CH 865 6

(C) (V39) AIR 1952 SC 119 (Pr 4): 1952 SCJ 156 6

(D) (V13) AIR 1926 Lah 584 (585): 96 Ind Cas 108 7

(E) ('12) 13 Ind Cas 161 (165) (Cal) 7

MALLAPPA J.:

In these three appeals the respondents are Contractors who entered into contracts with the Military Department for the construction of what are known as "Hutted Ancillaries" on a lump sum basis. Letters dated 27-4-43 were addressed to

them enclosing the tender documents and they were instructed to submit their tenders within 11 A. M. on 1-8-43. In para. 2(b) of the letter marked Ext. A the attention of the contractors was drawn to the fact that

"the Plinth areas inserted in Col. 15 of Sch. B, are rounded off to the nearest foot"

and that it should be understood that the amounts mentioned in Col. 19 against each item (except in the case of provincial items) are fixed amounts and shall not be varied and that the percentage tendered will be deemed to be above or below these amounts. While there is hardly any doubt that the contracts were therefore on a lump sum basis it will be noticed that in Sch. D in which the rates for pricing variations and additions are mentioned, it was stated that it was a list of items rates of the same standard of values as the Plinth area rates, entered in 'Sch. B' and shall be used for pricing variations and additions.

(2) The contention of the contractors is that the above statement in Sch. D led them to think that the lump sums mentioned in Ext. B had been worked out on that basis and that they are therefore entitled to claim money for the work done on that basis and not on the basis of their lump sum tender. It was also contended that there was an arithmetical error of Rs. 10,000/- in Schedule B and that they were entitled to get this corrected. The contention of the Government was that if there were any mistakes in Sch. B they were immaterial as the contract was clearly on lump sum basis. Moreover, the contractors had signed the final bills as well as no-claim certificates and they cannot reopen the question over again.

(3) When differences arose, the Government proposed to refer the matter to an Arbitrator as had been agreed to under Clause 35 of the contract. Apart from the two points referred to above, the Government contended that lorries had been supplied to the contractors at a low rate of Rs. 7-8-0 per lorry per day as per the instructions of the Commander Royal Engineers, but that the rate of hire per lorry per day should have been Rs. 45/- and the rate of Rs. 7-8-0 was wrong, unauthorised, and not binding on the Government. The contractors however felt that these differences were not matters that came under the arbitration clause, but both parties submitted the points of difference to an arbitrator, the contractors, raising before him the question of jurisdiction also. The award was:

"That schedule B prices and the total amount shall not be altered and that the contractor shall not be compensated; and that the rate fixed by C. R. E for hire of Military Transport is binding and that the Government have no claim against the contractor in this respect".

Petitions were therefore filed against the respondents under Section 14 (2), Arbitration Act. On the other hand the contractors filed petitions for setting aside the award, stating the facts of their case and contending that Clause 35 of the contract under which the matter was referred to arbitration did not apply to the case; that the arbitrator should have taken evidence before giving the award, that the award is liable to be set aside for judicial misconduct since the Arbitrator has deliberately and intentionally misinterpreted the law and that the award is not based on any evidence.

On the other hand it was contended by the Government that if the contractors wanted to adduce evidence they should have tendered the evidence and that no request was made for examining any witness. The allegations made by the contractors in para 13 of their affidavits about the arbitrator having ascertained what exact relief they wanted are denied and even otherwise one can see nothing wrong in the arbitrator having ascertained this.

(4) After stating the cases of the parties at some length, the learned Judge of the lower court has held:

"The defence of the Government before the arbitrator to the effect that the rates given in Schedule D are intended mainly for the pricing of work done by the contractors under Clause 25 of the conditions of the contract and that the purpose of Schedule B is to give the contractors an idea of the approximate price the Government proposed to pay for the work for which tenders were invited, cannot be sustained in the light of para 2 (b) of Ext. A, Cl. 3 of Ext. D and the statement in Schedule D to the effect that it is the list of the item rates of the same standard of values as the plinth area rates entered in Schedule B and shall be used for pricing variations and additions as per clause 3 of the special conditions of the contract".

The learned Judge has examined the correctness of the findings of the arbitrator, as if he was sitting in appeal over his findings. This is rightly objected to by the appellants. As observed in — 'Mair A. M. & Co. v. Gordhan Das Sagarmull', A. I. R. 1951 S. C. 9 (A):

"Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute".

(5) Even otherwise there is a good deal of substance in the contention on behalf of the Government that in para 2 (b) and the letter Ext. A it was made clear that the amount mentioned in Col. 19 in Schedule B against each item — except in the case of provincial items are fixed amounts and shall not be varied and that the percentage tendered will be deemed to be above or below these amounts, and that it must be taken that so far as these items are concerned the contract must be taken as being on a lump sum basis. Similarly it will be noticed that Sch. D makes it clear that the rates mentioned in it shall be used for pricing variations and additions.

The contention that, if at all, there was any assurance that the rates mentioned in Schedule D are of the same standard of values as those mentioned in Schedule B, the assurance can be taken advantage of in pricing variations and additions in respect of which the contract was not on a lump sum basis, but not the contract on the basis of Schedule B on a lump sum basis, is not also without substance (sic). There is therefore much that could be said in favour of the view taken by the Arbitrator in preference to that of the learned Judge of the lower court. What, however, the learned Judge of the lower court in cases of this kind should have more profitably examined was whether any case is made out under S. 30, Arbitration Act to set aside the awards.

(6) Under S. 30, Arbitration Act:

"An award shall not be set aside except on one or more of the following grounds namely:—

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under S. 35;

(c) that an award has been improperly procured or is otherwise invalid".

The award for instance can be set aside on the ground of corruption of the arbitrator or where the Arbitrator has secret interest with the subject matter of the submission. It is no doubt true that the arbitrator in this case is a military officer and in that sense interested in the contract. But when it was agreed that the differences have to be settled by an arbitrator who is a military officer, it cannot be said that the arbitrator had any secret interest in the subject matter of the submission or in any of the parties. In cases of this kind, as observed by Lord Justice Phillimore in — 'Smith Coney & Barett v. Becker Gray & Co.', 1916-2 Ch. 86 (B):

"In all probability the members of the Tribunal would be if not directly, indirectly, interested in the sense that it might affect other contracts in so far reaching a decision as there may be in this case, but it cannot be helped. The parties have agreed that it should be a condition precedent that there shall be such a tribunal and they must go before the arbitral tribunal, and it is not open to the plaintiffs to take advantage of the fact that third parties whose fiat is necessary are interested".

We may add here that in this case no objection was taken for submitting the differences to the particular arbitrator who has given the award, and in fact during the course of arguments it was made clear that no objection is being taken to this person having acted as arbitrator. What has, however, been seriously contended is that the disputes between the parties are not such as coming within the scope of any of the clauses of the contract between the parties under which the reference was made. There can hardly be any doubt that the arbitrator would be acting without jurisdiction in cases in which parties had not agreed that the matters in dispute should be decided by an arbitrator. In this case, however, Clause 35 of the contract states:

"All other disputes and differences the settlement of which is not provided for under any other clause of this contract and which shall arise either during the progress of the work or after completion thereof concerning the work or the execution or maintenance thereof or the construction or meaning of these conditions of contract or as to any other matter arising out of or relating to the contract or the work to be executed or payments to be made in pursuance thereof shall be referred to the arbitration".

The disputes between the parties are clearly with reference to the payments to be made in pursuance of the contract, and it is equally clear that the matter has been agreed to be settled by arbitration. What is however contended is that Clause 18 of the Contract provides for rectification of errors, omissions or wrong estimates discovered in the Bills of Quantities, and as such the dispute between the parties is covered under this Clause of the contract. Therefore, the dispute between the parties is whether Clause 18 excludes Clause 35 of the Contract, and Clause 35 which refers to cases other than those provided in other clauses is not applicable. This is a case in which the parties are at variance in respect of "the matter arising out of, or relating to the contract" referred to in Clause 35. We may here refer to the decision reported in — 'Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar', A. I. R. 1952 SC 119 (C) that:

"Where one party relying on the arbitration clause in a policy of insurance says that there has been a breach of its terms and the other party, also relying on that clause, says that there has been no breach but on the other hand the requirements of that clause have been fulfilled, the point in dispute between the parties is one for the decision of which the former is compelled to invoke to his aid one of the terms of the insurance agreement and so the difference between the parties is a difference 'arising out of the policy' within the meaning of the arbitration clause and the arbitrator has jurisdiction to decide it".

Moreover, even if it is assumed that Clause 18 of the contract is applicable to this case, all that could be said is that the party affected is entitled to certain rectification. It is not stated there how the party affected should obtain relief if differences arose between them. Clause 18 is not the clause which provides for the settlement of disputes and differences. Clause 35 is therefore clearly applicable and the parties were bound to refer to arbitration the claim of one of them for rectification under Clause 18. Since the parties have referred their disputes to arbitration without any objection, other than the untenable objection that the dispute is not one that comes under Clause 35, it cannot be said that the award is liable to be set aside on this ground either.

(7) However, the award could also be set aside on the ground that the arbitrator improperly rejected to receive evidence, and it is contended in this case that evidence has not been allowed to be let in. It must however be stated that it is not made out, as has been contended by the Government, that the contractors offered to let in evidence and still less they tendered any evidence. As observed by Jai Lal J, in the case reported in — 'Ganga Sahi v. Karim Bakhsh', A. I. R. 1926 Lah 584 (D) that:

"It is not the duty of the Court 'suo motu' to fix a date for evidence in support of the objections to an award filed in Court. It is for the parties to move the Court if they want to produce evidence".

This observation is no doubt with reference to the duty of the Court. But it is equally applicable to the case of an arbitrator. As observed in — 'Manindra Nath v. Mohanunda Roy', 13 Ind Cas 161 (Cal) (E), in order to make out a case entitling a party to impeach an award on the ground that the arbitrators improperly refused to take the evidence of an important witness, the witness must be distinctly tendered to the arbitrator.

(8) One other contention that appears to have been raised before the lower court is that the award could also be set aside on the ground that it is based on materials not placed before him. But the findings of the arbitrator are supported, as already observed, by what is stated in Ext. A and Schedules B and D. There is no substance in this contention also. It has not been shown that there has been any judicial misconduct of the arbitrator and that he deliberately and intentionally misinterpreted the law. The learned District Judge was not therefore right in setting aside the award. The appeals are allowed with costs, the awards are ordered to be filed in court and there shall be decrees in accordance with the terms of the awards. Advocate's fee Rs. 25/- in each case.

B/V.R.B. Appeals allowed.

A.I.R. 1954 MYSORE 49 (Vol. 41, C.N. 23)

MEDAPA C. J. AND VASUDEVAMURTHY J.

D. Siddaiah and another, Appellants v. S. Rudrappa and another, Respondents.

Misc. Appeals Nos. 33 and 34 of 1953, D/- 11-8-1953, against orders of Election Commr., Chitaldrug, D/- 27-4-1953 and 24-4-1953.

(a) Municipalities — Mysore Town Municipalities Act (8 of 1933), S. 20 — Period prescribed expiring on day when Courts are closed — (Limitation Act (1908), S. 4) — (General Clauses Act (1897), S. 10).

If a Subordinate Judge is appointed Election Commissioner he can be deemed to be a Court for the purpose of S. 4, Limitation Act and, therefore, if the time prescribed by S. 20 expires on a day when the Civil Courts are closed an election petition can be filed on the day the Courts re-open. At any rate, S. 10, General Clauses Act will operate to save petition from being barred by time. 3 Mys LJ 253; 8 Mys LJ 281 and 13 Mys LJ 116, Disting. (Para 3)

Anno: Limitation Act, S. 4 N. 6b; General Clauses Act, S. 10, N. 3.

(b) Municipalities — Mysore Town Municipalities Act (8 of 1933), Ss. 13 and 208(2)(b) — Rules under — R. 5 — Contents of Electoral Roll cannot be questioned before Election Commissioner.

The policy of the Legislature and the rule making authority in framing the Act and the Rules thereunder as well as the entire scheme of elections is clearly opposed to allowing questions being raised before the Election Commissioner with regard to the contents of the Electoral Roll. The Election Commissioner is, therefore, wrong in going into the question of the age of the voters and reversing the result of the election on the basis of his finding on that point. Case law discussed. (Paras 5 and 8)

V. Krishnamurthy, for Appellants; Nittoor Srinivasa Rao, for Respondents.

CASES REFERRED: Paras

(A) 3 Mys LJ 253 2

(B) 8 Mys LJ 281 2

(C) ('34) 13 Mys LJ 116 (117, 118) 2

(D) (V17) AIR 1930 PC 54 (55): 54 Bom 216 (PC) 4

(E) (V15) AIR 1928 Mad 1077 (1081): 115 Ind Cas 59 4, 7

(F) ('46-47) Misc A No 46 of 1946-47 (Mys) 5, 7

(G) (1901) 5 O'M & H 135 6, 7

(H) (1874) 9 LR CP 734 (750) 6, 7

VASUDEVAMURTHY J.:

These two appeals arise out of two orders passed by the Subordinate Judge, Chitaldrug who is the Election Commissioner for the area concerned. On applications filed before him, by the Respondents in these two appeals, he set aside the declaration of the Returning Officer whereby the Appellants had been declared duly elected to the Nayakanahatti Town Municipal Council from the first and eleventh division respectively. The difference between them and the Respondents was only one vote in the first case and four votes in the second. In the applications before the Election Commissioner the Respondents complained that this difference represented the votes of certain persons who were not qualified to vote under S. 12 of the Mysore Town Municipalities Act, which governs the elections.

Under that section the voters must have attained the age of 21 years in the official year preceding that in which the election roll is published before they can have their names included in the voters list. The Election Commissioner found that 4 voters in one case and one voter in the other were less than 21 years of age at the relevant time and that if those votes were excluded from computation, the Appellant in Mis. A. No. 34/1953 would fail as the Respondent would be found to have one vote in excess. In M.s. A. No. 33/1953 he found that they would be polling an equal number of votes. He therefore drew lots and declared the Respondent in that appeal as having succeeded as a result of such drawing.

(2) It is contended by Mr. Krishnamurthi, learned Counsel for the Appellants that the applications challenging the election were made in these cases after the expiry of 10 days provided in S. 20, Mysore Town Municipalities Act. The result of the election was declared on 23-3-1952 and the applications were filed on 12-5-1952 when the Civil Courts in the State were reopened after the summer vacation which commenced that year on 1-4-1952. The Election Commissioner has found that the applications were saved from the bar of limitation on account of S. 4, Limitation Act.

It is urged by Mr. Krishnamurthi that the learned Election Commissioner was really a 'persona designata' though it happens that he is a Subordinate Judge in a Civil Court and that as in the present case he happens also to be the First Class Magistrate of the station and was present in that area during the concerned period, the Respondents could not say that they could not have presented their applications to him within time. He has relied on — '3 Mys LJ 253 (A)'; — '8 Mys. LJ 281 (B)'; — 'Abdul Azeez v. Basheer Ahmed', 13 Mys LJ 116 (C)', where no doubt it has been held that the Election Commissioner was a 'persona designata' for the purpose of determining the elections concerned under Municipal Acts. Those cases were, however, concerned with the question whether appeals or revisions lay to this Court in accordance with the Code of Civil Procedure from his orders. Those cases cannot obviously have much bearing on the question before us.

(3) Section 4, Limitation Act provides that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed the same may be made on the day when the Court re-opens. 'Prima facie' no doubt the reference is to a Court & whether the Election Commissioner is a Court is a matter for consideration. If the Subordinate Judge of the concerned area has been appointed Election Commissioner it is difficult to see why he should not be deemed a Court for that purpose. It is provided by the same section that the Code of Civil Procedure shall as far as possible be followed in the enquiries before him.

It is not disputed that there was no office of the Election Commissioner as such open at the concerned time for such applications being lodged. The applications were to be accompanied by a deposit of Rs. 50/- and there was no arrangement made for the receipt of that money by him or in his office during the period of the summer vacation. Moreover under S. 10, General Clauses Act where any act or proceeding is directed or allowed to be done or taken in any Court or 'office' on a certain day or within a prescribed period, then, if the Court or 'office' is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done

or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. We think that that section if not S. 4. Limitation Act clearly operates to save the present applications from being barred by time and we agree with the learned Subordinate Judge that they were in time.

(4) Mr. Krishnamurthi next contends that the learned Election Commissioner was not justified in going behind the entry in the Electoral Roll and examining the eligibility of the person included therein to vote on the basis of the age mentioned therein. Under Rule 5 of the Mysore Town Municipal Election Rules framed under S. 13(1) and S. 208 (2) (b), Mysore Town Municipalities Act the Electoral Roll shall contain the 'age' of each elector in addition to other qualifications such as his name, the name of his or her father or husband as the case may be, the sex of the elector and the number of the house at which he resides. Elaborate provisions are contained in clauses 6 to 9 for the publication of the preliminary Electoral Roll, the lodging of claims and objections and to the enquiry into them by the Returning Officer & his amending the Electoral Roll in accordance with his decision.

Under R. 10 the orders passed by the Returning Officer under Rr. 8 and 9 are declared to be final and the final Electoral Roll is to be published under R. 11. Under S. 13(2), Mysore Town Municipalities Act at every election of Councillors every person enrolled in the Municipal Electoral Roll as for the time being in operation under sub-s. (1) shall be deemed to be entitled to vote and every person not so enrolled shall be deemed to be not entitled to vote. Mr. Krishnamurthi has referred to a case in — 'Commr. of Income Tax, Bombay v. Bombay Trust Corporation Ltd.', AIR 1930 PC 54 (D), where interpreting the words "deemed to be" in the Indian Income-tax Act their Lordships of the Privy Council have observed that where a person is "deemed to be" something the only meaning possible is that whereas he is not in reality that something, an act of Parliament requires him to be treated as if he were. The Appellant is also supported in his contention by a case reported in — 'Vaidyanatha Thevar v. Murugiahan Chettiar', AIR 1928 Mad 1077 (E).

In that case which related to an election under the Madras Local Boards Act it was pointed out by Devadoss J. that the question whether a person was a member entitled to vote or not was to be determined by proper proceedings under S. 57. When that course was not adopted, it was not open to a Court which holds an election enquiry to go into the question which might and ought to have been determined before a different forum. Section 57 prescribed the forum for the determination of such question and in the absence of an enquiry under that section the Court which holds an election enquiry must accept the persons who act as members.

He has further pointed out that the object of the election rules both under the District Municipalities Act as well as under the Local Boards Act was to avoid a defeated candidate from raising questions as to the qualifications of voters whose names were on the roll of voters and the Court was not permitted to embark upon an enquiry on questions which could have been and ought to have been decided before the final electoral roll was prepared. He thought that it was opposed to all principles to allow one of the candidates to raise an objection to the qualifications of the members when he could have done so before and it was nothing but putting a premium upon pettifogging to allow a defeated candidate to raise such an objection when he finds that the members whose qualification he could have questioned before but whom he expected to vote for him did not vote for him but for the other candidate. We are entirely in agreement with those observations.

(5) We think the policy of the Legislature and the rule making authority in framing the Act and the Rules thereunder as well as the entire scheme of elections is clearly opposed to allowing questions being raised before the Election Commissioner with regard to such contents of the Electoral Roll. If it is permitted the Election Commissioner would have to hold an elaborate enquiry, by examining witnesses and adopting the procedure prescribed by the Code of Civil Procedure, about the name of the elector or his father or his sex or age or even the number of the house in which he resides. That could never have been the intention of the Legislature and there is nothing either in the Act or in the Rules which compels us to adopt such a course. In this Court a similar view has been taken in — 'Mis. A. No. 46 of 1946-47 (F).

In that case the Court was dealing with elections to the Representative Assembly and one of the questions that arose for consideration was whether it was open to the Election Commissioner to go behind the electoral roll & ascertain whether the appellant had the necessary property qualification to be a voter in order to find out whether the notice of candidature of the appellant had been properly accepted. It was held that it was not open to the Returning Officer or the Election Commissioner to do so. Their Lordships were considering in that case R. 9, Representative Assembly Rules which provided that there shall be an electoral roll for every constituency and that no person who is not, and, except as expressly provided by these rules, every person who is, for the time being included in the electoral roll for any such constituency shall be entitled to vote in that constituency; and subr. (2) of R. 76 which made the decision of the Revising Authority final. They also considered in that connection a case reported in 'Hammond's Election Cases for India and Burma at page 165 (Bhagalpur North case)' and quoted with approval an observation in that case that

> "if in the opinion of the Commissioner the result of the election has been materially affected by any non-compliance with the provisions of the Act or the rules and regulations made thereunder, the election of the returned candidate shall be void. But the jurisdiction thereby granted is necessarily limited by the definite provisions of R. 9(3) regarding the finality of the order of the revising officer, and we are satisfied that under this rule we are precluded from enquiring into the question of the respondent's possession of the necessary qualifications as a voter. We are confirmed in this view by the conviction that the Legislature cannot have contemplated the provision of the cumbrous and elaborate procedure of an election commission to determine simple questions of fact concerning the possession of such qualifications."

In the light of the interpretation of the words "deemed to be" by the Privy Council and the wording of S. 13(2), Mysore Town Municipalities Act, the case for the Appellant is, in our opinion, even much stronger than in that case.

(6) Mr. Nittoor Sreenivasa Rao has referred to a passage at page 33 in Nanak Chand Pandit's Law of Elections and Election Petitions in India,

1951 Edn., where reference is made to — 'Nawab Sir K. G. M. Faroqui v. M. Habibulla Bahar Chaudhury and others', a case connected with the Bengal Legislative Assembly Constituency. In that case it seems to have been held, distinguishing an earlier case, that the Election Tribunal can go behind the Electoral Roll to ascertain the possession of the actual qualifications by a candidate for entry on the Roll, but the Returning Officer cannot go behind the Electoral Roll.

Further on, it is stated that in the Hooghly North-East General Rural Constituency, 1946, — 'Mohan Lal Mandai v. Radhanath Das and others', the Tribunal tried to distinguish the 'Bengal Legislative Assembly 1944 case' referred to above and held that the Election Tribunal has no jurisdiction to go behind the Electoral Roll where the disqualification of the voter is not of a personal nature. The members of that Tribunal relied on two English Cases, viz. — 'Pembroke Borough case', (1901) 5 O'M & H 135 (G) and — 'Stowe v. Jolliffe', (1874) 9 L R C P 734 (H). The author has then stated as his conclusion that the correct view is as stated above that the Election Court is entitled to find out whether the statutory disqualifications which bar a person from standing as a candidate from any of the Legislatures exist in a particular case or not.

(7) In — 'Stowe v. Jolliffe (H)', it has been held that the electoral roll is conclusive not only on the Returning Officer but also on every tribunal which has to enquire into elections, except only in the case of persons prohibited from voting by any statute or by the common law of parliament, i.e., persons who from some inherent or for the time, irremovable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors, such as peers, women, persons holding certain offices or employment under the Crown, persons convicted of crimes which disqualify or the like. This case has been followed in — 'Pembroke Boroughs Case (G)', where Darling J. has observed at pages 137 and 138:

> "And when you say that the Register is conclusive.....what you mean is this, that it is conclusive that the people who are on it have the qualification which entitles them to be there."

The views of this Court in — 'Mis. A. No. 46 of 1946-47 (F)' and of Devadoss J. in — 'AIR 1928 Mad 1077 (E)' are to the same effect.

(8) In the light of this discussion the learned Election Commissioner was, in our opinion, wrong in going into the question of the age of the voters and reversing the result of the election on the basis of his finding on that point. We, therefore, allow these appeals, set aside the orders of the Election Commissioner and declare that the Appellants were duly elected. The Appellants will have their costs from the respondents both here and in the Court below (Advocate's fee in this Court Rs. 25/- in each case).

B/V.R.B. Appeals allowed.

A.I.R. 1954 MYSORE 51 (Vol. 41, C.N. 24)

VENKATA RAMAIYA AND BALA-KRISHNAIYA JJ.

Deputy Commr. of Sales Tax, Bangalore, Petitioner v. Dharmaprakasha S. V. Sreenivasa Setty and others, Respondents.

Civil Petns. Nos. 64 and 73 of 1952-53 and 28 of 1953. D/- 10-9-1953.

Sales Tax — Mysore Sales Tax Act (1948), Ss. 6 and 3 — Exemption of silk from tax by notification — Artificial silk held not exempted — (Words and Phrases — "Artificial silk.")

'Prima facie', 'artificial' denotes what is not genuine or not real and the ordinary rule of construction is to give the word the meaning generally attached to it. To hold that artificial silk is silk would therefore be tantamount to treating the unreal as real. 'Silk' when qualified by the word 'artificial' indicates something which has its appearance and sheen, just as what is called German silver or chemical diamond in popular parlance signify the colour and lustre of these and not the contents thereof. The fact that it passes off as pure silk sometimes in the market and has sometimes escaped assessment is not a good reason to ignore the difference between the two. (Para 3)

The notification under S. 6 was as follows. "In exercise of powers conferred by S. 6, Mysore Sales Tax Act, 1948 the Government of His Highness the Maharaja is pleased to direct that (1) the sale of Filature Silk, Foreign Silk and Charka Silk twisted by hand, shall be exempt from taxation under sub-s. (1) of S. 3 of the said Act." The question was whether the artificial silk manufactured in foreign countries and imported into India, was exempt under the notification:

Held that Silk, be it 'Filature', 'Foreign' or 'Charka' as termed in the notification must be taken to have reference to the thread produced by the silk-worm and not to what is silk-like. The notification therefore was not applicable to artificial silk. (Para 3)

A. R. Somnath Iyer, Advocate-General, for Petitioner (in Nos. 64, 73 and 28); V. Krishna Murthy (in Nos. 64 and 28) and S. Srikantaiya (in No. 73), for Respondents.

CASE REFERRED: Para
(A) (1884) 12 QBD 224 (229): 53 LJ QB 165 3

VENKATA RAMAIYA J.:

The Deputy Commissioner of Sales Tax, Bangalore, has under S. 16, Mysore Sales Tax Act referred the following question in C. P. 64 of 52-53:

> "Whether in respect of sale of artificial silk manufactured in foreign countries and imported to India, the petitioner is liable to pay Sales tax thereon after 19-11-1948 in view of Government notification No. F1. 4851-S. T. 1-48-26"

(2) Substantially the same question has been referred by him in C. P. No. 73 and by the Commissioner of Sales Tax in C. P. 28/53. Arguments were addressed in common on the footing that the answer to be given in each case has to be identical. The claim for exemption from liability in all the cases is based on the interpretation of the terms of Cl. (1) of the notification mentioned in the question. Clause (1) is as follows:

> "In exercise of the powers conferred by Section 6 of the Mysore Sales-tax Act, 1948 the Government of His Highness the Maharaja is pleased to direct that
> (1) the sale of Filature silk, Foreign silk and Charka silk twisted by hand, shall be exempt from taxation under sub-s. (1) of S. 3 of the said Act.
>
> Section 3 of the Act provides for levy of the tax and S. 6 for exemption or reduction in rate in respect of the tax by a notification of Government."

Of the three kinds of silk referred to therein, Charka silk and Filature silk may be left out as

artificial silk is not alleged to be either of these but is said to be 'Foreign Silk'.

(3) In support of this it was argued that if the word 'silk' is meant to denote only the fine, soft substance produced by silk worm to form their cocoons the expression 'Filature Silk' itself is wide enough to include local as well as foreign silk and therefore the terms 'Foreign Silk' would be superfluous unless it is deemed to have reference to artificial silk. The argument implies that all silk is either 'Filature Silk' or 'Charka Silk' and these are exhaustive descriptions of whatever is silk. Assuming this to be true it does not follow that what is not silk must be regarded as silk.

In — 'Hough v. Windus', (1884) 12 Q B D 224 at p. 229 (A), Lord Selborne expressed the view of the great masters of law to be

> "that nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous."

Prima facie, 'artificial' denotes what is not genuine or not real and the ordinary rule of construction is to give the word the meaning generally attached to it. To hold that artificial silk is silk would therefore be tantamount to treating the unreal as real. 'Silk' when qualified by the word 'artificial' indicates something which has its appearance and sheen, just as what is called German silver or chemical diamond in popular parlance signify the colour and lustre of these and not the contents thereof. It may be that artificial silk is treated as good as silk on grounds of economy by those to whom the softness by touch & glistening on sight are enough irrespective of the contents of the fabric. The fact that it passes off as pure silk sometimes in the market and has sometimes escaped assessment is not a good reason to ignore the difference between the two.

Silk, be it 'Filature', 'Foreign' or 'Charka' as termed in the notification must be taken to have reference to the thread produced by the silk-worm and not to what is silk-like. If anything which is not silk was intended to be exempted from taxation the notification should have made it clear as has been done in some other provisions of the Sales Tax Act. In the absence of any such provision and having regard to the sense in which the expression "Artificial silk" is understood, it is difficult to accept the petitioners' contention.

No other point is raised and since the petitioners conceded that if the notification is held to be inapplicable to 'artificial silk' the answer to the questions formulated has to be in the affirmative against the petitioner in each case to the effect that they are liable to pay the tax notwithstanding the notification. Advocate's fee payable to Government in each reference is fixed at Rs. 50/- as arguments were common to all.

B/R.G.D. Answer in affirmative.

A.I.R. 1954 MYSORE 52 (Vol. 41, C.N. 25)

VENKATA RAMAIYA AND MALLAPPA JJ.

Muniappa and others, Petitioners v. Subrahmanyaswaraswami Bank by its Liquidator Venkatachaliah and others, Respondents.

Civil Revn. Petn. No. 438 of 1951-52, D/- 27-2-53, against decision of Dist. J., Bangalore in R. A. No. 351 of 1946-47.

(a) Provincial Insolvency Act (1920), Ss. 43 and 37 — Annulment — Effect on vesting.

If no vesting order is made at the time of annulling an adjudication under S. 43, any property of the insolvent which may have vested in the Receiver reverts to the debtor automatically and the Court cannot thereafter divest the debtor of the property and revest it in another person. 47 Mys 242 (FB), Rel. on. (Para 2)

Anno: Provincial Insolvency Act, S. 43 N. 6; S. 37 N. 5.

(b) Provincial Insolvency Act (1920), Ss. 17 and 37 — Death of insolvent — Court not passing any order for realization of property — Properties revert to debtor. (Para 3)

Anno: Prov. Ins. Act, S. 17 N. 1; S. 37 N. 5.

C. K. Narayana Rao, for Petitioners; M. P. Somasekhara Rao, for Respondents.

CASE REFERRED:
(A) 47 Mys 242 (FB) (Pr 2)

VENKATA RAMAIYA J.:

This is an application for revision of an order under the Insolvency Act passed by the learned District Judge setting aside the dismissal of two petitions I. A. Nos. IV and V in I. C. 9/36-37 of Chickballapur Munsiff's Court. That case arose on a petition by two creditors for their debtor Settappa and his two sons being adjudged insolvents. The petition was dismissed as against the sons but Settappa was adjudged insolvent on 3-9-40 fixing a period of 6 months for discharge. The creditors had to prove the debts due to them by 25-10-40 but only on 14-12-45 affidavits were filed by petitioners as regards the amounts due to them. An order for the Receiver taking possession of the insolvent's properties was passed on 7-3-41 but this was recalled on 9-11-45 by stating that "the vesting order is returned". Later this adjudication itself was annulled on 21-12-45 and subsequently the two applications I. As. IV and V were filed for the administration of the properties. The learned Munsiff dismissed these but on appeal the learned District Judge has set aside the dismissal. The correctness of the appellate order is now in question.

(2) As it is conceded that I. A. Nos. IV and V were both filed sometime after the order of annulment was passed, and no order for vesting the properties in any one was passed at the time of annulment, the properties must be deemed to be not subject to the directions of the Court.

According to the decision of the Full Bench in — '47 Mys. 242 (A)'

> "If no vesting order is made at the time of annulling an adjudication under S. 43 any property of the insolvent which may have vested in the Receiver reverts to the debtor automatically and the Court cannot thereafter divest the debtor of the property and revest it in another person."

Considering the dates I. As. IV and V are untenable as the properties had by that time reverted to the debtor.

To get over this result it is alleged that the insolvent Settappa was dead prior to the annulment and therefore the order of annulment is void. The learned Judge has set aside the order of annulment on this ground. The petitioners in these applications did not ask for the annulment being cancelled & did not allege that owing to the death of the insolvent at the time of annulment this order was defective. Though there is reference to the death in these and some other records, the date of death is not clear. Fact of death, if it be a fact cannot be now put forward

to treat the annulment as a nullity and the properties as being still in the hands of the Court.

(3) Further S. 17 relied on by petitioners themselves states

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders be continued so far as may be necessary for the realisation or distribution of the property of the debtor."

Death of the insolvent is not therefore a bar to the Court making orders if it deems fit for realisation of the property. When the Court does not pass any orders in this behalf the properties revert to the debtor under S. 37.

(4) In this view the order of the learned District Judge is set aside and I. As. IV and V are both dismissed. Parties will bear their own costs.

B/R.G.D. Order set aside.

A.I.R. 1954 MYSORE 53 (Vol. 41, C.N. 26)

VENKATA RAMAIYA AND MALLAPPA JJ.

In re Thipperudrappa and another, Accused, Appellants.

Criminal Appeal No. 30 of 1952-53, D/- 30-7-1953.

Penal Code (1860), Ss. 34, 323, 325, 326 — Applicability.

If a person received more than one injury inflicted by two persons, but there is only one injury which amounts to grievous hurt and it is not possible to say which of the two accused committed the injury which amounts to grievous hurt, none of the accused can be convicted for any offence other than simple hurt, unless there is material to show that the grievous hurt was caused in furtherance of a common intention to inflict an injury of that kind. Case law Rel. on. (Para 5)

Anno: Penal Code, S. 34 N. 1, 8; S. 323 N. 5; S. 325 N. 3; S. 326 N. 1.

V. Krishnamurthy, (for No. 1) and M. Sadanandaswamy, (for No. 2), for Appellants; Advocate-General, for the Govt.

CASES REFERRED: Paras

(A) ('07) 29 All 282: 5 Cri LJ 130 2
(B) (V14) AIR 1927 Lah 831: 28 Cri LJ 58 2
(C) (V29) AIR 1942 All 400: 44 Cri LJ 110 2
(D) (V28) AIR 1941 Mad 746: 42 Cri LJ 638 2
(E) (V29) AIR 1942 Cal 426 (2): 43 Cri LJ 455 2
(F) ('87) 1887 All WN 236 3
(G) ('66) Beng LR Sup Vol 443 3

VENKATA RAMAIYA J.:

The two appellants have been convicted under section 326 and sentenced to undergo R. I. for 8 years and 6 years respectively. The facts which may be taken to be established by the evidence are that one Kotrappa was beaten in a field near the village Chickamadapura, Challakere Taluk, on the morning of 13-1-1952, moved to the village in a cart within a short time and expired about an hour or two later. In Exhibit P-9 the earliest report of the occurrence the accused are mentioned to be the assailants and this is supported by the evidence of P. W. 14. The direct evidence to show that it is the accused who assaulted Kotrappa is only that of P. W. 14. P. Ws. have said that Kotrappa himself when questioned about the injuries shortly before his death attributed these to beating by accused.

One of the witnesses says that the accused were running on the road near the place where Kotrappa was lying injured. From the medical certificate Exhibit P-6 it is seen that accused 1 sustained small injuries on the same day and not improbably while hitting Kotrappa. The learned trial Judge has believed the evidence of P. W. 14 and in the light of other facts referred to, we do not see any ground to disagree with the finding that the accused assaulted Kotrappa.

(2) The determination of the offences of which the accused can be properly convicted is a point of some difficulty. The charge framed by the Magistrate mentioned it as one under Section 302, I. P. C. This was made subject to S. 34, I. P. C. by the amendment in the Court of Session. The learned Judge did not consider the materials to be sufficient to justify a conviction for murder but adequate for conviction under S. 326, I. P. C. which relates to causing grievous hurt with a deadly weapon. Existence of common intention to assault Kotrappa which is necessary for application of S. 34, I. P. C. may be inferred from the acts of the accused in jointly attacking him. This is not by itself enough to render them guilty of the offences under S. 326 and the fact that Kotrappa subsequently died cannot necessarily imply a common intention to cause death. There is absolutely no proof of any motive for the assault, of what led to it and of the part played by each in the incident.

Of the injuries caused to Kotrappa only the first which is a fracture of the skull is serious and such as is likely to cause death in the opinion of the doctor. But for this injury the person may not have died. The evidence does not show who as between the two accused caused this injury. It may be that the common intention was only to give an ordinary beating as indicated by the other injuries and one of the accused suddenly in rage or excitement struck the man on the head. There are cases in which under such circumstances, the accused are convicted under S. 325, I. P. C. —'See Emperor v. Bhola Singh', 29 All. 282 (A)', —'Lal v. Emperor', AIR 1927 Lah 831 (B)' &—'Nathu v. Emperor', AIR 1942 All. 400 (C). The important factor to be noticed is that the weapons used were cutting instruments or daggers in these cases. In —'In re Nachal', AIR 1941 Mad 746 (D), and —'Emperor v. Keamatali Sheikh', AIR 1942 Cal 426 (2) (E), notwithstanding the occurrence of death due to the beating, the assailants were convicted under S. 323 on the view that intention to cause death or grievous hurt is not made out.

The present case is of this kind as only sticks are said to have been used for the purpose of beating. The sticks may have been thick or thin, hard or soft as the eye-witness does not give any information about these and the sticks are not produced in the case. In view of all this, the offence of which the accused can be properly convicted is that of voluntarily causing hurt punishable under S. 323, I. P. C. The accused are said to have been in detention during the trial and undergone imprisonment for a few days before they were released on bail. The convictions of the appellants under S. 326, I. P. C. are altered to those under S. 323, I. P. C. and the sentence of imprisonment is reduced to the period already undergone.

MALLAPPA J.:

(3) I entirely agree. It has to be observed that the lower Courts often commit, in interpreting S. 34 I. P. C., the mistake committed in this case. If, apart from the person who actually causes an injury, other persons are present at the time the

injury is caused, it does not necessarily follow that they are also guilty of the offence. Before they could be convicted under S. 34, I. P. C. of an offence committed by another, it must be proved in the first place that they and he had the common intention of causing the injury and in the second place the act was committed in furtherance of the common intention. As observed by Mahmood J. in — 'Empress v. Dharam Rai', 1887 All W N 236 (F):

"This section was the subject of consideration impliedly in the case of — 'Queen v. Gorachand Gope', Beng LR Sup Vol p. 443 (G). At p. 456 Sir Barnes Peacock clearly laid down the rule of law that mere presence of persons at the scene of an offence is not, 'ipso facto', sufficient to render them liable to any rule such as S. 34, enunciates, and that 'the furtherance of a common design' was an essential condition before such a rule applied to the case of an individual person. It was probably in consequence of this expression of view from such a high authority that the Legislature by S. 1 of Act 27 of 1870, repealed the original S. 34; and in substituting another section therefor, inserted the important words 'in furtherance of the common intention of all' as representing the condition precedent to each of such persons being held liable for the crime in the same manner as if it were committed by him alone.

This change in the law is very significant, and it indicated to my mind that the original section having been found to be somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act. We have the opinion of an American Jurist on the point, whom Mr. Mayne, in his Commentary on the Indian Penal Code, quotes (Bishop, S. 439), where that learned author, laying down the rule, goes on to say: 'But if the wrong done was a fresh and independent wrong springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong'. This seems to me to be the right interpretation of the words 'in furtherance of the common intention of all' as they occur in S. 34, Indian Penal Code."

(4) The common intention may be proved by showing that there was a pre-arranged plan. It may not always be possible to get direct evidence of such a plan. The common intention may have to be gathered from the act or conduct of the person or persons present and other circumstances. But it must be possible from the evidence on record to infer that all the accused had the common intention of committing an act and that it was committed in furtherance of that common object.

(5) Five kinds of cases may arise when persons are tried in respect of an act committed by one of them. First there may be single injury inflicted by one of the persons present, but there may be no evidence to show which of them inflicted the injury though it is clear that one of them did so. In a case of that kind unless there are materials for the Court to come to the conclusion that the persons present had the common intention to commit that act and that act was committed in furtherance of that common intention all of them have to be acquitted. Secondly there may be evidence to show that one of the accused committed the act and another person or persons were present when the act was committed. In such a case the person who committed the act can no doubt be convicted. But other person or persons can only be convicted if the evidence justifies the conclusion that they had the common intention of committing the act and it was committed in furtherance of that intention.

The third kind of case is where more than one person commit different offences. One might be guilty of causing a simple hurt, while another might be guilty of causing grievous hurt. In such a case also, while each of the accused can be convicted of the offence he actually committed, none of the accused can be convicted of the offence committed by another, unless it is shown that they had a common intention of committing the act and it was committed in furtherance of same. Fourthly, there may be cases in which a person receives numerous injuries inflicted by all the accused and as a cumulative effect of all the injuries caused by a number of persons the person dies, and not on account of any single injury. In such a case it may have to be inferred that the beating took place in furtherance of the common intention of causing the death of the person and the accused may be convicted of the offence of murder under S. 34, I. P. C.

Lastly, there may be cases in which more than one person take part in committing offences but it is not clear what particular offence was actually committed by each of them. For instance, if, as in this case, a person received more than one injury inflicted by two persons, but there is only one injury which amounts to grievous hurt and it is not possible to say which of the two accused committed the injury which amounts to grievous hurt, none of the accused can be convicted for any offence other than simple hurt, unless there is material to show that the grievous hurt was caused in furtherance of a common intention to inflict an injury of that kind.

(6) As pointed out by my learned brother in this case there is only one injury which caused the death of the unfortunate injured person, and it is not in evidence which of the accused caused that injury though it is in evidence that both the accused dealt blows with a stick. They can therefore be convicted only of an offence under S. 323, I. P. C.

B/D.H.Z. Order accordingly.

A.I.R. 1954 MYSORE 54 (Vol. 41, C.N. 27)

VENKATA RAMAIYA AND BALA-KRISHNAIYA JJ.

N. Sreenivasa Murthy, Judgment-debtor-Petitioner v. Sri Vyasarajendra Co-operative Bank Ltd., Decree-holder-Respondent.

Civil Revn. Petn. No. 318 of 1952-53, D/- 21-8-1953, against order of Judge, Sm. C. C., Bangalore, D/- 24-7-1952.

Mysore Co-operative Societies Act (3 of 1948), Ss. 65, 60, 72 — Retrospective operation — Execution of award — Starting time of limitation — Applicability of S. 48, Civil P. C. — (Limitation Act (1908), Art. 182) — (Civil P. C. (1908), Ss. 48 and 2(2)).

Section 65 is retrospective so as to make Art. 182, Limitation Act applicable to application for execution of awards of the Regis-

trar made under the prior repealed Act 7 of 1918.

Section 48, Civil P. C. is no doubt mentioned in Art. 182, Limitation Act but the restriction imposed by it affects only execution of decrees of a particular kind in Civil Court. The definition of "decree" does not include an award under the Co-operative Societies Act. The award acquires and is invested with the status of a decree only when a certificate is granted by the Registrar and execution proceedings in the Civil Court are not possible without the certificate. The award remains merely an award till the certificate is issued and proceedings other than those in the Civil Court are provided for to enforce it. Except to the extent allowed in the Act itself, the Civil Procedure Code or the Limitation Act cannot govern those proceedings. The certificate being the basis for the jurisdiction of the Civil Court, S. 48, Civil P. C. can be attracted only after it is granted and by virtue of the grant. it becomes a decree and not before. Where the first application for execution of the award is filed within three years from the grant of certificate and the later applications were all filed within the same time from one another and the last application is not beyond 12 years from the date of the certificate, the execution of the award is not barred by limitation. Case law Ref. (Para 2)

Anno: Lim. Act, Art. 182 N. 20, 25; C. P. C., S. 48 N. 10; S. 2(2) N. 5.

Gulur Sreenivasa Rao, for Petitioner; C. K. Narayana Rao, for Respondent.

CASES REFERRED: Paras

(A) 44 Mys HCR 528 2
(B) 47 Mys HCR 230 2
(C) (V26) AIR 1939 Mad 304 (304): 185 Ind Cas 230 2
(D) (V27) AIR 1940 Mad 635 (635): ILR (1940) Mad 649 2
(E) (V23) AIR 1936 Bom 396 (397): 165 Ind Cas 512 2
(F) (V34) AIR 1947 Bom 370: (Prs 11, 13): ILR (1947) Bom 44 2
(G) (V34) AIR 1947 Bom 375 (Pr 4): ILR (1947) Bom 143 2
(H) (V34) AIR 1947 Lah 269: (Prs 10, 12): 48 Pun LR 538 2
(I) (V14) AIR 1927 Cal 853 (854, 855): 55 Cal 499 2
(J) (V39) AIR 1952 Mys 127 (Prs 7, 8): ILR (1952) Mys 221 2

VENKATA RAMAIYA J.:

A question of limitation as regards the enforcement of an award passed under the Mysore Co-operative Societies Act, is raised in this case. As the point involved is considered to be of importance and the decision is likely to affect other proceedings the case has been referred to a Division Bench.

The award enforcement of which is objected to as being barred by time was passed on 17-12-1934. On a certificate issued by the Registrar under S. 43, Co-operative Societies Act on 24-11-1942 for execution of the Award in the Civil Court, Execution Case No. 1544 of 42-43 was filed in Hassan Munsiff's Court on 24-5-1943 against the petitioner. No money was realised and the case was dismissed on 4-2-1944. Subsequently on a second certificate dated 25-5-1946 by the Registrar, Execution No. 1470/45-46 was filed in the Court of Small Causes, Bangalore. The petitioner objected to the execution but the objections were overruled in an order of 16-1-1947. Against this order he filed C. R. P. 341 of 1946-47 in this Court. During the pendency of the Revision Petition, there was a compromise as per rajinama filed on 4-12-1947 and the revision petition was dismissed on 5-1-1948. The amount payable according to the rajinama not having been paid by the petitioner, the respondent Society filed Execution No. 1092 of 48-49 and Execution No. 443/49-50. These were dismissed for default on 24-3-1949 and 2-3-1950 respectively. Thereafter Execution No. 1301-50-51 was filed on 5-1-1951 and the correctness of the order holding this to be in time is now challenged.

(2) Section 43(c), Co-operative Societies Act 7 of 1918 provides:

> "Every order passed.....by the Registrar or his nominee or arbitrators on disputes referred to him or them under S. 43(A) shall, if not carried out,
>
> (a) be executed on a certificate signed by the Registrar.....by any Civil Court in the same manner as a decree of such Court....."

According to the decisions in — '44 Mys H. C. R. 528 (A) and — '47 Mys H. C. R. 230 (B)', the period of time within which execution may be applied for is three years under Art. 181, Sch. I of the Limitation Act and time begins to run not from the date of the Award but from the date on which the certificate is granted. There is reference in — '47 Mys H. C. R. 230 (B)', to the view in — 'Subba Rao v. Calicut Co-operative Urban Bank Ltd.', AIR 1939 Mad 304 (C), that Art. 182 and not Art. 181 is applicable to such a case and to — 'Subba Rao v. Calicut Co-operative Urban Bank Ltd.', AIR 1940 Mad 635 (D), wherein that view was upheld in appeal. The view of the Bombay High Court in — 'Raghavendra Hanmant Rao v. Industrial Bank, Guledgud', AIR 1936 Bom 396 (E), to which importance seems to have been attached on account of the similarity between the Acts in Mysore and Bombay has been explained in other cases as not a clear authority to show that Art. 181 is applicable to the enforcement of awards.

In two cases — 'Bhimsen Hanmant v. Urban Bank, Muddebihal', AIR 1947 Bom 370 (F) and — 'Muppanna Malkappa v. Shree Gajanan Urban Co-operative Bank Ltd.', AIR 1947 Bom 375 (G), it has been definitely held, after a review of the cases bearing on the point that Art. 182 is applicable. To the same effect is the decision in — 'Anjuman Imdad Bahmi Qarza v. Imam Din', AIR 1947 Lah 269 (H), where an award of 1937 was sought to be executed in 1943, after a number of applications in the interval, Mahajan J. in the course of the judgment referred to the words "Enforce it as if it were a judgment" as being synonymous with "Enforced in the same manner as a judgment" and to S. 190, Indian Companies Act containing the same words and observed

> ".....the Courts below and the learned single Judge were in error when to the enforcement of the award in question Art. 181, Limitation Act was applied. The article applicable is Art. 182 read with S. 48, Civil P. C."

Reference is made in these cases to the construction in—'Belvedere Jute Mills Ltd. v. Hardwarimull and Co', AIR 1927 Cal 853 (I), of similar words providing for execution of awards under the Arbitration Act. The application in the present case will be barred by time if Art. 181 applies as laid down in the earlier cases of this Court and be saved from the bar if Art. 182 applies as held by the other High Courts. It is unnecessary to seek a reconsideration of the question as to which

is the correct view to be adopted since the Act on the provisions of which the two decisions of this Court were based has since been repealed and replaced by a new Act No. 3 of 1948. Section 65 of this Act which was not found in the previous Act states:

"The Registrar or any person empowered by him in this behalf, shall be deemed .....when passing any orders .....on any application made to him for such recovery or to take some step-in-aid of such recovery, to be a Civil Court for the purposes of Art. 182 of the first schedule to the Mysore Limitation Act, 1911".

Section 72(2) declares

"All ..... suits and proceedings instituted under the said Act (the Act of 1918) shall, so far as may be, be deemed to have been ..... instituted under this Act".

In —'Hassan Co-operative Society v. H. S. Suryanarayanappa', AIR 1952 Mys 127 (J), S. 65 of the new Act is held to have retrospective operation so as to make Art. 182 applicable to application for execution of awards made under the prior Act. Sri Gulur Srinivasa Rao did not contest this but strenuously urged that S. 48, Civil P. C., would operate as a bar as the interval between the date of the award and the present application is more than 12 years. Emphasis was laid on the words in S. 65:

"The Registrar ..... shall be deemed when exercising any powers under this Act ..... to be a civil Court".

and on sub-s. (3) of S. 60 which states:

"In computing the period of limitation for execution by a Civil Court of an order passed under S. 52, the time during which proceedings in execution were taken before a Deputy Commissioner on an application made under cl. (b) of sub-s. (1) of S. 54 shall be excluded",

in order to show that the period of 12 years has to be computed from the date of the award and that the award must be deemed to be a decree from the date it was passed. No case either of this Court or any other in which the award is held to be a decree either from the inception or before the issue of a certificate for enforcement in the Civil Court has been cited before us.

On the other hand, it has been stated in — 44 Mys H. C. R. 528 at p. 535 (A):

"The award by itself without the sanction of the Registrar will not be capable of enforcement and it is only the certificate given by the Registrar that enables a party to apply for realising the fruits of the award. In those circumstances it seems to us to be very unreasonable to hold that though the Registrar may grant the certificate at a later date it must be taken to date back to the date of the award itself".

Section 48, Civil P. C. is no doubt mentioned in Art. 182, Limitation Act but the restriction imposed by it affects only execution of decrees of a particular kind in Civil Court. The definition of "decree" does not include an award under the Co-operative Societies Act. The award acquires and is invested with the status of a decree only when a certificate is granted by the Registrar and execution proceedings in the Civil Court are not possible without the certificate. The award remains merely an award till the certificate is issued and proceedings other than those in the Civil Court are provided for to enforce it. Except to the extent allowed in the Act itself, the Civil Procedure Code or the Limitation Act cannot govern those proceedings. The certificate being the basis for the jurisdiction of the Civil Court, S. 48, Civil P. C. can be attracted only after it is granted and by virtue of the grant, it becomes a decree and not before. As the application for execution of the award was filed within three years from the grant of certificate the later applications are all filed within the same time from one another and the present application is not beyond 12 years from the date of the certificate. The objections of the judgment-debtor to the enforcement of the award on the ground of limitation are untenable.

(3) The petition is dismissed with costs.

B/R.G.D. Revision dismissed.

A.I.R. 1954 MYSORE 56 (Vol. 41, C.N. 28)

MALLAPPA J.

Rama Setty, Appellant v. Ibbanna Setty, Respondent.

Second Appeals Nos. 452 of 1949-50 and 59 of 1950-51, D/- 1-12-1952, against decrees of Addl. Dist. J., Mysore, in Appeals Nos. 122 and 124 of 1948-49.

Hindu Law — Minor — Power of guardian to gift minor's property.

The guardian (in this case, mother) of a minor, the only surviving member of a joint Hindu family, cannot make a gift of the minor's property to his sister in connection with her marriage. AIR 1944 Mad 91; AIR 1953 Mad 230, Rel. on. (Para 2)

M. P. Somasekhara Rao, for Appellant (in No. 452 of 1949-50) and for Respondent (in No. 59 of 1950-51); V. Krishnamurthy, for Respondent (in No. 452 of 1949-50) and for Appellant (in No. 59 of 1950-51).

CASES REFERRED: Paras

(A) ('98) 22 Mad 113 (115) 2
(B) ('36) 14 Mys LJ 456 (461) 2
(C) (V31) AIR 1944 Mad 91 (92): ILR (1944) Mad 418 2
(D) (V40) AIR 1953 Mad 230 (Pr 15): 1952-2 Mad LJ 506 2

JUDGMENT: The property in dispute in this case belonged to the joint family of which the deceased father of plaintiff was the manager. After the death of the father, the property belonged exclusively to his son, the surviving coparcener. During his minority his mother made a gift of property now in dispute to her step daughter for what is referred to as "Arisina Kunkama", in accordance with the wishes of her husband as stated in the document Exhibit 18. The appellant in S. A. 452 of 49-50 is a purchaser of the interest of the daughter Veeramma under Exhibit 21. The plaintiff filed a suit for declaration of his title and possession of the plaint schedule properties together with mesne profits.

(2) The short point for consideration is whether the guardian of a minor can make a gift of the minor's property to his sister in connection with her marriage and this point of law has been answered by the Courts below in favour of the plaintiff and I am inclined to think they are right. It is unnecessary to consider what powers a limited owner has in cases of this kind as that point has not come up for consideration in this case and in fact that point has not come up for consideration in any reported decision of this Court. Though the decision in — 'Ramasami Ayyar v. Vengudisami Ayyar', 22 Mad 113 (A)

dealing with that point has been referred to in — 'Chenna v. Kempanna', 14 Mys LJ 456 (B), that case has been referred to in order to support the decision in that case that a father has ample powers to make a gift of a small portion of the joint family property about which there is now no difference of opinion. The decisions in — 'Palaniammal v. Kothandarama Goundan', AIR 1944 Mad 91 (C), which refers to the earlier Madras case makes it clear that:

> "Although a marriage gift can be made by the manager of a joint family or by a widow succeeding to the property, it cannot be made by the guardian of the only person constituting the family. Such a gift can be validated only if it is made for purposes binding upon the minor".

This decision has been followed with approval in — 'Rangaswami Goundar v. Marappa Gounder', A. I. R. 1953 Mad 230 (D). It may not be safe to extend the power the father or brother has to make a gift of a small portion of the joint family to a daughter or a sister, to the guardian of a minor when the property belongs to the minor as the obligation of the father or brother to make a gift of the property at the time of the marriage of a daughter or a sister is a moral obligation and not an obligation which could be enforced under the law.

(3) Agreeing with respect therefore with the decision of the Madras High Court, I dismiss the appeal in S. A. 452 of 49-50.

(4) The connected appeal S. A. 59/50-51 is by the plaintiff for getting mesne profits which the Courts below have refused to grant. As the plaintiff's right to the plaint schedule property has been declared, the Courts had no option to refuse mesne profits. This appeal is therefore allowed. No enquiry however has been held with reference to the quantum of mesne profits prior to suit. But both parties agree that there may be a decree for a sum of Rs. 150/- in respect of mesne profits prior to suit. In the result the judgment dismissing the claim for mesne profits is set aside and there will be a decree for a sum of Rs. 150/- towards mesne profits prior to suit and there will be an enquiry with respect to mesne profits subsequent to suit on an application under Order 20, Rule 12. No order as to costs in this Court.

B/V.S.B. Ordered accordingly.

A.I.R. 1954 MYSORE 57 (Vol. 41, C.N. 29)

MALLAPPA J.

Abdul Basheer Saheb, Plaintiff-Appellant v. Govt. of Mysore by the Chief Secretary to Government, Public Offices, Bangalore, and another, Respondents.

Second Appeal No. 218 of 1950-51, D/- 2-12-1952, against decree of Dist. J., Shimoga in R. A. No. 32 of 1948-49.

Railways Act (1890), S. 77 — Claim for non-delivery of goods received and not lost, destroyed or deteriorated — Notice is not necessary. (Para 2)

Anno: Railways Act, S. 77 N. 3.

M. K. Sreenivasa Iyengar, for Appellant; K Nanjundiah, for Respondent No. 2.

CASE REFERRED: Para

(A) ('36) AIR 1936 Nag 21 (22, 23): 31 Nag LR Sup 79 3

JUDGMENT: The suit in respect of which this appeal arises was filed for recovery of Rs. 1241-10-6 as the value of 107 bags of salt not delivered, along with other claims such as freight paid, notice charges and interest. It is not disputed that 180 bags of salt were consigned at Bombay Harbour for delivery to plaintiff, on 25-4-44. Of these, 73 bags were delivered to plaintiff on 21-5-44. The remaining 107 bags of salt were not delivered. But on 30-8-1944, as per Ex. D, the Station Master, Shimoga, wrote to the plaintiff that 104 bags of salt would be delivered to him in case he was prepared to receive reasonable compensation for the loss of salt.

Plaintiff agreed to receive them and claimed a compensation of Rs. 712/- (vide Ex. E). Evidently no further offer was made to the plaintiff by the Railway authorities as they thought that the compensation claimed was excessive. On 23-4-1945 a notice was issued to the Chief Secretary to the Government of Mysore and the suit was filed on 18-7-1945, i.e., after two months from the date of issue of the notice. The Courts below have dismissed the suit mainly on the ground that no notice was issued to the Railway authorities under S. 61, Mysore Railways Act corresponding to S. 77, Indian Railways Act. They also relied on the fact that it was not shown that the loss occurred on the Mysore Railways.

(2) It will be noticed that the fact that the Mysore Railways offered 104 bags of salt in a damaged condition to the plaintiff agreeing to pay reasonable compensation, is more than sufficient evidence to prove that out of 107 bags of salt that had yet to be delivered to the plaintiff, 104 were received in a damaged condition by the Mysore Railways. It is in evidence that these 104 bags of salt were sold by the Mysore Railways and that a sum of Rs. 715/- was realised by their sale. To this extent, it cannot be said that the plaintiff's suit is a suit that required notice under S. 61. Section 61, Mysore Railways Act (equivalent to S. 77) is as follows:

> "A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railways or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."

The section is applicable only to a case in which a refund of an overcharge is claimed or to a case in which compensation for the loss or destruction or deterioration of animals or goods delivered to be carried is claimed. This is not a case of the first kind. In this case it could be said that there is loss, destruction or deterioration of salt to the extent of what has not been actually received by the Mysore Railways. But 104 bags of salt were actually received and though received, they were not delivered to plaintiff. To this extent the claim is one for non-delivery of goods received and not lost, destroyed or deteriorated and no notice under the section is necessary.

(3) As observed in — 'Ramlal v. B. N. Rly. Co., Ltd., Calcutta', AIR 1936 Nag 21 (A):

> "A notice under S. 77 prior to institution of a suit against a Railway Company, is necessary only in the case of loss, damage or deterioration. A claim of non-delivery may entail the necessity of a notice where such non-delivery may be due to loss of the goods concerned; but where there has been no loss, damage or deterioration such a notice is not necessary. Where the goods

have actually arrived at the destination although there is non-delivery, a notice prior to the institution of the suit for non-delivery is not necessary because the company is not in such a case required to make enquiries as to where the goods were or what had become of them."

In this case, to the extent the claim is in respect of the value of the salt actually received, it cannot be said that any notice is necessary. But the same cannot be said in respect of the balance of the suit claim relating to salt not actually shown or admitted to have been received by the defendant-company.

(4) The appeal is, therefore, partly allowed and in modification of the decree of the Courts below there will be a decree for recovery of Rs. 715/- and notice charges of Rs. 5-5-6, with interest at 6 per cent. from the date of suit till date of payment. Parties will bear their own costs throughout.

B/V.R.B. Appeal partly allowed.

A.I.R. 1954 MYSORE 58 (Vol. 41, C.N. 30)

VENKATA RAMAIYA J.

Kempe Gowda and others, Petitioners v. The State of Mysore.

Criminal Revn. Petn. No. 116 of 1953: D/- 22-9-53, against order of Special 1st Class Magistrate, Ramanagaram in C. C. No. 49 of 1953.

Penal Code (1860), S. 151 — "Lawfully commanded to disperse."

The word "lawfully" in S. 151 cannot be construed as having reference only to the authority or competency of the person issuing the command but is to be understood as signifying authority as well as likelihood of disturbance of public peace and if either of these is found lacking, the command cannot be said to be 'lawful'. The command under the section is not to be sought or issued for placing a party whose right to or possession of a land is seriously and 'bona fide' disputed by others in a position of advantage. If the accused persons tried to cut the crops on a land claimed as their own on the strength of registered sale deed, they were entitled to do so and their acts would not properly justify the command as it would be the other party interfering with them who had to be directed to leave the place. AIR 1922 Lah 135, Rel. on. (Para 3)

Anno: Penal Code, S. 151 N. 1.

A. Shamanna, for Petitioners; Advocate General, for the State.

CASE REFERRED: Para
(A) (V9) AIR 1922 Lah 135 (137): 23 Cri LJ 5 3

ORDER: The petitioners who are six in number have been convicted under S. 151, I. P. C. for having refused to go away when asked to do so by the Police Inspector on 31-12-52 and each sentenced to pay a fine of Rs. 5. The case was tried summarily and this is one of the grounds of objection to the conviction. From what can be gathered by a perusal of the judgment and the exhibits there is a dispute between the accused on the one hand and one Eregowda on the other about the ownership, possession or both of a land. Eregowda anticipating trouble by the accused being caused to his cutting the crops applied for police help and as apprehended accused went in a body to prevent Eregowda from removing the crop and refused to quit the place as ordered by the Inspector. It is argued that S. 151, I. P. C. has been resorted to with a view to deprive the accused benefit of a trial in the ordinary manner by giving up the complaint alleging serious offences, that the order of the Inspector was not lawful and that the conviction is unjust inasmuch as it implies a punishment for accused staying on a land which is theirs.

The judgment in the case does not set forth the points raised or necessary for determination as it should, though the case is tried summarily and proceeds on the view that disobedience to the Inspector's order will suffice to render the accused guilty under S. 151, I. P. C., which reads thus:

"Whoever knowingly joins or continues in any assembly of five or more persons likely to cause disturbance of the public peace after such assembly has been lawfully commanded to disperse shall be punished with imprisonment etc.

'Explanation'. If the assembly is an unlawful assembly within the meaning of S. 141 the offender will be punishable under S. 145."

(2) The person competent to command and disobedience to whose command constitutes the offence is not mentioned in the section. But S. 127, Criminal P. C. provides:

"Any Magistrate or Officer in charge of a Police Station may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly, etc."

(3) The condition for making the command is that there should be an assembly of five or more persons and likelihood of a disturbance of public peace. In — 'Girdhara Singh v. Emperor', AIR 1922 Lah 135 (A), it was held that it is not sufficient that the Magistrate who ordered the assembly to disperse considered it necessary and that for a charge under S. 151, I. P. C. evidence to the satisfaction of the Court must be placed to show that the assembly was in fact likely to cause disturbance of the public peace. The word "lawfully" in S. 151 cannot be construed as having reference only to the authority or competency of the person issuing the command but is to be understood as signifying authority as well as likelihood of disturbance of public peace and if either of these is found lacking the command cannot be said to be 'lawful'. The learned Magistrate does not seem to have applied his mind to see whether Eregowda or Kempegowda was in his opinion in possession of the land and as to who was entitled to take the standing crop.

The command under the section is not to be sought or issued for placing a party whose right to or possession of a land is seriously and bona fide disputed by others, in a position of advantage. If, as is urged for the accused, they tried to cut the crops on a land claimed as their own on the strength of registered sale deed, they were entitled to do so and their acts cannot properly justify the command as it would be the other party interfering with them who has to be directed to leave the place. There are other provisions in the Criminal Procedure Code which are to be availed of for preventing breach of peace when disputes relating to land are likely to cause it. The circumstances of the present case, in my opinion, did not warrant the Inspector to command the petitioners to leave the place and in that view the accused cannot be said to have been "lawfully

commanded" as required in the section. The convictions and sentences are therefore set aside and the accused are acquitted. The fines, if paid, will be refunded.

B/D.H.Z. Conviction set aside.

A.I.R. 1954 MYSORE 59 (Vol. 41, C.N. 31)

VENKATA RAMAIYA AND BALA-KRISHNAIYA JJ.

B. Krishnappa, Petitioner v. Bangalore City Co-operative Bank Ltd. and another, Respondents.

Civil Petn. No. 15 of 1953, D/- 30-7-1953.

(a) Civil P. C. (1908), S. 11 — Matter must be directly and substantially in issue.

Order by Government negativing resolution of Co-operative Bank remitting portion of debt due from a certain member, mentioning only as a fact findings in another case relating to removal of another member from membership — Case relating to removal treated separately and the question of removal not in issue in the case relating to remission — Held that the order cannot operate as 'res judicata' on the question of removal. (Para 2)

Anno: C. P. C., S. 11, N. 7.

(b) Mysore Co-operative Societies Act (52 of 1948), Ss. 59 and 62 — Scope.

Under S. 62 an appeal lies only when there is a point of law. Section 59 of the Act is wider in scope than S. 62 and enables Government to call for and examine either of its own accord or at the instance of the aggrieved party, the correctness, legality or otherwise of any order under the Act. The Government has jurisdiction under both sections to make an order approving the resolution, passed by the Bank removing a member, which has been held by the Registrar to be untenable and resort to either of these sections in any case is a matter for its determination. (Para 2)

(c) Mysore Co-operative Societies Act (52 of 1948), S. 52 — "Dispute."

A member is not a salaried employee of the society and is not liable to be dismissed from membership without regard to the provisions of the Act and bye-law, as well as the principles of natural justice. He is entitled to claim intercession of the Registrar when he felt that his membership was sought to be taken away unjustly and a petition filed by him before the Assistant Registrar questioning the validity or propriety of convening the General Body meeting to consider the resolution for expelling him is a dispute under S. 52 of the Act. AIR 1954 Mad 103 (FB), Rel. on. (Para 2)

(d) Mysore Co-operative Societies Act (52 of 1948) — Representation in proceedings by elected or appointed representatives.

A Co-operative Society like any corporate body can function through its elected or appointed agents and the representations made by a Secretary in a formal proceeding before the authorities cannot be explained away as his own not affecting the society, as he has 'locus standi' in such a proceeding, as a representative of the society and not as an ordinary person, to state anything which may be the basis of a decision. (Para 3)

(e) Constitution of India (1950), Art. 226 — Nature of proceedings — (Mysore Co-operative Societies Act (52 of 1948)).

Order by Government upholding the resolution of Co-operative Bank removing member — Proceedings on an application under Art. 226 against the order is not a proceeding in which the reasonableness of the order can be canvassed. The question is one of jurisdiction and not as to how it is exercised. (Para 4)

Anno: C. P. C., App. III, Constn. of India, Art. 226 N. 1.

(f) Mysore Co-operative Societies Act (52 of 1948), Ss. 62 and 59 — Removal of members — Duty of Government hearing appeal.

The operation of the bye-laws is subject to the provisions of the Act by virtue of which the resolution of the majority for removal of any one as a member is not final or absolute but is liable to be set aside by the Assistant Registrar. Where he sets aside the resolution on the ground that it had been passed contrary to what was agreed to by the Secretary of the Co-operative Bank before him the Government dealing with the question when it is brought before it cannot ignore the statements made by the Secretary before the Assistant Registrar. (Para 5)

(g) Mysore Co-operative Societies Act (52 of 1948) — Removal of members.

For the removal of a member it is necessary there should be imputation of something definite to indicate that he is unfit to be a member or that his membership is detrimental to the society and the member concerned should be afforded opportunity to refute the charge before he is sent out.

When the resolution for removal does not allege any specific acts or particular grounds against the member service of a notice on him intimating that a meeting would be held to consider the resolution cannot be regarded as sufficient compliance with necessary formalities or even to the requirements of bye-law of the society which vests power in the general body of members to remove a member for acts prejudicial to its interests, credit or reputation. Case law Relied on. (Paras 5, 7)

(h) Constitution of India (1950), Art. 226 — Scope — (Mysore Co-operative Societies Act (52 of 1948), S. 59).

Orders of Government, however extensive the power of the Government may be under S. 59 of the Co-operative Societies Act, are liable to be questioned on the ground of want of jurisdiction or failure to apply the principles of natural justice. The question of expulsion of a member is a "Dispute touching the business of a Society" and the decisions which would be protected from review by the Courts are 'constitutional' decisions, i.e., decisions pronounced in conformity with the Act the rules and the bye-laws and the principles of natural justice. (Para 8)

Anno: C. P. C., App. III, Constn. of Ind., Art. 226 N. 1.

K. R. Parthasarathy, for Petitioner; C. S. Venkataswami Naidu and Advocate-General, for Respondents.

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 103: 44 Mad Journal of Co-operation 647 (FB) 2

(B) (1879) 13 Ch D 346: 41 LT 638 5

(C) (1905) 1905 AC 78: 74 LJ KB 333 5

(D) (V39) AIR 1952 SC 192: 1952 SCR 583 (SC) 8

VENKATA RAMAIYA J.:

The order which the petitioner wants to be quashed by this Court, in exercise of its jurisdiction under Art. 226 of the Constitution of India, relates to his removal from the membership of the Bangalore City Co-operative Bank, Ltd., Bangalore.

The petitioner became a member of the said Bank about 15 years back and in his zeal to promote the interests of the Bank questioned from time to time the propriety of the acts of the Directors in managing the affairs of the Bank and subjected them to proceedings under the Co-operative Societies Act before the Registrar and his Assistants. The remission by the Directors of portions of the debts due by one Sri Kodandaramaiah and some others was an instance of this kind. His objection to the remission was upheld by the Assistant to the Registrar as well as the Registrar and finally by the Government.

Thereafter the petitioner was served with a notice stating that a special General Body Meeting would be convened at the request of certain members of the Bank to consider firstly the question of the remission and secondly removal of the petitioner from the membership of the Bank. The petitioner again filed a petition before the Assistant Registrar objecting to these. In the course of those proceedings the then Secretary, Mr. B. Rangaswamy, stated on behalf of the Bank:

> "that he would acquaint the General Body that the said proposition need not be moved since Sri B. Krishnappa is working in the interest of the Bank. The petitioner said that excepting Sri Kodandaramaiah's case in proposition No. 1, he will not press the other items."

The aforesaid statements bear the signatures of the petitioner and Mr. B. Rangaswamy on 20-9-1949.

The Personal Assistant to the Registrar on the same day made an order to the following effect:

> "In the circumstances the petition is dismissed. Separate orders will issue as regards the discussion of the subject relating to the write off of the amount due by Sri Kodandaramaiah."

In spite of this, however, the meeting did go on and by a majority of the members present at the meeting a resolution for removal of the petitioner from the membership of the Bank was passed on 25th September 1949. The Personal Assistant to the Registrar and the Registrar held that the resolution was not proper but on an application filed by the Bank for revision of these orders, the Government approved of the removal in its order dated 18-6-1952 and this is impugned before us.

(2) The petitioner who argued the case himself with the facility and force of one accustomed to it, attacked the order firstly on the ground that it offends the rule of 'res judicata'; secondly that the application which led to it was not maintainable, thirdly that it was obtained on malicious ex parte representations and lastly that it is vitiated by errors apparent on the face of the record.

The plea of 'res judicata' rests on construction placed on the order passed by the Government negativing the resolution of the Bank for remission of any portion of Kodandaramaiah's debt as also a decision in favour of the petitioner concerning his removal. The proceedings in which the question of remission was considered were treated as separate from those about the petitioner's removal and the finding arrived at in the latter was mentioned only as a fact in the other case. As the question of removal was not in issue in the other case and referred to as being dealt with separately the rule of 'res judicata' can have no application to the order in question.

The order cannot be held to be defective on the ground that no appeal was filed under S. 62, Co-operative Societies Act, as appeal lies only when there is a point of law, as S. 59 of the Act, which is wider in scope than S. 62 enables Government to call for and examine either of its own accord or at the instance of the aggrieved party, the correctness, legality or otherwise of any order under the Act. The Government, therefore, has jurisdiction under both sections to make the order and resort to either of these in any case is a matter for its determination.

As regards errors in the order, it is conceded that the number of the original suit in the civil court referred to as pending is a mistake and that as a matter of fact, there was no order of injunction in a pending case from any Court which could justify the participation of Kodandaramaiah in the meeting. The view that the matter involved is not a 'dispute' under S. 52 of the Act is, in our opinion, incorrect.

The petitioner has by his diligence found a recent decision of a Full Bench of the Madras High Court printed in — 'Madhava Rao v. Surya Rao', AIR 1954 Mad 103 at p. 111 (FB) (A), in which the word "Dispute" touching the business of a registered society, has been discussed. Reference is made with approval in the course of the decision to the following observations of the learned Chief Justice in another case:

> "We fail to see how a dispute raised by one of the members of the society against an action of the society taken at a meeting at the general body of the society in the exercise of a power conferred by one of the society's bye-laws, cannot be said to be a dispute touching the business of the society. On the day when the resolution was passed expelling the petitioner from membership admittedly this matter of expulsion was "one of the items of business on the agenda of the meeting. We do not think it extravagant to hold that the expulsion of an undesirable member is also a part of the business of the society. If so, any dispute relating to such an expulsion would be a dispute touching the business of the society."

It is significant that there is a parenthesis in S. 52 to denote what is intended to be not a "dispute" by express mention of disciplinary action against paid employees as such. The petitioner is not a salaried employee of the society and is not liable to be dismissed from membership without regard to the provisions of the Act and bye-law, as well as the principles of natural justice. He was entitled to claim intercession of the Registrar when he felt that his membership was sought to be taken away unjustly. We think that the petition filed by him before the Assistant Registrar questioning the validity or propriety of convening the General Body meeting to consider the resolution for expelling him was rightly treated as a dispute under S. 52 of the Act.

(3) As regards the resolution passed by the meetings which is relied on in the order for expulsion of the petitioner, it was contended that

there was breach of undertaking on the part of the Bank in allowing the resolution to be passed and that it was contrary to the assurance of Mr. Rangaswamy as Secretary before the Personal Assistant. The meeting itself was alleged to have been a packed body of persons set up only to vote for expulsion without giving any consideration to the reasonableness of it. The Directors are said to have exercised overpowering or undue influence over the members so packed, to stifle opposition and with the authorities to have the resolution approved. The statement of parties on the strength of which the application of the petitioner in Dispute Case No. 1 of 52-53 was dismissed do suggest that the question of removal would not be pressed and by reason of this the petitioner is prejudiced as he had neither the benefit of a decision of the matter nor of adherence to it.

On behalf of the Bank Sri Venkataswamy represented that the Directors personally voted against expulsion and that it was not within their power to avoid the meeting being held or the resolution being passed. The society like any corporate body can function through its elected or appointed agents and the representations made by a Secretary in a formal proceeding cannot be explained away as his own not affecting the society, as he has locus standi in such a proceeding as a representative of the Bank and not as an ordinary person to state anything which may be the basis of a decision.

(4) It is true that as urged on behalf of the respondents this is not a proceeding in which the reasonableness of the order can be canvassed, the question is one of jurisdiction and not as to how it is exercised.

(5) The Co-operative Societies Act has made special provisions for the smooth and efficient working of societies and has provided a machinery and procedure for settlement of differences. Relying on bye-laws framed under the Act and particularly on No. 77 which makes it obligatory on the Directors to convene a meeting of the General Body when there is a requisition for it by 100 members, No. 75 vesting supreme authority in all matters affecting the administration in the Bank, which, for the purpose of the bye-laws shall mean the general body of the members of the bank assembled at a meeting: No. 23 under which the Bank shall have power to remove any member for any act which in its opinion is likely to be injurious to the credit, reputation or interest of the Bank, it was contended that whatever may be the grievance against the Secretary or the Directors, petitioner cannot question the right of the members to remove him and power of Government to hold that the removal is necessary or justified.

The operation of the bye-laws is subject to the provisions of the Act. By virtue of these very provisions, the resolution of the majority for removal of any one as a member is not final or absolute but is liable to be set aside as was done in this case by the Assistant Registrar on the ground that it was contrary to what was agreed to by the Secretary before him. The notice of the meeting sent to the petitioner appears to be an intimation due to him as an ordinary member like any other and not such as is required when his membership is proposed to be taken away. The resolution in the notice only states "that Sri B. Krishnappa (Petitioner) of ..... be removed from membership under bye-law No. 23 A" without assigning reason for the same. Apart from the difficulty to know the wrongs attributed to him, the petitioner says that he did not expect that this resolution was open to discussion after the undertaking of the Secretary in the proceedings before the Personal Assistant. The Registrar therefore in his order dismissing the appeal of the Bank against the order of the Assistant Registrar remarked that the principles of natural justice have not been observed.

As to how the import of the Secretary's statement in the previous proceeding was conveyed at the meetings he said that from a perusal of the previous proceedings of the meeting

> "It is gathered that it was made to appear as personal to the person who expressed the said opinion. Sometimes it has also been stated to be the opinion of the Board of Directors. In the copious discussion that went on regarding the proposition the person who expressed the opinion or gave an undertaking before the lower court is not seen to have pleaded on behalf of respondent. On the other hand some of them have made statements against the respondent."

The Government order fails to notice, that while the members as a whole have a right to seek removal of any one, statements made by the Secretary concerning it cannot be ignored and the person sought to be removed has also a right to claim intimation of charges, opportunity for explanation and consideration at a meeting properly held.

Robson in his book on Justice and Administrative Law states at page 227:

> "The principle of natural justice is that a man shall not be removed from office or membership or otherwise dealt with to his material disadvantage, without fair, adequate and sufficient notice being given to him of what is alleged to his detriment and of having an opportunity of meeting the accusations which are brought against him..... The Courts are extremely zealous in the enforcement of the maxim 'audi alteram partem' and there are innumerable cases in the reports where decisions have been quashed on this ground."

Since the resolution for removal does not allege any specific acts or particular grounds against the petitioner, service of a notice on the petitioner intimating that the meeting would be held to consider the resolution cannot be regarded as sufficient compliance with necessary formalities or even to the requirements of bye-law 23.

In — 'Labouchere v. Earl of Wharncliffe', (1879) 13 Ch. D. 346 (B), the expulsion of a member from a club was set aside on the ground amongst others of want of notice of a definite charge. Jessel, M. R. at page 350 posed the question "What ought the Committee of a club to do when the conduct of one of its members is impugned?" and answered

> "They ought to see what the conduct has been and what excuse or reason can be given by the member for it; and they ought to give notice to that member that his conduct is about to be inquired into and afford him an opportunity of stating his case to them."

In — 'Andrews v. Mitchell', (1905) AC 78 (C) dealing with the expulsion of a member from a Society without a charge and a trial Lord Halsbury observed

> ".....You must summon a man and you must give him time to consider what he has got to do and you must give him the charge against him in writing. These are all matters of substance and not mere matters of form."

(6) What may be gathered from the materials placed here is that the petitioner has been a critic, rather a severe and sometimes unreasonable critic of the management and often put the Directors to necessity of having to justify their acts. There is no accusation of his being a defaulter or having sought for pecuniary advantage to himself or benefit to others at the cost of the Bank. On the other hand such are the grounds of complaints by him against others which were found in some cases to be justified. The criticism, though distasteful to a class of members, does not appear to be wanton or frivolous as can be seen from some of the orders made by the authorities and appointment of a special officer for the management of the Bank.

(7) The Bangalore City Co-operative Bank is a fairly long standing, important institution with a large number of members interested in promoting its reputation and usefulness. The members have a right and duty to see that these are not impaired by any acts of persons entrusted with the management. This is hardly possible unless the members are free to express their views and point out defects before the authorities having control over the administration and working of the Society. If continuance of any one as a member is to depend on the mere pleasure and sufferance of others, any one found inconvenient may be arbitrarily got rid of and this it may lead to elimination of even 'bona fide' protest or healthy opposition against the wishes of the majority. In the interests of the Society and in fairness to the member it is necessary there should be imputation of something definite to indicate that he is unfit to be a member or that his membership is detrimental to the society and the member concerned should be afforded opportunity to refute the charge before he is sent out. These are lacking in the case.

(8) However extensive the power of the Government may be considered to be under S. 59 of the Co-operative Societies Act its orders are liable to be questioned on the ground of want of jurisdiction or failure to apply the principles of natural justice. As observed in the Full Bench decision of the Madras High Court, in which as already mentioned, the question of expulsion of a member is held to be a "Dispute touching the business of a Society", the decisions which are protected from review by the Courts are 'constitutional' decisions, decisions pronounced in conformity with the Act the rules and the bye-laws and the principles of natural justice".

According to — 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 (D), Art. 226 enables the High Court to issue the writs or declarations referred to therein in grave cases where the subordinate tribunals, bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice..... or there is an error apparent on the face of the record and such act, omission or error or excess has resulted in manifest injustice. More than one of the several conditions mentioned as necessary are found to exist in this case. In spite of bye-law 23, jurisdiction of the general body to deal with the resolution for removal of the petitioner was not absolute but was subject to the statements of the Secretary with reference to it on behalf of the Bank in the prior proceeding. Even otherwise, the resolution cannot have the sanction of the bye-law as the power of removal can be exercised only when there is allegation of an act about which an opinion of its being likely to be injurious to the Bank can be formed or a serious breach of a bye-law is found. There is no reference to the commission of any act or breach in the resolution for consideration.

The meeting at which the resolution was passed is open to the objection of Sri Kodandaramaiah having participated in it, his being allowed to vote and speak in favour of the resolution. Admittedly the restoration of the membership of this person was held to be invalid in the order of Government dated 26-2-49 and there was no order, resolution or decision subsequently by which he could claim to be a member. His presence and participation in the meeting cannot be ignored as there is no certainty of the decision not being influenced by these. In this context there is an error or excess of jurisdiction affecting the resolution. The order of Government overlooks this and the disregard of the rules of natural justice, manifests errors in assuming facts which are not correct and in holding that the question of expulsion cannot be treated as a "Dispute". It is not just or proper that the petitioner should be deprived of his membership by such an order.

The Order of Government G. O. No. A. F. 2469/C.S.4-52-4 dated 18-6-1952 declaring that petitioner cannot continue as a member of 1st respondent Bank upholding the resolution of the General Body is, therefore, quashed. Parties will bear their own costs.

A/M.K.S. Petition allowed.

A.I.R. 1954 MYSORE 62 (Vol. 41, C.N. 32)

MEDAPA C. J. AND VASUDEVAMURTHY J.

Abdul Razack Saheb and others, Appellants v. Syed Abdul Jaleel Saheb and others, Respondents.

Appeal No. 135 of 1953, D/- 1-9-1953, from decree of 2nd Addl. Dist. J., Bangalore, in Original Suit No. 69 of 1948-49.

Court-fees Act (1870), S. 7 (iv) (f) — Final decree in a suit for dissolution of partnership and accounts — Appeal by plaintiff — Court-fee — (Mysore Court-fees Act, S. 4 (iv) (f).)

In a suit for dissolution of partnership and for accounts the plaintiffs valued their claim in their plaint at Rs. 10,500/- under S. 4 (iv) (f), Mysore Court-fees Act (corresponding to S. 7 (iv) (f), Indian Court-fees Act) and paid court-fees thereon. A preliminary decree was passed declaring that the firm should stand dissolved and directing accounts to be taken. No appeal was filed against that preliminary decree. Subsequently, after taking accounts thrcugh a Commissioner, a final decree was made. By this decree the plaintiffs were directed to pay Rs. 17,591/- and odd to the defendants. In an appeal against the final decree, the plaintiff-appellants valued the appeal at the same value as had been put by them in the plaint in the trial Court and paid court-fee on that sum:

Held that there was a money decree now against the plaintiff-appellants for a definite sum of money and that they wanted to get rid of the same and that they should pay court-fee on the amount of the decree; viz., Rs. 17,591/- and odd. AIR 1941 Bom 242, Relied on; AIR 1943 Mad 685, Not foll.; AIR 1938 Mad 435 (FB) and AIR 1929 PC 147, Expl. (Paras 2, 8)

Anno: Court-fees Act, S. 7 (iv) (f) N. 2, 7.

Mir Iqbal Hussein and T. V. Govinda Raja Iyengar, for Appellants.

CASES REFERRED: Paras

(A) (V30) AIR 1943 Mad 685 (685, 686): 211 Ind Cas 10 3, 3A

(B) (V25) AIR 1938 Mad 435 (438): ILR (1938) Mad 598 (FB) 3, 3A, 7

(C) (V28) AIR 1941 Bom 242 (242): ILR (1941) Bom 477 3, 5, 7

(D) (V16) AIR 1929 PC 147 (148): 10 Lah 737 (PC) 3. 5

(E) (V4) AIR 1917 Mad 668 (669): 39 Mad 725 (FB) 3A, 4

(F) (V20) AIR 1933 Mad 330 (331): 56 Mad 705 3A. 5

(G) (V18) AIR 1931 Rang 146 (147): 9 Rang 165 (FB) 4

(H) (1900) 23 Mad 490 (492): 10 Mad LJ 240 4

(I) 35 Mys CCR 164: 3 Mys LJ 273 4

(J) (V16) AIR 1929 Cal 815 (817): 57 Cal 463 5, 7

VASUDEVAMURTHY J.:

The Suit O. S. No. 69/48-49 on the file of the Additional District Judge, Bangalore, out of which this appeal arises, was brought for dissolution of a partnership and for taking of accounts of the same. The plaintiffs valued their claim in their plaint at Rs. 10,500/- under S. 4(iv)(f), Mysore Court-fees Act and paid Court-fee thereon. The defendants admitted the partnership but denied their liability to pay anything to the plaintiffs. They also pleaded that the latter it was who had failed to render proper accounts of the firm. A preliminary decree was passed on 19-8-1950 declaring that the firm should stand dissolved as from 19-3-48 and directing accounts to be taken. No appeal was filed against that preliminary decree.

Subsequently, after taking accounts through a Commissioner, a final decree was made on 16-1-53 and the present regular appeal is filed against the final decree. By this decree the plaintiffs are directed to pay Rs. 17,591-5-4 to the defendants respondents. The plaintiffs 2, 3 and 4, who have now appealed, have valued this appeal at Rs. 10,500/- the same value as had been put by them in the plaint in the trial Court and paid court-fee on that sum.

(2) The appellants have been asked to pay Court-fee on the amount mentioned in the decree viz., Rs. 17,591-5-4. It is contended by them that as they are plaintiffs they can value the appeal in the same way as they did in the suit under S. 4(iv)(f), Court-fees Act. It is of course clear that there is a money decree now outstanding against them for a definite sum of money which they want to get rid of by this appeal and which would otherwise become conclusive without any further accounting or investigation.

(3) In support of his position the learned Counsel for the appellants has relied strongly on — 'Ramadass v. Appala Narasayya', AIR 1943 Mad 685 (A). That case no doubt supports the appellants and the circumstances of that case were exactly similar to those of the present case and was an appeal from a final decree. In that case Shahabuddin J. sitting alone purported to follow an earlier case of the Madras High Court in — 'In re, Dhamukodi Nayakkar'. AIR 1938 Mad 435 (FB) (B), in preference to — 'Kashiram Senu v. Ranglal Motilal', AIR 1941 Bom 242 (C), and he also relied on certain observations of the Privy Council in — 'Faizullah Khan v. Mouladad Khan', AIR 1929 P. C. 147 (D). He held that in the matter of valuation of an appeal under S. 7(iv)(f), Court-fees Act of 1870, (which corresponds to S. 4(iv)(f) of our Act), the plaintiff-appellant, against whom a final decree for a much larger sum than that for which he had valued his claim in the plaint against the defendant had been made had greater freedom than the defendant-appellant and could value his reliefs in the appeal also in the same manner in which he could value it in the plaint.

(3A) In 'AIR 1938 Mad 435 (FB) (B)', on which he relies Leach C. J., with whom the two other members forming the Full Bench agreed, held that S. 7 gives greater freedom to plaintiff-appellants than it does to defendant-appellants in the matter of valuing an appeal memo. He observed that when a defendant-appellant appeals against a final decree he knows exactly the value of his relief and must pay a court-fee on the amount of the decree passed against him except in cases where he appealed only against a portion of the decree. Similarly a defendant appealing from a preliminary decree for an account has ordinarily to stamp his memorandum according to the plaintiff's valuation. He thought that by compelling a defendant to follow a plaintiff's valuation hardship was not likely to result as the plaintiff would never be anxious to pay any more court-fee than was necessary.

Their Lordships approved of some earlier cases decided by the Madras High Court including — 'Srinivasa Charlu v. Perindevamma', AIR 1917 Mad 668 (FB) (E) and overruled — 'In re Venkatanandam', AIR 1933 Mad 330 (F) which had taken a different view. At page 438 the learned Chief Justice has remarked that in the case before them, according to the heading of the memorandum of appeal, the appeal related only to the 'preliminary decree' for an account though at the end of the memorandum there was a note which suggested that the appeal was from a combined preliminary and final decree passed by the appellate Court in a suit for taking of accounts; and it was impossible to state accurately what the net liability of the appellants would be on a proper taking of the accounts, accepting the contention raised in the memorandum of grounds.

His Lordship has also referred to the long-standing practice in that Court and the natural reluctance to depart from it when it was not shown that the same was against law. In the course of the arguments it was intimated for the appellants that the intention was to limit the appeal to the 'preliminary decree', because if that was set aside the final decree would also fail. Therefore the learned Judges held that they saw no objection to the appellants treating their appeal as an appeal against the preliminary decree, if they so desired, but they would have to value their relief in accordance with the valuation in the plaint. This decision cannot be said to lend much support to the conclusion arrived at in AIR 1943 Mad 685 (A).

(4) In 'C. K. Umar v. C. K. Ali Umar', AIR 1931 Rang 146 (FB) (G) which was another case relied on for the appellants, the respondent had sued the appellant in the District Court for dissolution of an alleged partnership and for accounts. She valued her share at Rs. 15,000/-. But while giving evidence she valued it at Rs. 30,000/- and on the trial Court's order she paid an additional Court-fee. The trial Court found that there was a partnership and passed a preliminary decree for dissolution, accounts and appointment of a receiver. The defendant appealed against the whole decree on the ground that the suit was barred by limitation and that there was no partnership. He stamped his appeal memorandum on a valuation of Rs. 3,000/- only.

The Full Bench of the Rangoon High Court held that in a suit for accounts under Cl. (iv) (f) of S. 7, Court-fees Act the plaintiff in the trial Court and the appellant in the Court of Appeal is the person to make an estimate of the value of the relief that is claimed. Page C. J. thought that neither in — 'Samiya Mavali v. Minammal', 23 Mad 490 (H) or in AIR 1917 Mad 668 (FB) (E) which follows it and which was a case of an appeal by the defendant against a preliminary decree, the Madras High Court had given any reasons for holding that the value of the relief sought both in the suit and in the appeal from a decree passed therein was to be determined by the valuation which the plaintiff had put upon the relief sought in the plaint.

The intention of the Legislature in enacting S. 7 (iv) was, according to him, that in cases where it is impossible 'a priori' to ascertain with accuracy the value of the relief that is sought, the plaintiff in the trial Court and the appellant in the Court of Appeal should be the 'persona designata' to make an estimate of the value of the relief that is claimed. He thought the decision of the Privy Council was conclusive on the question. The Rangoon case has no application to the present one as it was an appeal against a preliminary decree; and moreover it is opposed to a decision of our Court.

In Mysore in 35 Mys CCR 164 (I) which was an appeal against a preliminary decree in a suit for dissolution of the partnership and accounts, it has been held, following AIR 1917 Mad 668 (E) that in a suit for dissolution of partnership and accounts the plaintiff's valuation in the plaint will be the valuation also for purposes of appeal whether at the instance of the plaintiff or of the defendant unless of course if the appeal is in respect only of a portion of the suit claim.

(5) In AIR 1941 Bom 242 (C) the plaintiff brought a suit for an account and paid Rs. 5/- stamp on a notional valuation. Ultimately the suit resulted in a decree against him for a sum of Rs. 6,464-7-0. He appealed against that decree and sought to pay a court-fee of Rs. 5/- on his appeal memo. Beaumont C. J. and Sen J. held that as the suit had resulted in a decree for a certain amount against the plaintiff, the appeal was not merely for an account but was an appeal against a money decree and the plaintiff must at any rate stamp his memorandum of appeal with 'ad valorem' stamp in respect of the amount of the decree. He may add a nominal amount in respect of any further relief claimed which may accrue by reason of the account being taken on a different basis from that adopted by the lower Court; but the stamp on the memorandum of appeal must cover the amount of the decree which is standing against the appellant and which he seeks to have set aside.

The appeal with which they were concerned was from a final decree. They also referred to the observations of the Privy Council in AIR 1929 PC 147 (D) and considered that those observations did not stand in the way of their coming to the conclusion they arrived at. They differed from the interpretation put on the Privy Council decision by *the Full Bench of the Madras High Court in AIR 1933 Mad 330 (F). They quoted with approval the case in — 'Kantichandra v. Radharaman', AIR 1929 Cal 815 (J) though it was one of a final decree against the defendants and the defendants had appealed.

(6) The Privy Council case AIR 1929 PC 147 (D) was a suit for a partnership account in which the plaintiffs had claimed Rs. 3,000/- and had valued the suit accordingly. The trial Court found that Rs. 19,000/- were due to the defendants by the plaintiffs and that no sum was due to the plaintiffs in respect of their claim for Rs. 3,000/-; the plaintiffs appealed valuing their appeal for purposes of Court-fee at Rs. 19,000/-. The question was raised whether the plaintiffs should not value their appeal at Rs. 19,000/- plus Rs. 3,000/- i.e. Rs. 22,000/-.

Their Lordships of the Privy Council held that the Court-fee already paid was sufficient. They observed that

> "the amount of Rs. 19,000/- may be not only in full but largely in excess of the true sum of relief at which a sound valuation could, in the present circumstances, be said to reach and it covered the appeal as a whole including that sum on the one hand and a much smaller figure of Rs. 3,000/- on the other."

It is this observation that has led to the difference of opinion between the Madras and Bombay High Courts. We do not think that that decision can be interpreted as laying down that the plaintiff can value his relief at the original notional or approximate figure which he mentioned in his plaint even when the claims of the parties have been settled and declared by a final decree which the party affected must get rid of by means of the appeal.

(7) The matter may also be viewed in another aspect. If the appellants secure relief in this Court by its being declared that they are not due in the sum of Rs. 17,591-5-4 to the defendants and are not entitled to recover anything from them and the appeal is dismissed, there is no provision in the Mysore Court-fees Act by which they can be compelled to pay later on any Court-fee on the substantial relief which they would have secured.

The position is different in the case of a preliminary decree as S. 8, Court-fees Act provides for Court-fee being recovered on any excess over and above the figure put in the plaint for purpose of valuation. As observed in AIR 1938 Mad 435 at p. 438 (B) it has never been questioned in the High Courts of India that a defendant appealing against a final decree should pay Court-fee on the amount decreed against him except in cases where he appeals only against a portion of the decree; see AIR 1941 Bom 242 at p. 243 (C) and AIR 1929 Cal 815 (J). And it is difficult to see anything in S. 4 (iv) (f) which would justify a difference in treatment between the case of the plaintiff and that of the defendant who is appealing against a final decree. The decision in AIR 1941 Bom 242 (C) is also in accord with the usual practice of this Court and we are inclined to follow that decision.

(8) The appellants are, therefore, directed to pay 'ad valorem' Court-fee on Rs. 17,591-5-4. They are given one month's time to make up the deficient Court-fee.

B/R.G.D. Order accordingly.

*The decision in AIR 1933 Mad 330 is not a decision of a Full Bench but a decision of a Division Bench. AIR 1933 Mad 330 was overruled by a Full Bench in AIR 1933 Mad 435.—Ed.

A.I.R. 1954 MYSORE 65 (Vol. 41, C.N. 33)

(FULL BENCH)

VENKATA RAMAIYA, BALAKRISHNAIYA AND MALLAPPA JJ.

Abdul Wahab and others, Defendants Nos. 1 to 4. Petitioners v. Ramakrishniah, Plaintiff-Respondent.

Civil Revn. Petn. No. 237 of 1948-49, D/- 31-3-1950, against order of 1st Addl. Sub-J., Bangalore, D/- 30-9-1948.

Civil P. C. (1908), O. 22, R. 3 and Ss. 151, 152 and 153 — Failure to cause legal representative to be brought on record — Effect and remedy.

On the death of the appellant, an application to be brought on record was filed by his legal representative; notices were issued and objection to the application was filed by the respondents but the Appellate Court, without passing any order on that application, heard the appeal on merits and remanded the case for fresh disposal. The trial Court finding that there was no living plaintiff on record to prosecute the suit, dismissed it. Revision against this dismissal was also dismissed. Subsequently, the legal representative filed application to the lower appellate Court under Ss. 151 and 152, Civil P. C. with the prayer that order be made to bring him on record and the suit be proceeded further. The lower appellate Court allowing the application, directed the trial Court to take suit on file and dispose of as directed by previous remand. On revision held,

(Per Venkata Ramaiya and Malappa JJ., N. Balakrishnaiya J., contra) : Under O. 22, R. 3, all that the person desirous of proceeding with the case has to do is that he should make an application. The further acts are left to the Court. Where no order is passed by the Court and the applicant also did not press the need for a formal order the omission on the part of the applicant will not take away his right to proceed with the case as there is no duty cast on him by the rule to remind the Court of observance of the rules.

In this view, the proceedings in the appeal after the death of the original appellant were not regular and valid. Since the omission on the part of the lower appellate Court placed both parties in a disadvantageous position, Ss. 152 and 153 provided the cheap and speedy remedy and the Court had inherent jurisdiction to correct the mistake. But the question here was, who the real legal representative was and the order under S. 151 was passed without giving an opportunity to the defendants respondents to show that the applicant was not the legal representative of the deceased appellant.

The High Court, therefore, directed the lower appellate Court to dispose of the case after hearing both parties and to decide the appeal treating the subsequent proceedings as of no effect. (Paras 25, 26, 27)

Per N. Balakrishnaiya J. : S. 151, Civil P. C. cannot be employed to assume jurisdiction to set aside a decree passed in subsequent proceedings when there is no appeal against those proceedings. Besides, the applicant legal representative having been represented by the counsel in the appeal and also in further proceedings, he could not approach the appellate Court which had ceased to have any jurisdiction and get the subsequent decree set aside by a mere application under S. 151. The proceedings were not a nullity, and the proper course was to take proceedings against the final disposal of the suit by the trial Court. (Paras 28-30, 32, 33, 34)

Anno: C. P. C., O. 22, R. 3 N. 9; S. 151 N. 4; S. 152 N. 6, 7, 8; S. 153 N. 2.

B. V. Balaji, for Petitioners; B. Neelakanta, for Respondent.

CASES REFERRED : Paras

(A) ('93) 1893 All WN 181 4, 11, 25, 31, 36
(B) 10 Mys LJ 269 5
(C) ('11) 9 Ind Cas 977 (All) 5
(D) (V22) AIR 1935 Pat 4: 158 Ind Cas 56 5
(E) (V3) AIR 1916 Cal 690: 29 Ind Cas 470 5
(F) (V16) AIR 1929 Mad 802: 52 Mad 933 17, 18, 26
(G) (V24) AIR 1937 Bom 401: ILR (1937) Bom 602 17, 18, 19, 20
(H) (V14) AIR 1927 Cal 76: 53 Cal 844 19, 20
(I) (V13) AIR 1926 All 212: 48 All 356 20
(J) (V31) AIR 1944 Lah 165: 216 Ind Cas 97 20
(K) (V22) AIR 1935 Lah 176: 158 Ind Cas 102 20
(L) (V11) AIR 1924 All 818(2): 46 All 864 20
(M) (1892) 1892 AC 547: 62 LJ PC 24 26
(N) (1903) 72 LJ PC 44: 1903 P 88 26
(O) (V19) AIR 1932 Oudh 291: 8 Luck 93 26
(P) ('47) 52 Mys HCR 33 35

ORDER OF REFERENCE

The petitioners before this Court are the respondents in R. A. No. 147 of 44-45 on the file of the First Additional Subordinate Judge, Bangalore. The first respondent herein is one Ramakrishnaiah who died on 9-1-1945 when the appeal was pending before the lower Court. The said Ramakrishnaiah filed a suit on 6-11-43 for declaration and possession of the suit schedule properties in the Court of the Munsiff of Dodballapur. The suit was dismissed on 7-11-1944. The said Ramakrishnaiah filed an appeal on 3-1-1945 before the District Judge, Bangalore and on 19-1-1945 it was reported to the Court that the appellant was dead. The case was adjourned to 29-1-1945 to bring the legal representative on record. I. A. No. 1 was filed on 29-1-1945 to bring one Ramachandriah as the legal representative of the deceased Ramakrishnaiah. Notices were ordered on 29-1-1945 to be served by 26-2-1945. In the meanwhile, on 30-1-1945 the appeal was transferred by the District Judge to the Subordinate Judge who issued notices to the respondents and after service the appeal was disposed of by arguments on 30-3-1946 with the result, that the dismissal order of the trial Court was set aside and the suit was remanded by allowing the amendment application of the defendant for fresh disposal according to law. After remand, objections were taken in the trial Court that there was no living plaintiff represented in the suit and that the suit was dismissed as there was no party to prosecute the suit. Against that order, C. R. P. No. 115 of 47-48 was filed.

(2) It may be observed here that no notices were served on the respondents to give intimation of the L. R. application filed by Ramachandriah with the result that the application was lost sight of by the appellant and the Court. No final orders were passed nor any legal representative brought on record before the appeal was disposed of on merits. In the revision petition above adverted to, the High Court observed that since no orders were passed on the L. R. application which was necessary for the progress of the case, the suit ended in dismissal in the Munsiff's Court and that the mere filing of the petition will

not entitle the petitioner to proceed with the suit. That being so, the High Court declined to interfere with the order in revision with an observation that the petitioner may seek his own remedy in other proceedings according to law.

The petitioner then filed an application before the First Additional Subordinate Judge (Court of Small Causes), Bangalore under Ss. 151 and 152, Civil P. C. Objections were called for and filed by the defendants on 11-6-1948. The main points urged are that the petitioner has no 'locus standi' to maintain the application as he was not a party to the proceedings and the application was belated. It is also stated in the objection statement that the deceased Ramakrishnaiah has left behind him his wife and children and the status of the petitioner also is disputed. The learned Subordinate Judge states that the default in not having brought the legal representative on record constituted an error or omission on the part of the Court and on that ground he allowed the application and made, what he calls, a formal order directing Ramachandriah to be brought on record as the legal representative of the deceased appellant.

He further directed the lower Court to take the suit on file and dispose it of as directed in the remand order of that Court dated 30-3-1946. In effect, the order on this application constitutes a reversal of the judgment and decree of the Court below which cannot be done under the guise of correction of an error or omission under Ss. 151 and 152, Civil P. C.

(3) Sri B. V. Balaji, learned counsel for the petitioners contends that at the time of arguments his party never knew the death of the appellant and the case went on as if the appellant was alive. If, as a matter of fact, the appellant was dead on that date, the judgment and the further proceedings are a nullity. The omission to bring the legal representative on record within 90 days from the date of the death of the appellant should automatically operate as abatement of the suit. It cannot be that the legal representative of the appellant could be brought on record more than two years after the death of the appellant and as such, the interference of the lower appellate Court below works prejudice so as to take away the right which is vested in his clients.

(4) Sri B. Neelakanta contends that the legal representative's application was pending in the Subordinate Judge's Court and it was not finally disposed of. As it is an omission without disposal, the trial Court has still jurisdiction to rectify the omission; otherwise, the plaintiff will have no remedy and suffers loss and damage. Sri Neelankanta relies upon some cases to substantiate his position. One such is reported in — 'Namdar Chand v. Bansidhar', 1893 All W N 181 (A), wherein similar circumstances arose, the Court held that on the death of one of the defendants, no application to bring the legal representatives was filed, but vakalats were filed on behalf of the legal representatives, with the result that both the parties took part in the further proceedings as if the legal representatives were brought on record though an order to bring the legal representatives was not expressly passed. So, the objection that the legal representative was not brought on record was considered to be a technical one and overruled.

(5) Sri Balaji on the other side, relies upon — '10 Mys L J 269 (B); — 'Badal Khan v. Murtaz', 9 Ind Cas 977 (All) (C); — 'Phekhu Tewari v. Bhagwat Lal', AIR 1935 Pat 4 (D) and — Romesh Chandra v. Anthony Penheiro', AIR 1916 Cal 690 (E). The effect of these decisions is that the suit abates if the legal representative is not brought on record within time.

(6) The important point for decision is whether the Subordinate Judge who dealt with the appeal was competent under Ss. 151 and 152, Civil P. C., to direct the legal representative to be brought on record after the disposal of the appeal and after the suit was dismissed in the trial Court when he was not actually seized with jurisdiction and whether in view of the fact that the judgment was passed with a dead person on record and if the further proceedings are to be ignored altogether the appellate Judge could have jurisdiction to amend the decree by bringing the legal representative on record. This point does not appear to be free from difficulty and I feel that since no other precedent except the All. Weekly Notes above referred to, was quoted before me during arguments and since there is no other case also of our own High Court bearing specifically on the points raised, it appears desirable to refer the matter to a Bench for a considered ruling on the point.

(7) The petition is, therefore, directed to be placed before a Bench for disposal.

ORDER OF THE DIVISION BENCH.

N. BALAKRISHNAIYA J.:

(8 to 10) (After stating the facts of the case his Lordship proceeded:) Sri Balaji, the learned counsel for the petitioners, urges that the application I. A. No. III which is filed under S. 151, Civil P. C. is not maintainable as the learned Subordinate Judge was not seized with the jurisdiction of the appeal at that stage and that the order of the learned Subordinate Judge has the effect of not only setting aside the judgment of his own Court but has also the effect of setting at naught the decree of the trial Court which was passed subsequently in consequence of the original order of remand. The contention of Sri Balaji is not without force. It is no doubt true that the Courts have inherent powers to review their own orders or correct their own mistakes, but that when the suit is otherwise finally disposed of by the trial Court, the appellate Court cannot without an appeal against the disposal of the trial Court interfere under S. 151, Civil P. C. and make an order in the manner in which it is done in this case. In I. A. No. III no prayer is made for setting aside the judgment remanding the suit nor is there any prayer to set aside the judgment of the trial Court. In fact, the appellate Court has made no order setting aside the decree of the trial Court but that it gives a direction that the suit may be taken to the file and disposed of as directed in the original decree of remand.

(11) It is to be noticed from the records of the appellate Court that after filing I. A. No. I a counsel has filed vakalat on behalf of the legal representative and the application I. A. No. II is filed by the said legal representative represented by the counsel and the defendants have also filed objections for I. A. No. II. The parties thus have taken for granted that the legal representative was on record and the Court also proceeded on that basis, and allowed the appeal by remanding the suit. The conduct of the legal representative subsequent to that is that he takes part in the proceedings before the trial Court and ultimately he files a revision petition, i.e., C. R. P. No. 115 of 46-47 in this Court complaining against the order of dismissal of the suit made by the trial Court. The case reported in — '1893 All WN 181

(A)' is cited where the appellant in the suit having died during the pendency of the appeal, an application was made by his son to have his name placed on the record as representative of the deceased appellant. On that application the Court made no order whatsoever, but nevertheless when the appeal came on for hearing the Court allowed the applicant to be represented and ultimately decreed the suit. On appeal by the respondent, the High Court declined to allow the defendant's plea that the person in whose favour the appeal in the Court below had been allowed had not properly been made a party to the appeal.

(12) The facts in this case are almost similar to the case cited before us and I am of opinion that the respondent, legal representative of the original plaintiff, was represented, did take part in the original appeal by filing applications and got the case argued and even by taking part in subsequent proceedings before the trial Court. In this view, he cannot be heard to say now that he can fall back upon S. 151, Civil P. C. and approach the appellate Court which is ceased to have any jurisdiction and get the decree set aside by a mere application under S. 151. The proper course ought to be to take proceedings against the final disposal of the suit by the trial Court.

(13) Sri Neelakanta, the learned counsel for the respondent, urges before us in this Court that the application I. A. No. III was left pending without orders on the file of the appellate Court though the appeal itself is disposed of, and that it was competent for the appellate Court to intervene at any stage of the proceedings and even after the High Court disposed of the matter, which in this case also has been done in C. R. P. No. 115 of 1946-47 to get his suit remanded. He urges further that all the proceedings that have taken place without bringing the legal representative on record are null and void. If it is viewed that he was not properly represented in the appellate Court, it was open for him to have the final disposal declared as a nullity by taking proper proceedings. But in the view I have taken that the plaintiff was represented in the appellate Court, the judgment of the appellate Court is not a nullity.

(14) Considering from any point of view, I am of opinion that the learned Subordinate Judge had no jurisdiction to entertain the application under S. 151, Civil P. C. and set aside the decree of the lower Court. The order on I. A. No. III under revision, is set aside and the revision petition allowed with costs. Advocate's fee Rs. 15/-.

PUTTARAJ URS J.:

(15) (7-11-1949) The point involved is one of great importance for the administration of justice and I think it is necessary to set out the facts in detail.

(16) The petitioners were the respondents in R. A. No. 147 of 44-45 before the first Additional Subordinate 'Judge, Bangalore. This appeal was against the judgment and decree of the Munsiff of Doddaballapur in O. S. No. 162 of 42-43 on his file. The plaintiff in that suit was one Ramakrishniah. The suit was for a declaration and permanent injunction against the defendants who are the present petitioners. That suit was dismissed and the appeal was filed in the District Court, Bangalore. When that appeal was pending on the file of the District Judge, the appellant Ramakrishniah died. Then the present respondent Ramachandriah filed an application for being brought on record as the legal representative. Notices also were issued to the present petitioners who are the respondents in that appeal. At that stage, the appeal was transferred to the file of the Principal Subordinate Judge, Bangalore, and it was registered as R. A. 130/44-45 on his file. In that Court also, notices were issued to the present petitioners in respect of the L. R. application filed by Ramachandriah, which was I. A. No. I. The notices also seem to have been served and the respondents then filed objections stating that Ramachandriah was not the legal representative and that there were other legal representatives.

At this stage, again the appeal was transferred to the file of the First Additional Subordinate Judge, and it was registered there as R. A. No. 147 of 44-45. In that Court no action on this I. A. No. I, i.e., the L. R. application, was taken. Arguments were heard and the learned Subordinate Judge remanded the suit to the Munsiff of Doddaballapur for fresh disposal. The Munsiff, Doddaballapur, after receiving the records, found that no legal representative had been brought on record and that there was no plaintiff to prosecute the suit and as such, dismissed the suit. Then the present respondent filed C. R. P. No. 115/46-47 on the file of this Court praying for a revision of the order of the Munsiff of Doddaballapur. That C. R. P. was dismissed mainly on the ground that the petitioner i.e., the present respondent had got other remedies.

After this, the petitioner in I. A. No. I filed an application under Ss. 151 and 152, Civil P. C. before the Additional Subordinate Judge, who had remanded the suit, bringing to his notice that no orders had been passed on I. A. No. I, that without bringing him on record as a legal representative the arguments had been heard and the suit had been remanded, that that was not correct and that orders may be passed on his petition bringing him as the legal representative of the plaintiff and arguments be heard again. The learned Additional Subordinate Judge allowed this application and ordered that the petitioner i.e., the present respondent might be brought on record as the legal representative in the appeal, and he also ordered that the order of dismissal passed by the learned Munsiff should be set aside and directed that the Munsiff should re-hear the case and dispose it of on merits. It is this order that is sought to be revised in this petition.

(17) The first ground that has been taken in this petition is that the Additional Subordinate Judge had no jurisdiction to entertain the application even, as a final order had been passed by him already remanding the suit for fresh disposal. I am not inclined to accept this argument, because the order of the learned Subordinate Judge was in effect no order at all and could not be considered as a final order, in view of the fact that no legal representative of the appellant had been brought on record. It was an order without an appellant on record and as such, it was a nullity as held in — 'Balaramier v. Vasudevan', AIR 1929 Mad 802 (F) and — 'Alabhai Vajsurbai v. Bhura Bhaya', AIR 1937 Bom 401 (G). This is not also denied by the learned advocate for the petitioners but what his contention is that the appeal had abated.

(18) This brings us to the second contention. The question whether the appeal abated because the Court had not passed any order on the legal representative's application does not seem to admit of any doubt in this case. It is true, as contended by the learned Advocate, that no separate order of the Court is necessary for the abatement of the suit. If the application for bringing any

legal representative is not filed in time, the suit abates automatically vide — 'AIR 1937 Bom 401 (G)'. As observed in — 'AIR 1929 Mad 802 (F)' a legal action on the death of a party to it passes into a state of suspense, and this state of suspense, if the legal representative is not brought on record within time, passes into a state of abatement. But in this case L. R. application was filed in time and no order was passed by the Court though objections had been filed. It cannot be said by any stretch of imagination that the appeal had abated, as the application had been filed in time and as no orders had been passed on it. Even if we consider that the appeal had abated, there are authorities which go to the length of saying that such an abatement order under such circumstances can be set aside by the Court 'suo motu' or on the application of the party. A distinction has to be drawn between cases in which applications of parties are necessary and those in which the Court can do these things of its own accord, and the present one is a case of the latter category.

(19) The next objection that has been taken by the learned Advocate for the petitioners is that the proper course for the respondent to take after the abatement of the suit was not to file an application under Ss. 151 and 152, Civil P. C. It has already been observed that even an abatement order under such circumstances can be set aside by the Court. It has to be observed that there is a plethora of authorities in support of this view. In — 'Kissen Gopal v. Suklal', AIR 1927 Cal 76 (H), it was held that where pending the hearing of the case the plaintiff is adjudicated an insolvent and consequently he is not present at the hearing, and the Court is informed that the plaintiff had become an insolvent, the Court should call upon the Official Assignee to state whether he intends to continue the suit and if the Official Assignee decides that he would continue the suit, it would then be necessary for the Court to make an order that he should give security for costs. It was also observed that the provisions of O. 9, R. 8, Civil P. C. did not apply to such a case and the dismissal of the suit for default was bad and the dismissal could be set aside in appeal whether it was under S. 151, Civil P. C. or whether it was under the inherent jurisdiction of the Court.

In — 'AIR 1937 Bom 401 (G)' referred to above, it was also observed that it was no part of the appellant's duty to take necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who are properly served with notice in order to correct the record of the Court in terms of its order & that this was a ministerial function which the Court's establishment had to perform and if it was not performed or if it was neglected, the fault did not lie with the appellant. In this case also it was none of the business of the party to ask the Court to pass orders on his application. He had filed the application, notices were taken to the respondents, he had filed objections and it was for the Court to decide whether the objections were to be overruled or enquiry was to be held and orders passed. If the Court did not do it, the party could not be held responsible for it. It was also held by this decision that the appeal which had abated under such circumstances could be set aside even beyond the period of limitation under Ss. 151 and 152 C. P. C.

(20) The next question that arises for consideration is whether the Court can under such circumstances interfere and set right things. Even in this respect there does not seem to be any doubt at all. The powers of the Court under S. 151 are very wide. It has been seen above that in — 'AIR 1927 Cal 76 (H)', it was held that the Court could interfere and set aside the dismissal of the suit for default in appeal, whether under Sec. 151, Civil P. C. or whether it be under the inherent jurisdiction of the Court. It looks as though there is, apart from S. 151, an inherent power in every Court to do any act to render justice. It was held in —'Harnand Lal v. Chaturbhuj', AIR 1926 All 212 (I), that the enactment of Sec. 151 declares the existence of an inherent jurisdiction in all Courts to go beyond the law of procedure in the ends of justice. In — 'Alfred Zalair v. Sirajuddin', AIR 1944 Lah 165 (J), it was held that in the absence of any specific words to that effect in the section, i.e. S. 151, Civil P. C. itself, the jurisdiction of the Court to act 'ex debito justatiae' cannot be ousted simply because another and perhaps an inconvenient remedy was also available. It was also held that a Court could undo an act under S. 151 which it had been made to do at the instance of a person who had been discovered, although subsequently not to have been entitled to the relief which he had obtained from the Court under false colours.

In this case it was as much the duty of the present petitioners to bring to the notice of the Subordinate Judge that no legal representative had been brought on record and that no arguments could be heard and no valid orders could be passed. It will not be wrong if we construe their quiescence as a fraud played on the Court and on the opposite party. It was held in — 'AIR 1937 Bom 401 (G)', that where an appeal was presented against a dead person or persons and the appeal had abated, the Court had power under Ss. 151 and 153 in order to prevent injustice being done to permit the amendment and allow the appellant to add the legal representatives of the deceased.

In — 'Nawab v. Sardar Singh', AIR 1935 Lah 176 (K), it was held that where a suit was dismissed under O. 9, R. 8, Civil P. C. in ignorance of the death of the plaintiff, there was no need for a formal application by the deceased plaintiff's legal representatives under O. 9, R. 9 to set aside the order of dismissal, and when such an application was made it could be held to fall under O. 22, R. 3 and the Court could exercise its powers under Sec. 151 in setting aside that order & restoring the case to file. It was held in —'Pandit Balgobind v. Sheo Kumar', AIR 1924 All 818 (L), that S. 151, Civil P. C. could not be invoked more appropriately than for the purpose of correcting a miscarriage of justice appearing on the face of the proceedings and for making such orders in the nature of consequential orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court. It was held that the High Court had power not merely to set aside abortive proceedings in lower Courts but to pass such orders as the Court ought to have passed itself and could if the matter be referred back still pass. It was further held that there could be no estoppel against a litigant arising out of the wrongful act of the Court permitted or performed by its own officials.

(21) It is clear from the above decisions that the powers of the Courts under Ss. 151 and 152 are vast and they could pass any order in the ends of justice. In this case, it has again to be repeated that the order passed by the Subordinate Judge was a nullity, an order without jurisdiction, and it was on account of this mistake of

the Court that the whole proceedings have been held up. It was urged by the learned Advocate for the petitioners that it was the duty of the respondent to have brought the fact that he was not brought on record to the notice of the Court, and as already said, this was as much the duty of the petitioners as that of the respondent. However, I think the order of the learned Subordinate Judge directing the legal representative to be brought on record without inquiry does not seem to be tenable.

(22) In the result, I am of opinion that all the proceedings commencing from the order of remand in the lower Courts have to be set aside and I order accordingly, and this case will be remitted back to the Additional Subordinate Judge with a direction that he should take the case on file and hold an enquiry as regards the L. R. application I. A. No. I and pass orders and then proceed to dispose of the appeal according to law.

(This Revision Petition coming on for hearing on 15th March 1950, in pursuance of an order of reference to a Full Bench on 1-11-1949, the Court made the following order :)

R. VENKATA RAMAIYA J.:

(23-24) (His Lordship stated the facts of the case and then proceeded :) The main contentions of the petitioners are that an order setting aside the dismissal of the suit could not be properly passed on an application filed under S. 151, Civil P. C., that the petition is belated and lastly the present respondent is not the legal representative of the deceased appellant-plaintiff.

(25) Order 22, R. 3, Civil P. C. states :

"(1) Where ..... sole plaintiff .... dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-r. (1), the suit shall abate so far as the deceased plaintiff is concerned....."

Rule 5, O. 22 states:

"Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court."

By Rule 11 these provisions are made applicable to appeals. Sub-rule (2) does not come into play as the applications I. A. No. 1 was filed within a month after the death of the original plaintiff. What is required by R. 3 is that on the death of the plaintiff or the appellant if the right to sue survives, an application could be made by the legal representative of the deceased plaintiff or appellant to be made a party. On this being done it is obligatory on the Court to make him a party and proceed with the appeal. If, however, there is a dispute about the applicant being a legal representative the Court has to determine the question under R. 5. All that the person desirous of proceeding with the case has to do is that he should make an application. The further acts necessary for enabling him to do so are left to the Court. Apparently by oversight or otherwise no order either granting or rejecting the application was passed. The respondent also who was the applicant in I. A. No. 1 does not seem to have pressed on the attention of the Court the need for a formal order and amendment of the cause title. This omission on his part cannot take away the right to proceed with the case if he is the legal representative, as there is no duty cast on the litigant by the rules to remind the Court of observance of the rules. A possible reason for the omission is that the respondent's Counsel took part in the appeal without any objection and the appeal was disposed of after hearing him. If the case stood at this, there would have been no difficulty and the absence of strict compliance with the formalities may have been viewed as an inconsequential technicality as in — '13 All WN 181 (A)'. But the petitioners do not admit that the respondent is the legal representative of the plaintiff. And they did not allow the suit to proceed in pursuance of the order of remand passed in the appeal on the score of there being no competent person present to prosecute the suit after the death of the plaintiff. The attitude displayed by the defendants in the proceeding is thus inconsistent and is nothing short of blowing hot and cold in the same breath, which cannot be countenanced. There can be no doubt that there has been a regrettable omission which has landed the respondent in undeserved predicament. As regards the remedy, the contention of appellants that it is by means of an appeal cannot be accepted since the Code provides for an appeal only against orders passed and not failure to pass orders.

(26) The proceedings in the appeal after the death of the original plaintiff cannot be considered to be regular as the Court has omitted to do what is required by Rules 3 and 5 of Order 22 and there is no one on record as plaintiff or his legal representative. The responsibility for this cannot be ascribed to the respondent. As a result of the omission, both parties are placed in a disadvantageous position, the petitioners by being denied an opportunity to contest that the respondent is the legal representative of the deceased plaintiff and the respondent by the absence of an order to treat him as a legal representative which entailed the dismissal of the suit. The consequences which have now ensued are to be traced to this omission. In — 'AIR 1929 Mad 802 (F)', when a revision petition was disposed of without the legal representative of a party who was dead, on record it was ordered that the case should be heard afresh observing that a legal action on the death of a party to it passes into a state of suspense ..... and while the action is in a state of suspense no valid act which is not purely formal or provisional but which involves a decision on the merits of any part of the action can be done by the Court. Under S. 152, Civil P. C. errors arising from any accidental slip or omission in judgments, decrees or orders may at any time be corrected by the Court either of its own motion or on the application of the parties. This section corresponds to Rule 2 of Order 28 of the Rules of the Supreme Court in England except for the absence of the words "without an appeal" found in the rule. But this does not imply that the section cannot be availed of to rectify mistakes which can be set right by means of an appeal.

In — 'Hatton v. Harris', (1892) AC 547 (M), Lord Watson said "the correction ought to be made upon motion to that effect and is not a matter either for appeal or for rehearing". In — 'E v. E', (1903) 72 LJP 44 (N), the correction was allowed even where the order was under appeal and notice of the appeal against the order sought to be altered was given by the party who applied. Section 152 provides a cheap and speedy remedy and there is no reason for driving the parties to secure it by means of an appeal which necessarily involves expense and delay. In — 'Parsotam Dass v. Mahammad Hamid', AIR 1932

Oudh 291 (O), an application for execution was dismissed as barred by time relying on the office note. The dismissal was later set aside on the ground of mistake. This was held to be justified under S. 152 Civil P. C. though the erroneous order of dismissal was appealable. Section 153 too gives power to the Court to amend defects or errors in any proceeding in a suit. The section states that all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. The question in this case is who the real or proper legal representative is and an order necessary for determination of this has to be made.

(27) In my opinion the order to be made for the purpose of shortening the litigation and avoiding confusion is to relegate the parties to the position they occupied at the time I. A. No. 1 was filed in the Appellate Court, direct the appellate Court to dispose it of after hearing both parties and decide the appeal treating what has been done in that Court and trial Court so far subsequent to I. A. No. I as of no effect. The parties will bear their own costs. There will be an order accordingly.

N. BALAKRISHNAIYA J.:

(28-30) (His Lordship stated the facts of the case and then proceeded :) Sri Balaji, the learned counsel for the petitioners, urges that the application, I. A. No. III, which is filed under S. 151, Civil P. C. is not maintainable as the learned Subordinate Judge was not seized with jurisdiction of the appeal at that stage and that the order of the learned Subordinate Judge has the effect of not only setting aside the judgment of his own Court but also the judgment and decree of the trial Court which was passed subsequently. The contention of Sri Balaji is not without force. It is undoubted that the Courts have inherent powers to review their own orders or correct mistakes, but S. 151 cannot be employed to assume jurisdiction to set aside a decree passed in subsequent proceedings when there is no appeal against these proceedings.

(31) It is to be noticed from the records of the lower appellate Court that, after filing I. A. No. I, a counsel has filed vakalat on benalf of the legal representative and the application I. A. No. II is filed by the said legal representative represented by the counsel and the defendants have also filed objections for I. A. No. II. The parties thus have taken for granted that the legal representative was on record and the Court also proceeded on that basis, and allowed the appeal by remanding the suit. The conduct of the legal representative subsequent to that is that he takes part in the proceedings before the trial Court and ultimately he files a revision petition i.e. C. R. P. No. 115 of 1946-47 in this Court complaining against the order of dismissal of the suit made by the trial Court. In —'1893 All WN 181 (A)', where the appellant in the suit having died during the pendency of the appeal, an application was made by his son to have his name placed on the record as representative of the deceased appellant. On that application, the Court made no order whatsoever, but nevertheless when the appeal came on for hearing, the Court allowed the applicant to be represented and ultimately decreed the suit. On appeal by the respondent, the High Court declined to allow the defendant's plea that the person in whose favour the appeal in the Court below had been allowed had not properly been made a party to the appeal.

(32) The facts in this case are almost similar to the case referred to and I am of opinion that the respondent, legal representative of the original plaintiff, was represented and did take part in the original appeal which was allowed in his favour. In this view, he cannot be heard to say now that he can fall back upon S. 151, Civil P. C. and approach the appellate Court which has ceased to have any jurisdiction and get the subsequent decree set aside by a mere application under S. 151. The proper course appears to be to take proceedings against the final disposal of the suit by the trial Court.

(33) Sri Neelakanta, the learned counsel for the respondent, urges before us in this court that the application I. A. No. III was left pending without orders on the file of the lower appellate Court though the appeal itself is disposed of, and that it was competent for that Court to intervene at any stage of the proceedings, and even after the High Court disposed of the matter, which in this case also has been done in C. R. P. No. 115 of 1946-47 to get his suit remanded. He urges further that all the proceedings that have taken place without bringing the legal representative on record were null and void. In the view that he represented in the lower appellate Court and took part and obtained a decree in his favour, it cannot be said that the proceedings are a nullity.

(34) Considering from any point of view, I am of opinion that the learned Subordinate Judge had no jurisdiction to interfere under S. 151, Civil P. C. to set aside the subsequent decree of the trial Court. The order on I. A. No. III under revision, is set aside, and the revision petition allowed with costs. Advocate's fee Rs. 15/-.

MALLAPPA J.:

(35) I agree entirely with the opinion of Venkataramiah J. I would like to merely add that the decision in — 'Munivenkatappa v. Gopalakrishna Setty & Brothers', 52 Mys HCR 33 (P), in a way supports the conclusion arrived at. In that case it was decided that a sale in an execution case, held after the death of the judgment-debtor without bringing his legal representatives on record is a nullity. No question of abatement arises as an L. R. application had been filed but no valid order can be passed after the death of a party without bringing his legal representatives on record.

(36) It is clear that the proceedings taken are not binding on persons who are not parties to the case. The appellant-plaintiff died and an application was filed in the District Court by one Ramachandriah to be brought on record as the legal representative of the deceased. He was however, not brought on record by oversight in the subordinate Judge's Court, as the case was at that stage transferred to that Court from the District Court. Arguments were no doubt heard, as if a legal representative was brought on record, though in fact he had not been brought on record. The case was, however, remanded as if he had been brought on record. If the defendants who had failed in that case had come up to this Court complaining against the order remanding the suit without formally bringing the legal representative of the Appellant-Plaintiff on record, the decision in — '1893 All WN 181 (A)', would have been applicable. It was possible to say that having argued the case as if the legal representative of the plaintiff-appellant was on record, the defendants are estopped from contending that it is not so. They did not do so.

On the other hand, the defendants took an objection in the Munsiff's Court that the plaintiff had died and without bringing his legal representative on record the suit cannot proceed and on that ground got the suit dismissed. They cannot now urge that the legal representative must be deemed to have been brought on record, after getting the suit dismissed on the ground that the legal representative had not been brought on record.

(37) The first order of the learned Subordinate Judge remanding the suit to the lower Court was not valid and in fact without the legal representative of the deceased plaintiff on record no such order could have been passed. The respondent cannot be allowed to suffer by the Court's failure to pass an order which it was bound to pass and the defendants who are petitioners in this case cannot be allowed to take advantage of their inconsistent attitude. When these things were brought to the notice of the learned Subordinate Judge, he has ordered that the legal representatives should be brought on record and the suit remanded. It will be noticed that this has been done without giving an opportunity to the defendants to show that Ramachandra Rao is not the legal representative of the deceased plaintiff. The only order in these circumstances that could be passed is to set aside all the orders passed subsequent to the application filed for bringing the legal representative of the deceased plaintiff on record and to direct the learned Subordinate Judge to proceed with the appeal from that point. The parties have to bear their own costs. I, therefore, agree with the opinion of Venkataramaiya J. There will be an order accordingly.

A/H.G.P. Order accordingly.

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MEDAPA C. J. AND VASUDEVAMURTHI J.

T. Adinarayana Setty, Appellant v. Special Land Acquisition Officer, Bangalore, Respondent.

Regular Appeal No. 255 of 1950-51, D/- 5-10-53, against order of 2nd Addl. Dist. J., Bangalore, D/- 18-9-1950

Land Acquisition Act (1894), S. 23 — Assessment of compensation — General principles — Land at Bangalore.

The value of lands in Bangalore in or about 1935 was at about the lowest and that after the commencement of World War II, particularly after the threat of the Japanese invasion was removed, the value of lands shot up enormously, as much as 5 to 10 times its value in 1935 and in some cases even more. An award of Rs. 1,41,169/- in 1947 for the compulsory acquisition of the land purchased in 1935 which cost the claimant in all Rs. 1,30,000/- cannot, therefore, be held to be adequate as it ignores entirely the sharp rise in the prices of lands. (Para 7)

In assessing compensation for the acquisition of land, the layout of which is sanctioned, 25 per cent. of the area may be excluded as an area earmarked for roads and drains. (Para 9)

If there is a hollow area in the layout which can be filled up and brought on level with other area, the amount of compensation for it would be the amount calculated on the basis of the rate applicable to rest of the area less the estimated cost of filling the hollow. (Para 10)

Anno: L. A. Act, S. 23 N. 2, 8.

B. Somaiya, for Appellant; Asst. Advocate-General, for the Govt.

MEDAPA C. J.:

The facts of the case leading up to and relevant for the disposal of this appeal, briefly stated, are as follows. The Appellant purchased Survey No. 19 of Jakkasandra village, Bangalore North Taluk, in the year 1935 and after paying the requisite fine for converting the same into building sites secured the necessary sanction of the Government on 20-10-39. The Appellant next applied to the Bangalore Municipality for the sanction of a private lay out on 24-2-1940 and obtained the sanction on 31-3-1944. Portions of this land before its conversion as building sites were acquired by the Government for the purpose of putting up a maternity home and a school in 1937 and 1939 respectively. The Appellant after the conversion of the land into building sites, applied to the Municipality for a licence for putting up a building and constructed a house on a portion of the land and leased out the same on a rent of Rs. 50/- per month. Later he sold several sites at rates varying from Rs. 6-8-0 to Rs. 15/- per sq. yd. in the year 1945.

Preliminary notification for the acquisition of this land was published in the Mysore Gazette on 11-10-1945 and final notification on 30-5-1946. The Appellant objected to the acquisition on various grounds detailed in Ex. 11, the most important of them being, (1) that the land was unsuited for the purpose of a maternity hospital as the same was adjacent to the Mysore Maharaja Weaving Mills and the Labour Colony and (2) that the acquisition would be uneconomical inasmuch as the land proposed to be acquired was not agricultural land but a building site and compensation for its compulsory acquisition will have to be paid for at a high rate. The objections of the Appellant were overruled and possession of the land was taken on 7-5-1947 by the Municipal Engineer after the order for its acquisition on 1-5-1947.

(2) The Appellant claimed compensation at the rate of Rs. 15/- per Sq. yd. but the Special Land Acquisition Officer awarded compensation at the rate of Rs. 10/- per sq. yd. The Land Acquisition Officer set off a sum of Rs. 98,807/- against the amount of compensation to be paid to the Appellant on the ground that the said sum was required for laying out roads and drains and for the installation of electric power. He disallowed the claim of the Appellant for compensation for the building put up by him on the ground that the same must have been constructed after the date of the preliminary notification and without the requisite licence from the Municipality.

The Land Acquisition Officer also excluded an area of 26248 sq. yds. from the award of compensation (the total area of the land acquired being 48404 1/3 sq. yds.) on the ground that the said area was required for laying out roads and drains. He left out of account an area of about 3000 sq. yds. on the ground that the same formed a hollow or 'halla' unfit for building or for any other purpose. The Appellant prayed for a reference to the District Judge, Bangalore. He claimed compensation at the rate of Rs. 15/- per sq. yd., disputed the validity and correctness of the Land Acquisition Officer's decision disallowing compensation for an area of 26248 sq. yds. of land and for the house as also for the 'halla' etc.

(3) The District Judge upheld the rate of compensation at Rs. 10/- per sq. yd. awarded by the Land Acquisition Officer as also his decision disallowing compensation for 26248 sq. yds. He also upheld the decision of the Land Acquisition Officer disallowing compensation for the building put up by the Appellant. He however allowed compensation at the rate of Rs. 3/- per sq. yd. for an area of about 3000 sq. yds. which had been left out of account by the Land Acquisition Officer. He also upheld the claim of the Appellant for Rs. 10,000/- which had been earmarked by the Land Acquisition Officer towards expenses for installing electric power and directed the said sum to be deducted from out of Rs. 98,807/- the sum directed to be set off against the compensation payable to the Appellant. Hence this present appeal.

(4) The Appellant in his appeal memo has urged many grounds but his learned Counsel confined his arguments to the following, viz.:

(1) that compensation at the rate of Rs. 10/- per sq. yd. was quite inadequate and should have been at the rate of Rs. 15/- per sq. yd.;

(2) that the Land Acquisition Officer and the District Judge were wrong in disallowing compensation for the entire area of 26243 sq. yds.;

(3) that a reservation of more than a sixth of the total area acquired for the purpose of making roads and drains was excessive and untenable;

(4) that both the Land Acquisition Officer and the District Judge were wrong in charging 20 per cent. of the total cost of the amount required for laying out roads and drains as necessary for fluctuations in labour charges;

(5) that the learned District Judge who disallowed the claim of the Land Acquisition Officer for charges towards installing electric power amounting to Rs. 10000/- should have allowed to the Appellant a further sum of 17½ per cent. of the said Rs. 10,000/- included by the Land Acquisition Officer for supervision charges; and

(6) that the award of compensation at the rate of Rs. 3/- per sq. yd. for what was known as 'halla' was quite inadequate.

(5) The Land Acquisition Officer has stated that he fixed the rate of compensation to be awarded at Rs. 10/- per sq. yd. on account of two grounds, viz. (i) an alleged agreement by the Appellant to receive compensation at that rate said to be implicit in Ex. II and (ii) that the rate of Rs. 10/- per sq. yd. is the average rate actually secured by the Appellant for sales effected by him prior to the preliminary notification. The District Judge relied on the same two grounds and also on the opinion of the two engineers examined for the respondent who say that the award of compensation at the rate of Rs. 10/- per sq. yd. was a very fair rate for the land acquired. The two Assistant Engineers have not given or placed any material in support of their opinion. The Respondent has also not produced any other evidence regarding the rate at which lands were sold in or about the locality at or about the time of the acquisition; even entries from the Sub-Registrar's Office regarding sales of lands in the locality at the relevant time have not been made available to the Court. The argument that the Appellant agreed to receive compensation at the rate of Rs. 10/- per sq. yd. is sought to be supported by his statement in Ex. II. A perusal of the said exhibit however does not warrant this contention. The Appellant has no doubt stated:

> "This rate ranges from Rs. 10/- to 12/- on the average of Rs. 10/- a square yard as could be verified from entries in the local Sub-Registrar's Office and Bangalore City Municipal Office. At any rate, I myself have sold in the course of this year some 6 sites out of the land proposed to be acquired for rates ranging from Rs. 7/- to 15/- or on an average of Rs. 10/- per square yard. At this rate the compensation amount will be Rs. 5,12,430/- adding the statutory allowance of Rs. 77,360/- at 15 per cent on the compensation amount; on account of the compulsory nature of the acquisition the total cost of the land will be Rs. 5,89,290/- or nearly six lakhs of rupees only for the land required for the maternity hospital is a very heavy amount."

It is not clear how the Land Acquisition Officer and the District Judge spelled from this statement an agreement on the part of the Appellant to receive compensation at the rate of Rs. 10/- per sq. yd. It is obvious from the context that the appellant agreed to receive compensation at the rate of Rs. 10/- per sq. yd. provided he was given compensation at that rate for the entire land without any deduction whatsoever. This is made manifest by his statement

> "At this rate the compensation amount will be Rs. 512,430/-."

It must be remembered here that the Appellant when he sold portions of his land did not exclude or leave out of account the space required for construction of roads and drains but expected and secured payment at the rate of Rs. 10/- per sq. yd. for every bit of land sold by him. The Land Acquisition Officer when he struck the average rate of Rs. 10/- per sq. yd. knew or must have known that every bit of the land included in the several sales was paid for and that no portion of the land sold, was excluded by the Land Acquisition Officer in calculating the average price per sq. yd.

(6) Under these circumstances we fail to see how the statement extracted above can be pressed into service to ferret out an agreement by the Appellant to receive compensation at the rate of Rs. 10/- per sq. yd. for 'a portion only' of the acquired land as satisfactory compensation for 'the whole area acquired'. The agreement to receive Rs. 10 per sq. yd. for every inch of the land acquired cannot in fairness be pressed into service to pin the Appellant to receive compensation at the rate of Rs. 10/- per sq. yd. for only a portion of the land acquired. The learned Counsel for the Appellant pointed out that rates of Rs. 14/- and 15/- per sq. yd. for lands near or immediately abutting the 'halla' have been received by the Appellant as per his sale deeds, one or two months before the preliminary notification. He contended that in order to attract persons to purchase his sites, his client first put up a house at a cost of Rs. 7000/- and then leased out the same on a rental of Rs. 50/- per mensem; that as soon as the house was tenanted some persons came forward to purchase sites and put up buildings and that the rates at which they acquired sites rose steadily from about Rs. 6-8-0 per sq. yd. in the beginning to about Rs. 15/- per sq. yd. at or about the time of acquisition.

He also stressed that if the preliminary notification for acquisition had not been published, the Appellant would have secured very much more and that the statement of his client that

he could have obtained a rate of Rs. 25/- per sq. yd. cannot be brushed aside on the ground that it was either unreasonable or improbable. It cannot be said that this contention is without force. There have been four sales of sites in or touching the 'halla' and they have fetched a rate of Rs. 12/-, 15/-, 14/- and Rs. 7-8-0 per sq. yd. respectively and if the sites in or near the 'halla' for which the Land Acquisition Officer refused to award any compensation could fetch as much as Rs. 14-15/- per sq. yd. it must be conceded that the lands touching the Tumkur Road and the road on the side of the Maharaja Mills would have fetched very much more, possibly a rate approximating to or touching the rate mentioned by the Appellant.

(7) The Appellant states that he purchased the survey number in question in the year 1935 and that he paid for the same in all Rs. 1,10,000/-. He has in addition paid to the Government a conversion fine of Rs. 11, 000/- and put up a building at a cost of Rs. 7000/-. Thus the total amount spent by the Appellant for the land acquired will be in the neighbourhood of Rs. 1,30,000/-. It cannot be disputed that the value of lands in Bangalore in or about 1935 was at about the lowest and that after the commencement of World War II, particularly after the threat of the Japanese invasion was removed, the value of lands shot up enormously, as much as 5 to 10 times its value in 1935 and in some cases even more. An award of Rs. 1,41,169/- in 1947 for the compulsory acquisition of the land purchased in 1935 which cost the Appellant in all Rs. 1,30,000/- cannot at all be held to be adequate. It ignores entirely the sharp rise in the prices of lands in Bangalore referred to above which has more or less come to stay as is discernible from the fact that the price of land still shows no signs of any appreciable sagging in spite of the tightness of the money market. Under these circumstances, we are of the opinion that the compensation at the rate of Rs. 10/- per sq. yd. and that for a portion only of the acquired land is inadequate and merits modification.

The learned Counsel for the Appellant urged that the highest rate secured by his client for the sale effected by him prior to the preliminary notification should be taken as a proper index more particularly so because of the finding of the Land Acquisition Officer that the sales effected by the Appellant are genuine transactions—a finding which has been accepted by the District Judge and to which no objection has been taken by the Respondent in this appeal. It was pointed out that the Appellant as a prudent man in order to attract purchasers and develop the area offered lands for sale in the initial stages at lower rates with the reasonable hope that when the locality developed and got publicised, the sites will necessarily fetch much higher rates. It will be seen that it was only after the appellant had put up a house that purchasers stepped in to buy the suit lands and that generally speaking the later sales fetched a much higher price than the initial sales even though the last sales were of lands situated close to and abutting the hollow for which the Land Acquisition Officer gave no compensation on the ground that the same was unfit for any purpose.

It must be admitted that lands situate at higher levels and abutting the two roads must normally fetch a higher price than the lands touching the 'halla' which as seen in the sale deed, Ex. 8 dated 2-8-45 secured a price of Rs. 15/- per sq. yd. just two months before the preliminary notification. The land in question is situated close to the Maharaja Mills and a school and a maternity home have already been put up on a portion of it. The learned Assistant Advocate-General submitted that the lands in this very survey number were acquired by the Government on an average at Rs. 1/- per sq. yd. but this fact can have little or no bearing for the disposal of this appeal as the said acquisitions were in 1937 and 1939, that is to say, long before the acquisition in question and the rise in prices of lands referred to earlier. Besides, the acquisitions in 1937 and 1939 were of agricultural land, long prior to its conversion as building sites and without the sanction of the Municipality for a private lay-out, whereas the present acquisition is of building sites with the requisite sanction for a private lay-out.

(8) The next contention of the learned Assistant Advocate-General that the area acquired is considerable and that the Appellant could not have been sure of securing purchasers easily for all his sites at or about Rs. 15/- per sq. yd. has a good deal of force and must be borne in mind. It has been pointed out that the expectations of the Appellant to secure a rate of more than Rs. 15/- per sq. yd. could not be said to be unsupported by data and on that ground discarded or considered unreasonable. The Appellant had pointedly drawn the attention of the acquisition officers to this important circumstance and it is a bit surprising to note that the acquisition proceedings were continued in spite of the caution and that too after a committee of medical men had given it as their opinion that the land was unsuited and unsuitable for the construction of a hospital.

The learned Counsel for the Appellant stressed on the opinion of medical men referred to above and on the delay in the proceedings regarding conversion, sanction of the private lay-out, and acquisition as also on the timing of the preliminary notification and submitted that his client had been deliberately deprived of the benefit of the rise in prices, for his land. The necessity for and the bona fides of the acquisition of a large area of very nearly 10 acres and 23½ guntas of land in the heart of Malleswaram for the development of a comparatively small maternity home already possessing a compound of nearly 1½ acres, against the opinion of a committee of medical men, the failure so far to put the land for the use for which it was acquired, the locking up of a considerable amount of public money without any benefit, incidental to the acquisition and the synchronisation of the preliminary notification with the success of the appellant in securing sales for his sites at good prices give point to and support the submission of the Appellant. These circumstances seem to indicate that there must be something more in these proceedings than meets the eye.

The plaintive wail of the Appellant regarding the delay in the acquisition proceedings seen in Ex. J dated 31-3-47 is under the circumstances not only understandable but revealing. The evidence discloses that the Appellant has effected 4 sales about a couple of months prior to the date of preliminary notification and the rates secured by him are Rs. 12/-, 15/-, 14/- and 7-8-0 which on calculation give an average of Rs. 12-2-0 per sq. yd. The Appellant's Counsel prayed for the award of compensation on the basis of the highest price secured by his client. We have already come to the conclusion that the submission of the learned Assistant Advocate-General that it would not have been easy for the Appellant to

obtain the sale of all the lands at that rate is not without force. The learned Assistant Advocate-General stressed the necessity of bearing in mind this circumstance while fixing the rate at which compensation was to be awarded.

On a consideration of all the evidence and submissions made by the parties and keeping in mind the sharp rise in prices of lands, we feel that a rate higher than the average rate will be a proper rate at which compensation should be awarded. The average as already seen works out to Rs. 12-2-0 per sq. yd. while the maximum price secured by the Appellant is Rs. 15/- per sq. yd. We feel that a rate approximating to the mean between these two rates viz., Rs. 13-8-0 will be the appropriate rate at which compensation has to be awarded and we order accordingly. We consider that a reduction of Rs. 1-8-0 per sq. yd. will be sufficient to cover the difficulty pointed out by the learned Assistant Advocate-General.

(9) The next contention of the Appellant is that the refusal to award compensation for 26243 sq. yds. is unwarranted. The two engineer witnesses for the Appellant state that a reservation of not more than 20-25 per cent of the total area for roads and drains is reasonable and adequate in all modern lay-outs and one of the witnesses was responsible for completing the Tata Silk Farm Lay-out near the locality. The witnesses for the Respondent state that an area of 25-30 per cent. of the total area will be required but they have not produced any material to support their opinion. The Appellant's contention is that reservation of more than a sixth of the total area is unreasonable while the Respondent has set apart more than 50 per cent. of the total area for the construction of drains and roads.

The learned Assistant Advocate-General contended that the Appellant must be deemed to have consented to the exclusion of this area in computing the compensation as the sanction for the lay-out was accorded according to the plan, Ex. I, and the said sanction has been accepted by the Appellant without any protest. His argument is that in the plan Ex. I roads and drains have been marked out and that for the area so earmarked no compensation is or can be awarded. The contention that the Appellant accepted without murmur the area set apart for roads and drains as marked out in the plan is opposed to the notice he issued through his advocate, Ex. VII dated 11-4-1943 wherein he has specifically stated his objection.

Further the area earmarked in the plan for roads and drains falls much short of 26248 sq. yds. This fact was stated to us by the Corporation Engineer at the time of arguments after taking out the measurement of the area earmarked for roads and drains in the plan, Ex. I. There is besides no conclusive proof on the part of the Respondent that the sanction for the lay-out was accorded as per the plan, Ex. I, while the appellant is positive that the lay-out sanctioned was not in accordance with the said plan. We consider it safe and proper on this state of evidence to reserve for roads and drains the maximum percentage spoken to by the engineer witnesses for the first Claimant-Appellant and the minimum percentage of the area stated by the engineer witnesses for the Respondent, viz., 25 per cent. We accordingly hold that 12101-1/12 sq. yds. should be earmarked for roads and drains and be excluded from calculation in the award of compensation.

(10) The next point urged is that the rate of Rs. 3/- per sq. yd. awarded for the hollow or 'halla' comprising 3000 sq. yds. is quite inadequate. The Respondent in the estimate for construction of roads and drains etc., has specified in Ex. XII an item of Rs. 15000/- towards the cost of filling up the 'halla' so as to bring it up to level of the road. It cannot be denied that the 'halla' when filled up as proposed. can be utilised for putting up buildings and the Appellant, as also one of his engineer witnesses, say that buildings can be put up in this area even without its being filled up. In any case it seems to us inequitable that the Appellant should be charged Rs. 15,000/- towards the cost of filling up the 'halla' in order to award him a compensation at Rs. 3/- per sq. yd. amounting in all to only Rs. 9000/-.

The learned Assistant Advocate-General submitted that the sum of Rs. 15,000/- was needed not only for filling up the one 'halla' which is about 3000 sq. yds. in extent but also several others and in support of his contention relied on the existence of the 'ravines and valleys' spoken to by the witnesses for the Respondent in their evidence before Court. The information furnished by the Assistant Engineer of the Municipality, R. W. 2, to the Land Acquisition Officer in Ex. 12 is however specific and sets out that this sum of Rs. 15,000/- was required to fill up 'the halla'. The use of the definite article and singular number in the phrase "Cost of filling up 'the halla' on the area" negatives this contention. The evidence of the witnesses for the Respondent that there are "valleys and ravines" in the land only goes to expose the bias and anxiety of the witnesses to support their actions and the case of the Respondent. This area after it is filled up can in no way be deemed to be inferior to the other portions and should also be awarded compensation on the same basis. This procedure will in effect mean the award of compensation for this area at Rs. 5/- less than the rate allowed for the other area.

(11) The next contention of the Appellant is that a charge of 20 per cent. on the amount required for constructing roads and drains and for filling up the 'halla' is unwarranted. His argument is that when the cost of work has been estimated there is no reason why another sum amounting to Rs. 20 per cent. of the estimated cost should be added to it. This contention does not appear to us to be sound. The estimated cost is according to the evidence in the case, calculated on the basis of the schedule rates and schedule rates cannot be taken as the criterion for arriving at or determining the actual costs because of the fluctuations in labour charges which in all engineering contracts are fixed at 20 per cent. higher than the schedule rates. In this view this claim of the Appellant must fail and is accordingly rejected.

(12) It is urged for the Appellant that the learned District Judge who disallowed the item of Rs. 10.000/- for the installation of electric power should also have taken away 17½ per cent. and another 20 per cent of the amount so disallowed, included in the estimate on the ground of supervision and fluctuation in labour charges. His argument is that when the cost of installation of electric power is not to be borne by the Appellant, supervision and fluctuation in labour charges of 17½ per cent. and 20 per cent. of the installation cost should not also be charged to him. This contention was not opposed by the learned Assistant Advocate-General and appears reasonable. It is accordingly allowed.

(13) The last contention of the Appellant is that the learned District Judge erred in disallow-

ing compensation for the house put up by him. The learned District Judge has adopted the reasoning of the Land Acquisition Officer for disallowing compensation claimed by the Appellant for his house. Those reasons are: (a) that the house must have been put up after the date of the preliminary notification for acquisition of the land, and (b) that the house must have been constructed without the requisite licence from the Municipality. A scrutiny of the evidence on record discloses that both these reasons are incorrect and therefore untenable. The evidence for the Appellant is to the effect that he commenced construction of the building after he had made an application to the Municipality for the requisite licence and after waiting for more than a month for an endorsement from the Municipality.

His case is that according to S. 115(4) of the Municipalities Act an applicant who does not get an endorsement for a period of one month after the date of his application for a licence to put up a building can proceed to construct his building as per his plan. The Land Acquisition Officer and the District Judge have apparently come to the conclusion that the evidence on behalf of the Appellant on this aspect of the case is not true. It will however be seen that the evidence of the Appellant on this point receives corroboration from an entry in the registers of the Municipality copy of which is produced in this Court. This entry shows that the appellant made an application to the Municipality on 19-2-45, that is to say, more than 7 months prior to the date of preliminary notification, for a licence to put up a house. His evidence is that he did not get an endorsement for the same for more than a month. The Respondent has not shown that he sent an endorsement to the Appellant. The Appellant was therefore quite within his rights to put up a building for which he now claims compensation.

The other reason is that the Appellant must have put up this construction after the preliminary notification. This is also opposed to the evidence in the case for as already pointed out the application for a licence was made on 19-2-1945 and the preliminary notification is on 4-10-45 and the evidence on behalf of the Appellant is that the building was put up prior to the date of preliminary notification. The learned District Judge has relied on a sentence said to occur in Ex. J dated 31-3-1947 in support of his argument for the disallowance of the claim for compensation for the building. The extract appearing in the judgment of the learned District Judge is as follows:

> "As far back as December 1946 (i.e. subsequent to the notification) the foundation stone for the building stipulated on my land was also laid."

He has also relied on the date appearing in Ext. D which is a bill, detailing cost of the building constructed near the Maternity Hospital at Malleswaram by Mr. V. Venugopal, viz. 25-12-1946. The date in Ext. D cannot be of much assistance in determining the question whether the building was put up prior to the preliminary notification. The bill must obviously have been prepared sometime after the construction was put up and cannot as such be a good or reliable guide for determining the exact date of the completion of the construction. A comparison of the sentence extracted above from the judgment of the learned District Judge with the sentence seen in Ext. J shows that the said extract is not correctly made. The correct extract from Ex. J, which is dated 31-3-1947 is as follows:

> "As far back as December 1946, the foundation stone for the buildings to be erected on my land was also laid."

This sentence can have no reference to the building put up by the Appellant for it clearly refers not to the building to be put up by him but to the laying of the foundation stone for the 'buildings' to be erected on his lands. This position is made clear from the next Exhibit, Ex. J-1 which is dated 22-3-1947, that is to say, 9 days earlier to the date of Ex. J in which he states:

> "It is not correct to say that the building was erected subsequent to the publication of the preliminary notification. An application for a licence was sent to the Municipal Commissioner by registered post on 19-2-1945 and was duly acknowledged by him on the 22-2-1945. No reply has so far been received from him. Under Cl. 4 of S. 115 of the City Municipal Regulation, a month after the acknowledgment by the Municipality of my application for a licence, the right to proceed with the construction of the building accrued to me. Accordingly on 25-3-1945 I started construction and proceeded with the work till the publication of the Government notification for the acquisition and immediately thereafter I stopped further construction."

The fact that in Ex. K-3 dated 22-5-1947 the Appellant has asked the Municipal Engineer to take possession of the house from his tenant is yet another circumstance which goes to strengthen the evidence of the Appellant that he had put up the building prior to the preliminary notification. The evidence of the Appellant and his witnesses to the effect that the Appellant has spent Rs 7000/- for the construction of the building has not been challenged much less disproved by the Respondent. The Appellant offered the house to the Medical Department as a free gift though the same was refused by the Medical Authorities. Having regard to all these circumstances we fix the value of the building at Rs. 7000/- as spoken to by the Appellant and his witnesses. He is therefore entitled to get this amount along with the usual statutory allowance of 15 per cent thereon as compensation.

(14) In the result, the appeal is allowed in the manner and to the extent indicated above. The Appellant will get the statutory allowance of 15 per cent on the value of the lands calculated in the manner stated above. He will also get interest at 6 per cent on the total amount of compensation from the date of taking possession. The parties will receive and pay costs in proportion to their success and failure both here and in the Court below. The decree passed by the learned District Judge will be modified accordingly.

B/D.R.R. Appeal allowed.

A.I.R. 1954 MYSORE 75 (Vol. 41, C.N. 35)

VENKATA RAMAIYA AND MALLAPPA JJ.

In re Ranga and others, Accused-Appellants.

Criminal Appeal No. 48 of 1952-53, D/- 6-10-1953, against conviction and sentence passed by Addl. Sess. J., Mysore, in Sessions Case No. 20 of 1951-52.

(a) Criminal P. C. (1898), S. 367 — Appreciation of evidence — Test of adequacy — (Criminal trial — Evidence).

The adequacy of evidence to prove the case against anyone has to be determined on the peculiar circumstances of the situation in which the crime was committed and in the absence of any rule requiring a particular number of witnesses to testify to the acts imputed to the accused, the conviction cannot be assailed only because it is based on the evidence of a single witness. What is necessary in such a case is that the evidence should be subject to strict scrutiny. (Para 4)

Held that considering the place and time of the assault, the manner in which the accused like hunters in quest of a prey, lay in wait outside the village to pounce upon any Pariwar the single eye-witness's evidence did not suffer from absence of another eye-witness. (Para 4)

Anno: Criminal P. C., S. 367 N. 7.

1949 Mitra: S. 367 P. 1128 N. "Reasons for decision" (4 Pts. extra in N. 7 to S. 367 in A.I.R. Com.—2 Pts. extra in Mitra).

(b) Penal Code (1860), Ss. 149 and 34 — Distinction — Common object alleged to be assaulting — Conviction for murder — Validity.

It is more on the applicability of S. 149 than of S. 34 that the correctness of the conviction of persons who are not the assailants depends. Section 34 cannot be invoked as it has been held to refer to cases in which several persons intend to do an act and some do that act and not to cases where several persons intend to do an act and some one or more of them do an entirely different act. (Para 6)

Section 149 may be applicable to cases to which S. 34 does not apply. The essential condition for the operation of either section is that the intention in one case and object in the other should be common and if the act is in excess of or beyond the intention or object of the members, they cannot be constructively liable for it. AIR 1925 Cal 913, Ref. (Para 6)

Where the common object specified in the charges is "assaulting the Pariwars" the words cannot be understood as denoting murder though assault may sometimes prove fatal and if the latter part of S. 149 imputing knowledge of the offence likely to be committed is not referred to in the charge, there is no jurisdiction for the conviction of all the members of the unlawful assembly for murder, when it is not alleged in the charges that murder was the common object and the evidence did not establish it. AIR 1942 Mad 446, Rel. on. (Para 7)

Anno: I.P.C., S. 149 N. 5; S. 34 N. 3.

(c) Penal Code (1860), Ss. 146, 147 — Common object — Proof of — Mere presence not sufficient.

Mere presence of a person along with members of an unlawful assembly is not sufficient to support a finding that he had the common object of the unlawful assembly, even for the purpose of conviction under S. 147. There must be other evidence direct or circumstantial to justify a finding that he had the common object. (Para 8)

Anno: I.P.C., S. 146, N. 3, 10.

V. Krishnamurthy, for Appellants; Advocate-General, for the Govt.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Mad 446: 43 Cri LJ 813 5, 7
(B) (V12) AIR 1925 Cal 913: 26 Cri LJ 827 6

VENKATA RAMAIYA J.:

The appellants who are 9 in number are involved in a case of rioting and murder. All of them have been convicted under S. 302 read with S. 34 or 149, I. P. C. for the murder of one Puttaranga Naika and sentenced to transportation for life and also of an offence under S. 147, I. P. C. and sentenced to rigorous imprisonment for a period of two years with a direction that the sentences should run concurrently. Appellants 1, 2 and 3 have been in addition convicted under S. 148 and sentenced to undergo rigorous imprisonment for three years the said sentence being directed to run concurrently with the other sentences imposed upon them.

All these offences are found to have been committed on 27-2-1951 in a village called Honganur in Chamarajanagar Taluk, when what was apparently a boyish prank or innocent mischief of two boys, sons of accused 4 and 9, in causing water used for washing a buffaloe in a pond to fall on the members of the pariwara community, who had gone there to bring water for household use, led to an outburst of animosity on the part of the appellants and others of their community against the Pariwars of the village. The immediate reaction to the prank was a rebuke by the person who had come to fetch water. The boys went home and brought their fathers and their companions who chastised the Pariwars for having rebuked the boys and were about to punish them severely. Thereupon some of the leading members of the Pariwar community arrived and remonstrated with the appellants and others who had accompanied them not to mind the affair seriously. The appellants and others with them seemed to be pacified but shortly after the Pariwars returned home, stones were pelted pell-mell, one Puttaranga Naika a Pariwar while returning home in a cart carrying fuel, was waylaid and done to death and another Pariwar by name Kadagara Naika was also later on killed.

(2) Of the persons against whom a charge-sheet was placed for the commission of several offences connected with this incident three were discharged and the rest have been acquitted of the offence relating to death of Kadagara Naika by the learned Sessions Judge, but convicted of other offences as mentioned above. The incident relating to the exchange of words between the boys washing the buffaloes and the Pariwars taking water for use at home happened at what is called Kuppe Halla and the pelting of the stones was in the village. P. Ws. 16 and 17 are the persons who took objection to the water being thrown by the sons of A-4 and A-9 and there is no reason to distrust their testimony. This is referred to in the F. I. R., Exhibit P-19, sent by the Patel on the same day. The Patel is a Mahammadan and Exhibit P-23 the mahazar shows that a number of stones were found lying scattered near the school. The evidence of P. Ws. 16 and 17 further shows that after the two boys reported the incident to their kinsmen some of those who arrived were armed with cutting instruments and uttered threats of injury to P. Ws. 16 and 17 and others connected with them in retaliation for the wrongs done by Pariwars. Such display of hostility on the part of appellants is not surprising as their disposition towards Pariwars of the village was by no means friendly and they with others of their group were smarting with bitterness and sense of frustration on ac-

count of a decree for conduct of processions through Pariwar locality not being effective and the case for murder of a member of their community having ended in acquittal. The appellants, as members of a community larger in number than the Pariwars desirous of emphasising their strength and spirit seized it as an opportunity to fall on Pariwars.

(3) The first victim to this frenzy was one Puttaranga Naika a Pariwar who left his house on the morning of 27-2-1951 to bring fuel but did not return at all. His brother and his father besides a neighbour have testified to the bullocks being yoked to the cart in the morning and his having started in a cart driven by a servant P. W. 31. Exhibit P-29 is the mahazar prepared at the spot where the wood was cut. While the cart was approaching the village it was stopped; Puttaranga Naika was dragged and mercilessly killed on the spot by some of the appellants. The attack by the appellants on Puttaranga Naika is spoken to by P. W. 31 and his is the only evidence about it.

(4) Sri Krishnamurthy the learned counsel for the appellants contended that the witness cannot be relied upon & at all events his evidence is insufficient for a conviction of murder. The adequacy of evidence to prove the case against anyone has to be determined on the peculiar circumstances of the situation in which the crime was committed and in the absence of any rule requiring a particular number of witnesses to testify to the acts imputed to the accused, the conviction cannot be assailed only because it is based on the evidence of a single witness. What is necessary in such a case is that the evidence should be subject to strict scrutiny. Considering the place and time of the assault, the manner in which appellants, like hunters in quest of a prey, lay in wait outside the village to pounce upon any Pariwar, P. W. 31's evidence cannot suffer from absence of another eye-witness. The spot of assault was not within the village but a furlong or two away from it and the attack may not have taken place or may have been prevented if there were persons nearby to intervene.

P. W. 31 states that while the cart was proceeding towards the village he saw the appellants standing under a tamarind tree, that A-1, 2 and 3 had deadly weapons such as chopper, dagger or spear in their hands, that suddenly accused 3 came forward, dragged Puttaranga Naika down, A-1 and A-3 thereupon hit him with the axe and spear on the face and abdomen causing instantaneous death and that A-4, 8 and 9 incited others to cut him down. P. W. 30 says that the occurrence was reported by P. W. 31 to him within a few minutes after this and there is mention of this in Ex. P-19 the F. I. R.

The learned Judge has accepted the evidence as true and I see no reason to take a different view. Accused 2 is said to have chased the witness for some distance and there is other evidence to show that all the accused ran after other Pariwars. As a matter of fact, another Pariwar Kadagara Naika was later on found lying dead. The accused have been acquitted of the charge of murder of this Kadagara Naika but this does not affect the conviction for being members of an unlawful assembly and for accused 1, 2 and 3 being armed as such members with lethal weapons and for A-1 and A-3 causing death of Puttaranga Naika. There is no reason to interfere with the conviction of the accused for the offence under S. 147 or with the conviction of accused 1 to 3 of the offence under S. 148 or the sentences passed with respect to these.

(5) The conviction of the accused under S. 302 read with S. 34 or 149 raises some difficulty. It is argued that having regard to the fact that the common object mentioned in the charge is only assault and that according to the evidence only A-1 and A-3 hit Puttaranga Naika, the other accused cannot be held to be guilty of murder. In support of this — 'In re Manakkal Kumaran', AIR 1942 Mad 446 (A), has been cited. That was a similar case of rioting in which there were two murders and convictions were also similar. The learned Judges taking into account that S. 149 consists of two parts one relating to the commission of the offence in prosecution of the common object of an unlawful assembly and another to the knowledge that it is likely to be committed in prosecution of that object held that the later provision in the section cannot be resorted to for convicting all the members of the unlawful assembly of murder unless such was the common object.

(6) Section 149 states :

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of the assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence."

It is more on the applicability of this section than of S. 34 that the correctness of the conviction of persons who are not the assailants depends. Section 34 cannot be invoked as it has been held to refer to cases in which several persons intend to do an act and some do that act and not to cases where several persons intend to do an act and some one or more of them do an entirely different act. Section 149 may be applicable to cases to which S. 34 does not apply. See — 'Aniruddha Mana v. Emperor', AIR 1925 Cal 913 (B). The essential condition for the operation of either section is that the intention in one case and object in the other should be common and if the act is in excess of or beyond the intention or object of the members, they cannot be constructively liable for it. The common object specified in the charges is "assaulting the Pariwars" and the words cannot be understood as denoting murder though assault may sometimes prove fatal. The latter part of S. 149 imputing knowledge of the offence likely to be committed is not referred to in the charge and what is alleged is that in prosecution of the common object the accused did commit murder by intentionally causing the death of Puttaranga Naika, a Pariwar.

(7) In — 'AIR 1942 Mad 446 (A)', the conviction of members of the unlawful assembly who did not themselves cause death was set aside although common object was mentioned in the charge to be murder as it was found from the evidence that the common object was to cause hurt. There is less justification in this case for the conviction of all the members of the unlawful assembly for murder as it is not alleged in the charges that murder was the common object and the evidence does not establish this. Accused 5, 6 and 7 by joining others and by reason of their being found to be near them cannot be deemed to have intended to kill Puttaranga Naika when they carried no weapons with them.

(8) Even for a conviction under S. 147, I. P. C., it must be remembered that mere presence of a person along with members of an unlawful assembly is not sufficient to support a finding that he had the common object of the unlawful assembly. There must be other evidence direct or circumstantial to justify a finding that he had the common object. In this case the appellants were found in more than one place showing a hostile attitude to Pariwars and in fact there is evidence to show that all the appellants chased Kadigara Naika another Pariwar who was later on found murdered. The object which may be imputed to them in the circumstances of the case can be nothing more than causing hurt. The act of accused 8 in pulling him out of the cart cannot necessarily be anything more, than that of accused 5, 6 and 7. Accused 4 and 9 are said to have only uttered abusive words and incited others to attack. The convictions of accused 1 and 3 and sentences passed on them according to the judgment of the lower Court are confirmed and the appeal is dismissed as regards these. The conviction of the other accused under S. 147, I. P. C. is confirmed. The conviction of these under S. 302 read with S. 149 or 34, I. P. C. is modified by convicting them of offences under S. 324 read with S. 149, I. P. C. The sentences for these are limited to the period of imprisonment already undergone. Except for this modification the appeal is dismissed. Accused 4 to 9 will be released forthwith.

B/D.R.R. Order accordingly.

A.I.R. 1954 MYSORE 78 (Vol. 41, C.N. 36)

VENKATA RAMAIYA J.

T. B. Gavishappa, Plaintiff-Appellant v. Devatha Krishniah Setty and another, Defendants-Respondents.

Second Appeals Nos. 505, 506, 510 and 511 of 1950-51, D/- 23-9-1953, against decree of Addl. Sub. J., Bangalore, in R. As. Nos. 39 and 40 of 1950-51.

(a) Easements Act (1882), S. 35 — Right to party wall.

Held that whether the wall was common property of plaintiff and defendant or whether each was entitled to a half longitudinally was not material since in either case, the stability or preservation of the wall was necessary for both and neither could use the wall either as joint owner of the whole or full owner of the moiety in such a way as to injure the rest of the wall or the structure supported by it. The agreements entered into entitled the defendant to have use of the wall and placing R. C. C. beams or girders to the extent of 8 inches on the wall. But the scratches or scoopings caused in the process might, if not suitably covered up, weaken the wall and thereby the lateral support due to the plaintiff's building might be impaired. It was in the interests of both necessary that the wall on both sides should be in a safe and stable condition and the direction that defendant should plaster the wall to cause the scoopings to disappear was justified. (Para 2)

Anno: Easements Act, S. 35 N. 7.

(b) Easements Act (1882), S. 28(e) — Scope.

Section 28(e) may be resorted to in the absence of evidence about probable intention of parties as regards mode of enjoyment and the purpose for which the right was imposed or acquired.

To the east of plaintiff's building and close to the common wall there was a lane through which a drain was laid to serve as an outlet for all the refuse water of his house. The construction of the defendants if allowed to proceed was to lead to the disappearance of the existing drain and its being substituted by a new one. There was evidence of arrangement entered into by the parties twice to avoid disputes. The position of the drain was not prescribed in the documents but extension and improvement of the same might be effected by defendants with a condition that plaintiff had to contribute half the expenses for the same. The laws and rules of sanitation had rendered adherence to what was in vogue formerly impossible as the drain was not now open but underground and the waste water from plaintiff's building was thrown into the drain not exactly at points prescribed in the documents but at the end of the wall:

Held that the right which the plaintiff in view of this could be deemed to have, was an outlet on defendant's land for the waste water of his house being conveyed to the municipal gutter and if that was safeguarded and sufficiently ensured the plaintiff could have no cause for complaint. The defendants without seeking any payment from plaintiff undertook to facilitate the flow of water from the plaintiff's building to the public drain through the new one to be set up, as freely and uninterruptedly as in the existing one. This should be enough for protection of plaintiff's rights. (Para 3)

Anno: Easements Act, S. 28 N. 1.

(c) Easements Act (1882), Ss. 28, 35 — Impairing of enjoyment.

Enjoyment of the easement cannot be regarded as impaired by acts which are negligible and such as changes as a person of ordinary sense and temper will not mind. (Para 6)

Anno: Easements Act, S. 28 N. 1.

V. Krishnamurthy, for Appellant; Nittoor Srinivasa Rao, for Respondents in Nos. 505 and 506 of 1950-51; Nittoor Srinivasa Rao, for Appellants; V. Krishnamurthy, for Respondents in 510 and 511/1950-51.

CASES REFERRED: Paras

(A) (V9) AIR 1922 Bom 407: 46 Bom 910 4

(B) ('96) 20 Bom 788 5

JUDGMENT: These four Second Appeals arise from a suit for injunction mandatory and permanent with respect to a wall, passage and flow of water through a drain. Plaintiff is the owner of the building Municipal No. 2/25 and defendants who are two brothers own the property No. 2/24 to the east of the building in Chickpet Bangalore City. To the east of plaintiff's building and close to the wall there is a lane through which a drain is laid to serve as an outlet for all the refuse water of his house. For construction of two opposite rows of shops leaving some space between the two, after demolition of the existing shops at the southern end of No. 2/24 defendants obtained license from the City Corporation and

for the purpose of the said construction girders are placed on the eastern wall of No. 2/25 causing some damage to it. The construction, if allowed to proceed, will lead to the disappearance of the existing drain and its being substituted by a new one in the passage provided for between the two rows of shops. The plaintiff, therefore, sought for permanent injunction to restrain defendants from interfering with his right of access to the common wall and of passage as heretofore, for mandatory injunction to pull down the construction, which obstructs plaintiff's right of access to the wall, flush and passage.

The trial Court held that the wall is common property, the western half belonging to the plaintiff and the eastern half to the defendants entitling them to rest the beams thereon but mandatory injunction was granted for plastering the wall and setting right the scratches or cracks caused by fixing the girders or otherwise. The lane in which the drain exists was held to be the exclusive property of the defendants but the plaintiff's right to let out the water—including that from the bath room and latrines of the building —through two definite apertures into the drain, was upheld. Shifting the drain from its present position was allowed since it would not affect the right of sewage or sullage from plaintiff's building. The claim of passage was limited to enable plaintiff to see that the wall was intact.

Both parties being dissatisfied appealed and in a judgment by which both appeals were disposed of, the learned Subordinate Judge confirmed the direction that defendants should plaster the wall except at three points where the R. C. C. beams are resting, allowed the claim to the flow of water from plaintiff's building to and in the drain as heretofore without restrictions for it of the particular apertures fixed by the trial Court and the claim that the drain should continue not merely as it is but also where it is. The finding as regards the wall was that half of it longitudinally exclusively belonged to the plaintiff and the other half to the defendants with a right of passage to the plaintiff to inspect the wall and the drain. Against this decision in the two appeals, there are second appeals by the plaintiff and two by the defendants, which may all be disposed of by a common judgment.

(2) The question whether as held by the trial Court the wall is common property of plaintiff and defendants or whether as found by the Appellate Court, each is entitled to a half longitudinally is not material since in either case, the stability or preservation of the wall is necessary for both and neither can use the wall either as joint owner of the whole or full owner of the moiety in such a way as to injure the rest of the wall or the structure supported by it. Sri Krishnamurthy on behalf of the plaintiff argued that the wall as a whole which is 64½'x1'x3" as well as the drain must be treated as subject to joint ownership of the parties and the defendants cannot unilaterally interfere with either the wall or drain in any manner.

Reliance is placed for this on the document Exhibit C dated 11-10-1924 between the plaintiff's father and the predecessors in title of the defendants. There seem to have been disputes between the neighbouring owners even earlier about the wall and drain as seen from Ex. D a registered document of 6-1-1897. Though Ex. C is of later date, it cannot be deemed to be a new agreement in supersession of Ex. D, as urged for the plaintiff. Being unstamped and unregistered its utility to serve as a basis of the rights of parties is open to doubt and Ex. C cannot be read as being repugnant to Ex. D. Exhibit C does not refer to Ex. D at all and the mention of the wall as common or belonging to both in Exhibit C is not inconsistent with the recital in Ex. D that half of the wall longitudinally belongs to each as it implies that in relation to the whole both have equal rights. According to Ex. D cost of the creation of the wall was to be borne by plaintiff's father and the drain was provided by the defendants' predecessors in title. Exhibit C requires that the cost for setting right the wall and improving the drain should be shared by the parties.

Reading the two what may be gathered is that both could have the use of the wall and the drain without disadvantage to either with joint liability for the proper upkeep of these. The wall is what is called a party-wall of the kind mentioned at page 428 in Gale on Easements denoting "wall divided longitudinally into two portions each portion being subject to a cross easement in favour of the other". The agreements entered into previously entitle the parties to have use of the wall and placing R. C. C. beams or girders to the extent of 8" on the wall as is found to be done by defendants cannot be said to be unauthorised. But the scratches or scoopings caused in the process may, if not suitably covered up, weaken the wall and thereby the lateral support due to the plaintiff's building may be impaired. The wall seems to have been raised originally by the owners of plaintiff's building and even if Exs. D and C are construed as conferring on defendants full rights to a moiety of the wall they cannot deal with it in a manner which will endanger the plaintiff's structure.

At page 396 of Gale's book on Easements it is stated:

> "Where a man grants a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between his own house and an adjoining one to be built by the grantee the law implies the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall varying with the particular circumstances of each case. Thus if for example it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall which is comprised in the grant the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected, and similarly the grantee's moiety of the wall will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall."

Exhibit D contemplates the wall being made use of for a first floor and it is already so made use of in plaintiff's building. The defendants too may have similar use but it is in the interests of both necessary that the wall on both sides should be in a safe and stable condition. There is no need, therefore, to interfere with the direction that defendants should plaster the wall to cause the scoopings to disappear is justified.

(3) The main grievance of defendants against the decision of the learned Subordinate Judge is stated to be the prohibition imposed upon them to shift the drain by altering its situation. It is

urged by Sri Nittoor Srinivasa Rao on their behalf that the proposed change does not in the least prejudice the plaintiff but without it defendants will suffer substantial loss and disadvantage inasmuch as a long strip of land has to be left vacant and they will be handicapped as compared with plaintiff in exercise of their rights over the party wall. Considered in the light of convenience and results of permitting or forbidding the diversion of the drain, the view of the learned Judge that the drain should continue as it exists does not seem to be reasonable. The property is situated in a busy commercial locality of the City where every inch of ground is of high value and if the drain has to remain where it is, the row of shops facing east as shown in the plan Ex. M approved by the Corporation cannot be constructed. When asked to explain as to how the plaintiff would be inconvenienced if the drain is shifted, Sri Krishnamurthy and the plaintiff did not allege anything in particular but it was contended to be opposed to law so as to make it obligatory on the defendants without regard to the considerations of convenience or hardship not to meddle with the existing condition.

Reliance for this was placed on S. 28(e) of the Easements Act according to which the mode of enjoyment of a prescriptive right such as the one in dispute must be determined by the accustomed user of the right. This provision may be resorted to, as stated in the section itself, in the absence of evidence about probable intention of parties as regards mode of enjoyment and the purpose for which the right was imposed or acquired. This is not a case in which the mode of enjoyment needs to be determined only with reference to accustomed user as there is evidence of arrangement entered into by the parties twice in Exs. D and C to avoid disputes. The position of the drain is not prescribed in the documents but extension and improvement of the same may be effected by defendants with a condition that plaintiff has to contribute half the expenses for the same.

As pointed out for the defendants, the laws and rules of sanitation have rendered adherence to what was in vogue formerly impossible as the drain is not now open but underground and the waste water from plaintiff's building is thrown into the drain not exactly at points prescribed in Ex. D but at the end of the wall. The right which the plaintiff in view of this can be deemed to have is an outlet on defendant's land for the waste water of his house being conveyed to the municipal gutter and if that is safeguarded and sufficiently ensured the plaintiff can have no cause for complaint. The defendants without seeking, as they are entitled to, under Ex. D any payment from plaintiff undertake to facilitate the flow of water from the plaintiff's building to the public drain through the new one to be set up, as freely and uninterruptedly as in the existing one. This should be enough for protection of plaintiff's rights.

(4) Even so Sri Krishnamurthy urged that the right of passage would be affected and these considerations cannot apply to it. In support of this he cited — 'Dhundiraj Balkrishna v. Ramchandra Gangadhar', AIR 1922 Bom 407 (A) in which it was held when a line of way was definitely set out neither the dominant nor the servient owner can compel the other to give or accept a different or substituted way. The present case is distinguishable as there is no defined right of way to be considered, Exs. C and D make no reference to it and approach to any particular spot or place as in that case is not involved. Further the right is essentially one of observation and inspection of the drain and there will be no impediment to this as plaintiff has for exercise of the right, only to turn his attention towards a slightly different direction. The principle enunciated in the said decision cannot be of any help to the plaintiff.

(5) A case more in point is the one in — 'Bala v. Moharu', 20 Bom 788 (B) where it was held that a right to have water carried away over the adjoining land does not give its owner any power to prevent the erection of buildings on the adjoining ground as long as the arrangements necessary to the preservation of his right are made. Section 27, Easements Act enables the servient owner to

> "use the servient heritage in any way consistent with the enjoyment of the easement not tending to restrict the easement or render its exercise less convenient."

(6) Enjoyment of the easement cannot be regarded as impaired by acts which are negligible and such as changes as a person of ordinary sense and temper will not mind. The considerations governing it are stated by Gale in his book of Easements at page 514 thus:

> "It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. The injury complained of must be of a substantial nature in the ordinary apprehension of mankind and not arising from the caprice or peculiar physical constitution of the party aggrieved."

I do not think there is any justification for the plaintiff to feel aggrieved by the deviation of the drain. The direction in the decree of the learned Sub-Judge forbidding it is therefore set aside. With a view to prevent further dispute between the parties in modification of the decrees of the Courts below there will be a decree in the following terms:

(a) That defendants will at their own cost plaster the wall marked B C in the plan Ex. A;

(b) defendants will not prevent the flow of water from plaintiff's building through the existing drain till they construct a drain as shown in Ex. M and after such construction defendants may build on the existing drain;

(c) The Wall B. C. is common property in the sense that western half longitudinally belongs to the plaintiff and eastern half to defendants with rights to both to inspect each other's portion when necessary and obligation not to do anything which may prejudice right of lateral support each is entitled to;

(d) plaintiff has a right of passage to inspect the drain when there is need for it.

As in the Courts below, parties will bear their own costs in this Court.

B/D.H.Z. Order accordingly.

A.I.R. 1954 MYSORE 81 (Vol. 41, C.N. 37)

VENKATA RAMAIYA AND
BALAKRISHNAIYA JJ.

Bayyappanavara Muniswamy and others, Accused, v. State.

Criminal Appeals Nos. 38, 42, 53 and 54 of 1953 and Cri. Referred Case No. 4 of 1953, D/- 24-9-1953.

(a) Criminal P. C. (1898), Ss. 222, 223 — Abetment — (Penal Code (1860), S. 109).

The date of the abetment was stated in the charge to be that of offence or about that time, while evidence was let in to make out that the instigation was 10 days earlier. Held that there would be no room for the objection that divergence concerning the time is a vital defect sufficient to entitle the accused to an acquittal irrespective of the evidence if it was stated in the charge that the accused abetted the commission of the offence between any two dates within which the one referred to by witnesses falls. AIR 1915 Lah 16 Rel. on. (Para 5)

Anno: Cr. P. C. S. 222 N. 3.

1953 Mitra: S. 222 P. 931 N. 725 "Particulars .... etc.).

Cr. P. C. S. 223 N. 17; Penal Code S. 109 N. 7.

(b) Criminal P. C. (1898), S. 222 — Time of offence.

Where the charge framed against accused alleged that on or about 8-11-1952 at Thirumalahally they abetted the commission of the offence of murder of one Appaiah Held that the words "on or about 8th Nov. at Thirumalahally" in the charge could not be construed as being comprehensive enough to apply to acts outside the village about 20 days earlier and sufficient to give notice of it to accused. AIR 1934 Lah. 535, Rel. on. (Pr 6)

Anno: Cr. P. C. S. 222 N. 3.

1953 Mitra : S. 222, P. 931, N. 725, "Particulars .... etc".

(c) Penal Code (1860), S. 120A — Characteristics of conspiracy — (Criminal P. C. (1898), S. 367).

Privacy and secrecy are more characteristic of a conspiracy than a loud discussion in an elevated place open to public view in the garden of a stranger. (Para 9)

Anno: Penal Code S. 120A N. 1, Cr. P. C. S. 367 N. 6.

1949 Mitra: S. 367 P. 1128, N. "Decision thereon" (Topic discussed in N. 6 to S. 367 in AIR Com. on "Appreciation of evidence" extra).

(d) Evidence Act (1872), S. 27 — Extent of information provable.

Where the instrument was an instrument of the kind possessed ordinarily by persons in the village, situation and condition of the hut were such as to afford easy access and entry to any one and the accused persons were living together and both were accused of the murder; Held that the production of the instrument by one of the accused was not by itself sufficient to incriminate him though it might raise suspicion. It only implied that he was aware of the instrument being kept or left in the hut. As means of connecting the accused with the offence its value depended on the other evidence. AIR 1947 P. C. 67 Foll. (Para 14)

Anno. Evidence Act S. 27 N. 7.

(e) Criminal P. C. (1898), Ss. 208, 252, 286 — Duty of prosecution to call as witnesses all persons — (Evidence Act (1872) S. 114.)

The prosecution cannot be expected much less enjoined to produce evidence which tends to demolish its own case but has to present it in fairness in its true colour without twisting or straining it for securing a conviction but put it for consideration by the Court. If all available evidence helpful to the prosecution as well as destructive of the case put forward, is placed before the Court, needless confusion will be caused and unnecessary labour will be imposed on the Court. AIR 1936 P. C. 289 Explained. (Para 15)

Anno: Criminal P. C., S. 208 N. 7.

1953 Mitra: S. 208 P. 882 N. 697 "Taking..... produced" (3 Pts. extra in N. 7 to S. 208 in A.I.R. Com.—2 Pts. extra in Mitra — See also S. 252 N. 5 and S. 286 N. 6 in A.I.R. Com. and 1953 Mitra S. 252 P. 1081 N. 823 "Taking..... prosecution", P. 1082 N. "Order....witnesses", 1949 Mitra, S. 286 P. 897, N. 893 "Examination..... witness" and P. 286 N. "Order....examination").

Criminal P. C., S. 252 N. 5.

1953 Mitra: S. 252 P. 1081 N. 823 "Taking.... prosecution" and P. 1082 N. "Order....witnesses" (4 Pts. extra in N. 5 to S. 252 in A.I.R. Com. —4 Pts. extra in Mitra — 51 Cri L. J. 115=A.I.R. 1949 Cal 586 not noticed under Pt. 7 in N. 5 to S. 252 in A.I.R. Com.—See also S. 208 N. 7 and S. 286 N. 6 in A.I.R. Com. and 1953 Mitra: S. 208 P. 832 N. 697 "Taking.....produced", 1949 Mitra: S. 286 P. 897 N. 893 "Examination....witnesses" and P. 286 N. "Order.....examination").

Criminal P. C., S. 286 N. 6.

1949 Mitra: S. 286 P. 897 N. 893 "Examination .....witnesses" and P. 286 N. "Order..... examination" (Pts. 10, 11, 15, 16, 18, 22, 24 and 25 extra in N. 6 to S. 286 in A.I.R. Com.—See also S. 208 N. 7 and S. 252 N. 5 in A.I.R. Com. and 1953 Mitra: S. 208 P. 882 N. 697 "Taking.... produced", S. 252 P. 1081 N. 823 "Taking..... prosecution" and P. 1082 N. "Order....witnesses").

Evidence Act, S. 114 N. 11.

(f) Evidence Act (1872), S. 134 — Conviction based on evidence of solitary witness.

Although it is permissible to base a conviction on the testimony of a solitary witness and there are instances of such convictions even for capital offences, such instances are rare and found to be of exceptional circumstances. A case cannot be considered to be one of that type when the spot of murder is surrounded by houses in the village and close to the Bhajanemane where people congregate and the time is evening when people usually return home. It is difficult to assume that none but a single person could have witnessed the commission of the crime or that better material could not have been placed before the Court. (Para 15)

Anno: Evidence Act, S. 134 N. 1.

(g) Criminal P. C. (1898), S. 161 (3) — Record of statements.

The Investigation Officer need not record verbatim what the various witnesses tell him and sub-s. (3) hits at the practice of writing against the names of certain witnesses after the first that they corroborated the statements of the earlier witness. The section leaves it to the option of the police officer to record or not, statements of those he exa-

mines, and when he does record statements of a number of persons, each statement must be capable of being read by itself without necessarily looking into the other. To facilitate the statements being used for purpose of contradiction, it is advisable to note as far as possible, the exact words in which the statements are made and also to err, if at all, on the side of superfluity rather than brevity as that will avoid controversies about omissions. (Para 15)

Anno: Criminal P. C., S. 161 N. 6.

1953 Mitra: S. 161 P. 553 N. 498 "Recording of statement" (2 Pts. extra in N. 6 to S. 161 in A.I.R. Com.—3 Pts. extra in Mitra).

C. B. Motaiya, V. Krishnamurthy, M. Ranga Rao and Guloor Sreenivasa Rao, for Accused (Nos. 1, 6, 7 and 8 in Cr. A. Nos. 38, 42, 53 and 54 respectively); Advocate-General, for the Government.

CASES REFERRED:	Paras
(A) (V2) AIR 1915 Lah 16: 16 Cri LJ 354	5
(B) (V21) AIR 1934 Lah 535: 149 Ind Cas 127	6
(C) (V34) AIR 1947 PC 67: 48 Cri LJ 533 (PC)	14
(D) (V23) AIR 1936 PC 289: 37 Cri LJ 963 (PC)	15
(E) (V37) AIR 1950 Cal 363: 51 Cri LJ 1307	15
(F) (V35) AIR 1948 Mad 23: 48 Cri LJ 973	15

VENKATA RAMAIYA J.:

On the evening of 8-11-1952 one Venkataramanappa alias Appaiah aged about 45 years was murdered in front of his own house in Tirumalahally, a village situated at a distance of about 6 miles from Mulbagal and about 60 miles from Bangalore. Information of the murder reached the police Out Post at Tayalur shortly after and conveyed to the Sub Inspector at Mulbagal the same night. Investigation started on the following day and a charge sheet was placed on 25-11-1952 in the Magistrate's Court at Kolar against 9 men alleging commission of the offence of murder by some with the abetment of others amongst them. Of the 9 persons thus accused, the last has been absconding, the 3rd was discharged and the rest were committed for trial.

The learned Sessions Judge acquitted Accused 2, 4 and 5, found Accused 1 guilty of committing the murder and sentenced him to death. Accused 6, 7 and 8 are convicted under S. 302 read with S. 109 I. P. C. and sentenced to transportation for life. Against these convictions and sentences these four appeals are filed by Accused 1, 6, 7 and 8 respectively and for confirmation of the sentence of death there is a reference under S. 374 Criminal P. C. The appeals and the reference will be disposed of by this judgment.

(2) It is undisputed that Appaiah returned at about 6 P. M. on 8-11-1952 to his house after a visit to a neighbouring village, went out to bring coffee powder as his wife said that there was no powder to prepare the coffee he asked for and within a short while after this, severe injuries on his chest and abdomen were inflicted causing instantaneous death. The only person who has given evidence as regards the persons who caused those injuries is P. W. 30, a son of the deceased Appaiah. Accused 6, 7 and 8 are not alleged to be the assailants but are said to have instigated or induced Accused 1 to murder Appaiah. For this, the evidence of two witnesses P. Ws. 27 and 28 is chiefly relied upon.

(3) The motive imputed to A-6, A-7 and A-8 for plotting the death of Appaiah is that he and Accused 8 headed rival factions in the village, that owing to hostility of feeling between the parties Accused 8 was highly incensed when Appaiah who failed to secure even a single vote at the election of members to the Village Panchayati became the Chairman and therefore, in collaboration with Accused 6 and 7 who are both of his party, engaged Accused 1 for getting rid of him. Though the accused have denied the existence of parties in the village, the statement of P. W. 8 the Amildar that there were two parties, one led by Appaiah, the other by Accused 7 and 8 and that the two were at loggerheads at the time of the Panchayat Elections may be accepted as unbiassed and true.

The records relating to the Elections were called for and exhibited to show that A-6 and A-7 did not stand as candidates at all for Election, that while A-8 got the highest votes, Appaiah got none and that he was not even nominated as a member of the panchayat. The names of the elected and nominated members are mentioned in Ex. D-22 but no one is named as Chairman in the column provided for it. In view of the absence of Appaiah's name in Ex. D-22 and of any order or resolution about the Chairmanship, it is difficult to believe that Appaiah was or could be the Chairman as stated by some witnesses though he was miserably defeated in the election and not even nominated as a member. The Amildar does not speak to it and no rule under which this is possible has been pointed out.

(4) The interval between the election and the murder is so long as two years during which Accused 8 would not have failed to disclose his resentment by protest or otherwise if Appaiah acted as Chairman and if A-8 took it seriously. There is nothing to suggest that Accused 7 or Accused 8 was enraged against Appaiah on this account or that his being the Chairman prompted or aggravated hatred towards him. It is not likely to have been dormant for nearly two years and suddenly without any further provocation flared up so as to goad Accused 6, 7 and 8 to employ hirelings for killing him. Considering the evidence as a whole the motive alleged for the abetment of the offence appears to be weak and far-fetched.

(5) As regards the evidence relating to the charge Sri Jayaram Iyer learned counsel for Accused 7 and 8 argued that apart from its being untrustworthy, it has no bearing on the charge framed against Accused 6, 7 and 8 since the date of the abetment is stated in the charge to be that of offence or about that time, while evidence is let in to make out that the instigation was 10 days earlier. This divergence concerning the time is commented upon as a vital defect sufficient to entitle the Accused to an acquittal irrespective of the evidence. There would not have been room for the objection if it was stated in the charge that the Accused abetted the commission of the offence between any two dates within which the one referred to by the witnesses falls. The charge in — 'Balmokand v. Emperor', AIR 1915 Lah 16 (A), was of that kind.

The abetment in the present case is sought to be proved not by inference from acts or circumstances spread over days but by the conversation of Accused 1 with Accused 7 and 8 on a particular day at a particular place and this conversation implies that the instigation was indefinitely earlier but not within a fortnight as it is said to have started with reminding Accused 1 of the payment of consideration for the murder of Appaiah about a fortnight back and pointing out the dilatoriness on the part of Accused 1 to fulfil

the task. Excepting the conversation itself there is nothing on record to suggest that Accused 6, 7 or 8 contacted Accused 1 or arranged with him either before or after it, for the murder. If, as indicated in the conversation, the scheme for murder originated previously the abetment must be deemed to have been about 20 days prior to the commission of the offence.

(6) Section 222, Criminal P. C. states :

"The charge shall contain such particulars as to the time and place of the alleged offence and the person (if any) against whom and the thing (if any in respect of which) it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged."

The charge framed against Accused 6, 7 and 8 alleges that on or about 8-11-1952 at Thirumalahally they abetted the commission of the offence of murder of Appaiah, by A-1, A-2, A-4, A-5, etc. There is no evidence of abetment either on 8th November or at Thirumalahally. The words "on or about the 8th November at Thirumalahally" in the charge cannot be construed as being comprehensive enough to apply to acts outside the village about 20 days earlier and sufficient to give notice of it to Accused. In view of this there is force in the contention that if the time of abetment had been specified in the charge in keeping with the evidence the Accused may well have established a plea of alibi and they are prejudiced by the evidence which is clearly at variance with the charge so far as the date is concerned, being acted upon. In — 'Panchu Gazi v. Ejahar Ali Sarkar', AIR 1934 Lah 535 (B), a conviction for assault was quashed by Tekchand J. on the ground amongst others that the error in the charge as regards the date of assault was a material irregularity.

(7) The learned Sessions Judge has apparently overlooked the discrepancy and the effect of this. He has also failed to notice that the evidence, such as it is, is thin in varying degrees to prove abetment by Accused 6, 7 and 8.

(8) Accused 6 and the other two are of different castes and there is evidence of a protracted litigation between him and Accused 8 still pending in this Court. It is also admitted that his brother was murdered by a brother of Accused 1. The improbability of Accused 6 being in intimate association with Accused 8 or Accused 1 on account of these is strengthened by his having acted as an interested friend of Appaiah in persuading his wife to join him. P. W. 19 has testified to the compromise he brought about. P. Ws. 27 and 28 who profess to have overheard the talk do not say that Accused 6 participated in the talk and from the conversation as rendered by them even the presence of Accused 6 when the murder by Accused 1 was hit upon and fixed previously cannot be inferred.

(9) P. Ws. 27 and 28 are, what may be called "chance witnesses", who as passersby out of curiosity or otherwise, casually listened to the exchange of talk going on between Accused 1 on the one hand and Accused 7 and 8 on the other, while these were seated on a mound in a garden known as Aziz garden. They could not have heard the talk but for a conjunction or series of accidents such as selection of the particular route which lay near the Aziz garden in preference to shorter or other routes for returning to their village, arrival at the place at the crucial moment when the conversation relating to murder commenced, availability of a convenient position for them to hear without being seen, their remembering the exact words employed for the question and answers but nothing else spoken at the time. Privacy and secrecy are more characteristic of a conspiracy than a loud discussion in an elevated place open to public view in the garden of a stranger. These are considerations for assessing the evidence of these witnesses with special care and caution.

P. W. 27 admits that in his deposition as recorded by the Magistrate, there is no reference to Accused pointed out to the Inspector and that he is indebted. It is suggested in the cross-examination that his evidence regarding genuineness of a receipt produced by a judgment-debtor in Chittoor Court was disbelieved, that petitions are sent by him to Government about the present case and that Accused 7 had preferred a complaint against him for cutting sandal tree. P. W. 28 denies that he was fined by the Amildar on a complaint by A-7. But Ex. D-1 shows that for the wrongful disposal of trees belonging to Government as his own, he was fined Rs. 50/- and ordered to pay Rs. 120/- as value of the trees. When there is no express reference to Appaiah by Accused 7 in the conversation as reproduced by this witness, no reference to Accused 8 in the deposition of P. W. 27 in the committal Court and accused 6 according to both was a mere listener and a spectator, the conversation which is mainly relied upon as of proof of conspiracy can be of little value, apart from the charge being defective. The fact that these Accused travelled in the same bus sometimes as stated by P. Ws. 12 and 17 or that they drank coffee together in a hotel as stated by P. Ws. 10 and 11 can only signify at best companionship and not conspiracy. P. Ws. 9 and 19 say that Accused 1 and 5 have got lands and houses, and apparently A-1 was in want or need to be tempted to serve as hireling.

(10) Another factor to be noticed in regard to the theory of abetment is that according to the evidence of P. Ws. 19 and 25, Accused 1 and his brother are said to have often manifested their hostility to Appaiah by threatening to strike him with chopper and dagger in their hands. P. W. 8 the Amildar says Appaiah complained to him about Accused 5 for this. P. Ws. 29 and 33 also say that Accused 1 and 5 were inimical to Appaiah. If Accused 1 was a sworn enemy of Appaiah and made no secret of his determination to kill him, he did not need instigation of any one to perpetrate the crime. Payment of money to him was unnecessary and an avoidable payment is not likely to have been made by Accused 7 and 8 as inducement for the commission of the offence. In any case there is uncertainty of the murder being due to Accused 1's own determination or instigation of others. A-2, A-4, and A-5 who along with Accused 1 were charged with commission of the offence have been acquitted. Though the charge imputed abetment of the commission of the offence by all these no evidence whatever is adduced with respect to Accused other than A-1. On the whole, I think the materials on record are inadequate to justify the conviction of A-6, A-7 and A-8 for an offence under S. 302 read with S. 109, I. P. C.

(11) The conclusion arrived at about A-6, A-7 and A-8 affects to a certain extent the case against A-1 who is held to be the principal offender as it takes away the alleged cause for the attributed acts. Though enmity against Appaiah is said to be common to A-1 and A-5, though P. W. 30 the eye witness has stated that A-2, A-4 and A-5 struck Appaiah and P. W. 31 says that he saw both A-1 and A-2 run away soon after the fatal assault, the learned Judge has felt it

unsafe to rely upon these for convicting Accused 2, 4 and 5. The main reason for a difference being made in the case of Accused 1 appears to be his being mentioned in Ex. P-7 as the only assailant and production of M. O. 7 the blood-stained dagger by him from a hut.

Beyond stating that Accused 1 was expressing and displaying his murderous intent none of the witnesses has ascribed any motive for A-1 being wroth against Appaiah. The threats, if true, must have been slighted, treated as empty, as no complaint is shown to have been made against A-1 and the only complaint was to the Amildar and that against A-5 and not A-1. The contest in the election was between the deceased and A-8 amongst the Accused. A-1 did not figure in it nor does it seem that he espoused the cause of any of the rivals. Lack of even a plausible ground on which he may be deemed to have been driven to indulge in a cruel attack, unmindful of consequences is an important factor to be borne in mind while dealing with the case against Accused 1 as motiveless murders are rare.

(12) It is no doubt stated in Exhibit P-7 that A-1 was the assasin and this would have been a strong factor against him if it was free from suspicion. The Patel P. W. 29 by whom Ex. P-7 was signed and sent, says that he does not know its contents. It was written by his brother P. W. 34 who is a dismissed patel and is succeeded by Accused 8. The learned Judge has characterised him as a very unreliable person and this is borne out by his having mentioned only the name of Accused 1 in Ex. P-7 though "P. W. 30 told P. W. 29 in (his) presence that A-1 and others had killed his father"; while he says that signature of P. W. 30 was not taken to the report P. W. 30's statement in the committing court was "after hearing me (him) P. W. 29 (Patel) to'd Appe Gowda (P. W. 34) who wrote the report and they took my (his) signature to it". The evidence of P. W. 26 the constable at Tayalur Out-Post who received Exhibit P-7 makes it worse as he says that on receipt of Ex. P-7 he noted in his day book that "some one" had murdered Appaiah on the public road and his statement before the Magistrate is that P. W. 34 wrote Ex. P-7 before the Police Station, P. W. 29 signed it in the presence of P. Ws. 31 and 33. The latter statement is contrary to that of the Patel and the said witnesses and the entry is inconsistent with the recitals in Ex. P-7.

There is thus a grave doubt whether Ex. P-7 is really the first report of the occurrence, whether it was written at the village chavadi on the basis of the information given by P. W. 30 or prepared later near the police station in consultation with the witnesses. The discrepancy between the entry in the book that 'some one' and the statement in Ex. P-7 that A-1 was the murderer was left unexplained in re-examination of P. W. 26 and the book has not been produced. It is now represented that there is no such book and no entry whatever but this was not elicited from the witness or the Inspector who was examined later. In view of this and R. 123 of the Police Manual, Volume I, which states:

> "Every literate constable ....shall maintain a note book in Form No. 22 wherein he shall record the work done by him, the facts observed, information obtained etc.",

the statement of the witness cannot be false or ignored. Added to this there is admission of P. W. 35 the Police Inspector that P. W. 29 the Patel had given a petition saying that the original complaint given by him was torn by the Inspector and another got written.

The complaint referred to is Ex. D-13 dated 13-11-1952 addressed to the Deputy Commissioner wherein P. W. 29 mentioned two persons as eye-witnesses to the murder and alleged that the Inspector and his subordinates came to the spot, hurled abuses on him, tore away the report sent by him, got some report written by compulsion and coerced him to sign it, which is 'contrary to facts'. Exhibit P-34 dated 5-11-52 is another report by P. W. 29 addressed to the Daffedar, Tayalur circle: wherein information given by two persons about the names of murderers are set forth. P. W. 25 the Inspector denies having received any report such as Ex. P. 34. The impression left by all these is that there was shuffling and manipulation in the representation of the incident. Exhibit P-7 cannot therefore claim the importance and weight due to a First Information Report.

(13) As regards witnesses to the occurrence, two were cited in the charge sheet but only one is examined and he is a son of the deceased, 10 or 12 years of age. His version of the incident is that A-4 and A-5 each held one arm of his father, A-1 pierced his chest with a dagger, A-2 hit his head with a chopper, that on a cry being raised A-2, A-4 and A-5 ran away, A-1 then felled the father and pierced the stomach with a dagger and ran away, he told his mother P. W. 32, then P. W. 33 and P. W. 29 the Patel that A-1, A-2, A-4 and A-5 killed the father. The statement with respect to A-2, A-4 and A-5 is contradicted by P. W. 29 who says that only A-1 was mentioned as murderer. The boy pleads confusion for making inconsistent statements about signing the report. The attack is said to have taken place subsequent to the father saying that he would go to shop of P. W. 19 for coffee powder and after his return but there is no proof of his having gone there. The Bhajane Mane is situated near the house of the deceased and out of the 10 or 12 persons present there, only P. W. 19 came out hearing the cry and he too does not say that A-1 was seen.

The evidence of P. W. 31 who is of a different village is that he saw Appaiah being surrounded by 4 or 5 persons including A-1 and A-2 with dagger and chopper, that A-1 and A-2 ran after Appaiah was struck down and that he did not mention what he saw to any one but the police. His evidence can only be taken as being suggestive and not positive as regards actual assailants. His running away without calling for aid and omission to mention the incident to any one is however strange. P. W. 33 who speaks to A-1 and A-2 running away with M. O. 7 and M. O. 9 respectively in their hands; is not a disinterested person as he admits that A-1, A-2 and A-5 were witnesses for the prosecution in a case in which he was accused of murder. He seems to have taken active interest in this case. That A-1 was seated and A-2 was standing by his side near the house of Appaiah, as spoken to by P. W. 19, before the occurrence, is not a material circumstance against A-1 as his own house is close by. Unless it is possible to rely on the testimony of P. W. 30 the evidence of all those will not be sufficient for the conviction of A-1.

(14) The learned Assistant Advocate-General contended that production of M. O. 7 by A-1 supports the evidence of P. W. 30. M. O. 7 is of course a deadly weapon stained with mammalian blood, secured in a hut outside the village surrounded by fields at a distance of ¾ mile (Vide

P. W. 17). According to P-29 the mahazar it is roofed with cocoanut leaves and date leaves and dimension is such as to admit only one person inside. P. W. 18 an attestor of Ex. P-28 which embodies the information given by A-1 says that the hut has no door, shutter and no walls around. P. W. 19 the attestor of Ex. P-29 says that A-1 and A-5 live jointly in a house in the village. Since M. O. 7 is an instrument of the kind possessed ordinarily by persons in the village, situation and condition of the hut were such as to afford easy access and entry, to any one. A-1 and his brother A-5, were living together and both were accused of the murder, the production of M. O. 7 by A-1 is not by itself sufficient to incriminate him though it may raise suspicion. It only implies that he was aware of M. O. 7 being kept or left in hut.

As observed in —'P. Kottaya v. Emperor', AIR 1947 P. C. 67 at p. 71 (C).

"Except in cases in which the possession or concealment of an object, constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof and the other links must be forged in the manner allowed by law."

As means of connecting A-1 with the offence its value depends on the other evidence and chiefly Ex. P-7 and that of P. W. 30. In the course of the investigation itself Ex. P-7 was denounced by the very person who sent it as a substitution for a report made earlier, of which nothing is known.

(15) Besides, elements of inconsistency in what P. W. 30 has stated on different occasions about the persons responsible for the death and the report of it, omission to examine the person numbered 10 in the charge sheet was urged as an infirmity in the prosecution case to discount P. W. 30's evidence. The charge sheet credits him with being an eye-witness present at the occurrence. If his evidence was made available to corroborate P. W. 30, it would certainly have been of help for the decision. Unfortunately the examination of that person was given up during the committal proceedings on the ground that he had turned hostile. It is contended that the examination was nevertheless necessary and the observation of the Judicial Committee in — 'Stephen Seneviratne v. The king', AIR 1936 P. C. 289 at p 300 (D), that

"witnesses essential to the unfolding of the narrative on which the prosecution is based, must of course be called by the prosecution whether, in the result, the effect of their testimony is for or against the case for the prosecution"

was relied upon. The observation cannot be read as laying down an inflexible rule to be invariably followed in every case, whatever the consequence of letting in the evidence and the reason for not adducing it may be.

The prosecution cannot be expected much less enjoined to produce evidence which tends to demolish its own case but has to present it in fairness in its true colour without twisting or straining it for securing a conviction but put it for consideration by the court. If all available evidence helpful to the prosecution as well as destructive of the case put forward, is placed before the court, needless confusion will be caused and unnecessary labour will be imposed on the Court. That such a course was not intended to be adopted is clear from what is stated earlier in the same case thus :

"Their Lordships do not desire to lay down any rules to fetter discretions on a matter such as this which is so dependent on the particular circumstances of each case.....they cannot, speaking generally approve of an idea that a prosecution must call witnesses irrespective of number and reliability or that a prosecution ought to discharge the functions both of prosecution and defence."

On the assumption that the omission on the part of the prosecution to examine witness No. 10 in the charge sheet is justified it has the effect of leaving the evidence of P. W. 30 alone as that of an eye-witness, without the strength of corroboration by another and showing that a person expected to have knowledge of the incident is unwilling to support the case against A-1 as no reason whatever is given for his having turned hostile. Although it is permissible to base a conviction on the testimony of a solitary witness and there are instances of such convictions even for capital offences, such instances are rare and found to be of exceptional circumstances. This case cannot be considered to be one of that type as the spot of murder is surrounded by houses in the village and close to the Bhajanemane where people congregate and the time was evening when people usually return home. It is difficult to assume that none but P. W. 30 could have witnessed the commission of the crime or that better material could not have been placed before the Court. Though the murder was brutal and dastardly and committed in an outrageous manner in the open street which should attract persons to quickly come for aid and catch the culprit, they escaped untouched leaving the man dead.

What followed the gruesome event, has instead of unravelling the forces which led to it and the persons responsible directly or indirectly for the commission, has clouded the affair with suspicion and speculation beginning with the F. I. R. The investigation was impugned soon after it began, as not proper. The Inspector P. W. 35 did not apply for the records relating to panchayat Election being sent, for verifying whether Appaiah was Chairman at all. Nor did he find out and examine the Revenue Inspector who conducted the elections. The explanation that he could not make out where the Revenue Inspector is, is puerile as there is no proof of his asking for the information and not getting it from the office of the Revenue department. Although P. W. 27 apprised him of the conversation in the Aziz garden two days after the crime, he did not visit the spot and ascertain from P. Ws. 27 and 28 the place of conspiracy and of the hearing.

Although information relating to the conspiracy appears to have been gathered before the 15th November, no reference to the conspiracy is made in the application for remand of that date, and there is mention of it for the first time in the application of 18-12-52. The statement in the course of the Inspector's deposition "I learnt that A-5's brother had married A-6's sister" cannot be true as A-5 and A-6 are of different castes. The manner in which statements of the witnesses were recorded by noting the substance instead of verbatim was criticised but I do not think recording the substance of the statements can be said to be a non-compliance with the new subsection to S. 161, Criminal P. C., which states:

"The Police Officer may reduce into writing any statement made to him in the course of an

examination under this section and if he does so he shall make a separate record of the statement of each of such person whose statement he records."

— 'Bejoy Chand v. The State', AIR 1950 Cal 363 (E), cited on behalf of the Accused does not support the contention that the statement should be recorded in full.

Harries C. J., no doubt states at p. 364 :

"In other words if a police officer examines a number of witnesses he cannot record condensed version of the examination of all of them or a precis of what the witnesses are supposed to have said. He must record what each witness says. He cannot for example record that witnesses A, B and C said so and so".

The case was one in which statements before the police were sought to be made use of, for the purpose of contradiction during the trial and therefore the exact words before the police and not the statements in a 'boiled form' were deemed necessary. This is made clear by stating later

"Before concluding I should like to point out that if it is possible to deduce from the gist recorded what witnesses said then, what each witness said must be put to the witness, if it is intended to contradict the witness by use of such statement."

'In re, Subba Reddi', AIR 1943 Mad 23 (F), cited by the learned Assistant Advocate General directly deals with the contention now raised and lays down that the Investigation Officer need not record verbatim what the various witnesses tell him and that the new sub-section hits at the practice of writing against the names of certain witnesses after the first that they corroborated the statements of the earlier witness. The section leaves it to the option of the police officer to record or not, statements of those he examines, and when he does record statements of a number of persons, each statement must be capable of being read by itself without necessarily looking into the other. To facilitate the statements being used for purpose of contradiction, it is advisable to note as far as possible, the exact words in which the statements are made and also to err, if at all, on the side of superfluity rather than brevity as that will avoid controversies about omissions.

(16) Apart from this the investigation does not seem to have inspired confidence amongst the villagers and the course as well as the result of the proceedings lend support to it. This is a matter for enquiry and appropriate action by the authorities.

(17) Having regard to the factions in the village and personal jealousies against opponents, the possibility of manipulation and developments in the case cannot be excluded. There is much which is not natural and not normal to be glossed over to justify the conviction. It is highly unfortunate that the evidence in such a serious case as this, should be riddled with flaws and inconsistencies. Whatever may be the reasons for these, the Accused are entitled to have the advantage of the proof not being clear and convincing to bring home the guilt.

(18) On this consideration, I am of opinion that the case is not established beyond doubt against the Appellants including Accused 1. The convictions and sentences are therefore set aside and A-1, A-6, A-7 and A-8 are all acquitted The Accused are directed to be set at liberty forthwith.

B/D.H.Z. Convictions set aside.

A.I.R. 1954 MYSORE 86 (Vol. 41, C.N. 38)

MALLAPPA J.

Mrs. Lucy, Defendant-Appellant **v.** Francis Furtado, and another, Respondents.

Second Appeals Nos. 541 and 542 of 1950-51, D/- 11-11-1952, against decrees of Sub-J., Shimoga, in R. As. Nos. 55 and 56 of 1950-51.

(a) Limitation Act (1908), S. 5 — Illness of party.

Where an appellant is prevented from filing an appeal on account of her having had an abortion & consequent haemorrhage the delay of only nine days deserves to be condoned. (Para 2)

Anno: Lim. Act, S. 5 N. 15 Pt. 2.

(b) Limitation Act (1908), S. 5 — Appeal.

Where an appeal is filed and is given a number and it is later on dismissed on the ground of limitation, along with the application to condone the delay, an appeal lies against the order of dismissal. AIR 1942 Mad 604, Distinguished. (Para 3)

Anno: Lim. Act, S. 5 N. 45 Pts. 4, 5.

V. Krishnamurthy, for Appellant; R. V. Srinivasaiya, for Respondent No. 1.

CASE REFERRED :

(A) ('42) AIR 1942 Mad 604: ILR (1942) Mad 868 (Pr 3)

JUDGMENT: These two appeals have been filed against the order of the learned Subordinate Judge dismissing R. A. 55 and 56 of 50-51 on the file of his Court and refusing to condone the delay of a few days in filing these appeals.

(2) The case of the appellant is that she had an abortion and severe haemorrhage on 9-5-50 and was not able to move about till a day prior to 24-5-50 on which day these appeals were filed. The appeals ought to have been filed on 15-5-50 and the application was for condonation of delay of nine days under the circumstances referred to above. That the appellant had an abortion on 9-5-50 and that consequently she suffered from severe haemorrhage and was not able to move about for a fortnight is supported by the evidence of a respectable witness Mrs. Bhaghyamma Samuel Lady Assistant Surgeon at Jog. There is absolutely no reason suggested in her cross-examination to show that she is interested in swearing to what is not true. The learned Subordinate Judge has given a flimsy reason that the out-patient Register has not been summoned. According to him the lady Doctor admits that she usually enters in the out-patient's register the names of the out-patients. Considering that the appellant had an abortion, it would not be strange if her name does not find a place in the register of the out-patients though the doctor might have attended on her in her house as in that state of her health, the appellant must necessarily have been confined to bed. If at all, she could have been an in-patient in the hospital, but that is nobody's case. Even if she was an in-patient, her name could not have found a place in the outpatient register. On the other hand if the abortion took place in her house as sworn to by the lady doctor who attended on her, it cannot be said that the patient could have attended the hospital as an outpatient and it is unlikely that her name could have found a place in the out-patient register. In fact it is elicited in the cross-examination of the witness that the appellant was not able to go to the Hospital. In these circumstances, it is difficult to understand why the delay was not condoned. It is no doubt true that it is in the discretion of the Courts below to refuse to condone the delay and that discretion should not be lightly

interfered with by appellate Courts. I am, however, inclined to think that no better case for condoning the delay can be found than in a case like this where the appellant was prevented from filing the appeals on account of her having had an abortion and consequent haemorrhage and the delay is only one of nine days. I am inclined to think that the order of the learned Subordinate Judge is, to say the least, perverse. His order dismissing the two appeals is, therefore, set aside and the delay in filing the two appeals condoned. They will be taken on file and proceeded with according to law. No order as to costs.

(3) It was also contended during the course of arguments that no appeal lies in cases of this kind and a decision reported in — 'Kamaraja Kantulu v. Balla Saramma', AIR 1942 Mad 604 (A) was relied on. King J, in that case observed that the appeal he was dealing with was not really an appeal against the orders of the District Judge dismissing the appeal, but an appeal against the orders of the District Judge refusing to excuse the delay against which no second appeal is provided. It is contended in this case also that no second appeal is maintainable. There is no reported case of our Court on this aspect of the matter, though it is conceded that numerous appeals have been filed against such orders and disposed of as appeals in this Court. However, an unreported case to the contrary was brought to my notice. But what is to be remembered in cases of this kind is that when an appeal is filed and is given a number and it is later on dismissed on the ground of limitation, along with the application to condone the delay, it cannot but be said that the appeal stands dismissed. In fact decrees have been drawn up in these appeals and if any amendment of the decree for any good reason is to be sought on the ground that it is not in accordance with the order of the lower Court, the question that arises would be whether the trial Court has any jurisdiction to allow it at all, as its decree has been confirmed by the decree of the appellate Court. When a suit is filed and it is dismissed after a number is given to it on the ground that it is barred by time, can it be said that no appeal lies against the judgment and decree of the trial Court? In fact a plaint could be rejected under Order 7, Rule 11, Civil P. C. But even against such an order of rejection, which amounts to a decree, an appeal can be filed. It must, however, be stated that the cases now under consideration have to be distinguished from the case which King J. had to deal with, as in that case no number to the appeal had evidently been given, as has been done in the regular appeals now under consideration, and the order passed in that case was one of rejecting the appeal as barred by time and refusing to condone the delay. I do not, therefore, find any substance in the contention that the second appeals do not lie in cases of this kind.

B/V.S.B. Appeals allowed.

A.I.R. 1954 MYSORE 87 (Vol. 41, C.N. 39)

VENKATARAMAIYA AND MALLAPPA JJ.

T. S. Nateshmurthy and others, Plaintiffs-Appellants v. Govt. of Mysore.

Regular Appeal No. 108 of 1949-50, D/- 22-1-1953, against decree of Addl. Sub-J. Mandya in O. S. No. 11 of 1947-48.

Hindu Law — Religious Endowment — Mutt — Representation — (Civil P. C. (1908), O. 1, R. 10).

Persons who are deprived of management of Mutt by an order passed in accordance with law cannot represent the mutt in the proceedings for enforcement of the mortgage against the mutt. 11 Ind Cas 290 (All), Rel. on; 43 Mys 466, distinguished. (Para 3)

Anno: C. P. C., O. 1, R. 10. N. 27.

M. Lakshminarayana Rao, for Appellants; A. R. Somanatha Iyer Advocate General, for Government.

CASES REFERRED: Paras

(A) 43 Mys 466 3

(B) ('11) 11 Ind Cas 290 (All) 4

VENKATARAMAIYA J.:

This appeal arises from a suit for possession of the lands described in the plaint schedule and mesne profits. The plaintiffs are the sons of the purchaser of these properties at a Court sale held in execution of a mortgage decree obtained by him against two persons Mallikarjunaswamy and his father Mallappa. Defendant is the Government of Mysore whose servants are said to have wrongfully dispossessed the plaintiffs. That the properties were hypothecated to plaintiff's father under a registered deed, Ex. A, dated 20-6-1932 executed by Mallappa and his son, that the mortgage was sued upon in O. S. No. 77 of 43-44, that in Execution Case No. 108 of 43-44 the properties were purchased by plaintiffs' father in satisfaction of the decree and that subsequent proceedings in Mis. 101 of 45-46 also indicate delivery may all be deemed to be proved. The suit is dismissed on the ground that the properties did not belong to the defendant-judgment-debtors but to the Channabasavaswamy Mutt of Poorigali, that the management of the properties was taken over by Government under an order dated 7-12-1938 and that the proceedings relied upon are not binding on the Mutt.

(2) Although it was alleged in the pleadings that the lands in dispute were the property of defendant, it is not and cannot be now disputed that the Mutt is the real owner. There is overwhelming evidence to show this and unqualified admission of the judgment-debtors themselves in the petitions and statements previously made by them (See Ex. 12) to support it. The argument that 3rd item should at least be held to be the private property of the defendants cannot be accepted as the prior admission was absolute and unqualified with respect to all the items and the evidence shows that it was acquired with the aid of Mutt properties and treated as such. It is also clear that as a result of the complaints about mismanagement of the properties an order was passed by Government on 7-12-1938 after enquiry for vesting the management in Government and possession of the properties was actually taken by the officers of Government on 29-5-1941.

(3) The contention of Sri Lakshminarayana Rao learned Counsel for appellants is that the mortgagors who were the defendants in the case were the managers of the Mutt, the amounts were utilised for the benefit of the Mutt and therefore the proceedings culminating in the Court sale are binding on the Mutt and Government. For one thing this is not the ground on which relief was claimed in the plaint and the prior litigation too proceeded on the footing that the lands were the private property of defendants. Secondly the defendants, having ceased to be the managers and being deprived of the properties could not represent the Mutt in the proceedings for enforcement of the mortgage. Whatever may be the effect of these against the defendants, the rights of the Mutt as owner of the lands remain undisturbed. The question at present is not whether the debt was contracted for a purpose binding on the Mutt but whether the the suit and the subsequent proceedings are bind-

ing on it. The debtors may have been the managers at the time the mortgages were effected but had ceased to be so when the suit was filed. 43 Mys. 466 (A) cited for Appellants cannot be considered as supporting the view that persons who are deprived of management of Mutt by an order passed in accordance with law can act for or on behalf of the Mutt.

(4) The decision of the Calcutta High Court in — 'Ganga Sahai v. Indarjit Singh', 11 Ind Cas 290 (All) (B), is that when a decree has been obtained against a person on the allegation that he is the shebait of a temple and is sought to be executed against the successor of the judgment-debtor it is open to the person against whom the application for execution is made to show that the decree was obtained against a person who was not a shebait and that consequently it is not capable of execution against the properties of the endowment in his hands. The sale relied upon by plaintiffs cannot be regarded as conveying to the purchaser the rights of the Mutt in the plaint schedule properties. There is no reason to interfere with the dismissal of the suit. The appeal is consequently dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1954 MYSORE 88 (Vol. 41, C.N. 40)

VASUDEVAMURTHY J.

Manche Gowda, Defendant-Appellant v. Basamma, Plaintiff-Respondent.

Second Appeal No. 443 of 1951-52, D/- 21-1-1953, against decree of Sub-J., Mandya, in R. A. No. 133 of 1950-51.

(Mysore) Hindu Law Women's Rights Act (10 of 1933), S. 8(2)(a)(b) — Share of step-mother.

A Step-mother claiming a partition against her stepson who has become the sole surviving coparcener is entitled to a 1/4 & not to a 1/3 share. 15 Mys LJ 85; 50 Mys HCR 171, Ref. (Paras 6, 7)

D. M. Chandrasekhar, for Appellant; K. S. Puttaswamy, for Respondent.

CASES REFERRED: Paras

(A) ('36) 15 Mys LJ 85 5
(B) 50 Mys HCR 171 6

JUDGMENT: This second appeal arises out of a suit filed by the plaintiff for partition and possession of her share in the plaint schedule properties. The plaintiff is the step-mother of the defendant who has become the sole surviving coparcener of the family after his father's death. The plaintiff claimed in the plaint as originally filed a ¼th share in the properties and later by an amendment she claimed 1/3rd. Both the lower Courts have awarded a 1/3rd share to her and the defendant has appealed

(2) The only point that arises in this appeal is the share to which the plaintiff is entitled. The appellant contends that it is only ¼th while the respondent urges that the lower Courts have rightly decreed a third share in her favour. The lower Courts have assumed that she is entitled to a 1/3rd share and there is no discussion in this matter at all. There are also no reported decisions of this Court directly bearing on this matter and there can of course be no precedents in Courts outside the State as the question arises under the Hindu Law Women's Rights Act which is peculiar to Mysore. Section 8 of that Act declares who are all the females entitled to claim a share at a partition and the mother—which expression includes a step-mother—is of course entitled to claim a share; and where joint family property passes to a single coparcener by survivorship, it shall so pass subject to the rights to shares of the classes of females enumerated earlier in that section.

Under Section 8(2) such share shall be fixed as follows:

(a) in the case of the widow, one-half of what her husband, if he were alive, would receive as his share;
(b) in the case of the mother, one-half of the share of a son if she has a son alive, and, in any other case, one-half of what her husband, if he were alive, would receive as his share.

We are not concerned in this case with sub-clause (c). Clause (3) provides that the term 'widow' includes a step-mother, and the term 'son' includes a step-son as also a grandson and a great grand-son. Clause (4) provides that fractional shares of the females as fixed above shall relate to the share of the husband, son, father or brother as the case may be and their value shall be ascertained by treating one share as allotted to the male & assigning therefrom the proper fractional shares to the female relatives.

(3) It is contended by Mr. K. S. Puttaswamy learned counsel for the respondent, that S. 8, Cl. (2)(b) applies to this case and that the plaintiff as the mother is entitled to one-half of the share of the son, the defendant, and consequently she would be entitled to a third of the properties while the defendant would be entitled to 2/3rds. For the appellant Mr. D. M. Chandrasekhar, his learned counsel, has contended that it is Cl. (2)(a) that applies as it is a case of a widow who is claiming a share and that she is entitled to get only one-half of what her husband, if he were alive, would receive as his share. It must be observed that nowhere in that section have any female relatives been awarded more than one-half or one-fourth of the shares of a husband or a son or a brother or a father and it is not clear why if a mother is claiming a share from her only son, as in this case, she should be given a larger share than what she would have been entitled to, had she been claiming, say from others like her daughter-in-law or a brother of her husband or his widow or her father-in-law. The son has obviously a better and stronger claim for consideration than those others as he would have to perform the ceremonies of his father and mother and other religious rites and perpetuate the family line and maintain the family's prestige.

(4) It is argued for the respondent that the expression "in the case of the mother, one-half of the share of a son if she has a son alive" in S. 8, Cl. 2(b) must be read literally as meaning one-half of the share of the defendant; as he is a son within the meaning of sub-section (3), although he is a step-son, who is alive at the date of the partition and that Cl. (2)(a) does not apply. The word 'mother' appears in S. 8, Cl. (1)(a) as well as in Cl. (1)(b). In Section 8, Cl. (1)(a) the case of a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of the pre-deceased undivided sons and brothers who have left no male issue has been provided for. In Section 8, Cl. (1)(b) a case of partition of joint family property among brothers, their mother, their unmarried daughters and the widows and unmarried daughters of their pre-deceased undivided brothers who have left no male issue has been similarly provided for. Clauses (2)(b) and (c) of that section, I think, were meant

to apply to the case of a partition between persons or classes of persons envisaged in Cl. (1)(a) and (b) while Cl. (2)(a) is more appropriate to apply where, as in this case, the widow is claiming a share as against a sole surviving coparcener like her son who is entitled to the rest.

(5) If the words "if she has a son alive" in S. 8(2)(b) are meant to include the case of a living son like the defendant, the defendant's existence would operate to cut down his own share and that could not be the intention of the legislature or a proper construction to put. Sir D'Arcy Reilly, C. J. found a similar difficulty in interpreting Cl. (g) of sub-s. (2) of S. 10 in — 'Govinda Rao v. Chandra Bai', 15 Mys L J 85 (A). He observed that that clause was not easy to interpret. That sub-clause reads:

S. 10(2) Stridhana includes—

x x x x

(2)(g) "Property taken by inheritance by a female.....except when there is a daughter or daughter's son of the propositus alive at the time the property is inherited."

It was urged before him that the daughter who was claiming an absolute estate based upon that section could not validly do so as there had been another daughter of the propositus alive when he died and who had since passed away. Sir D'Arcy Reilly pointed out how a literal interpretation of that sub-section would lead to an absurdity as a daughter would be prevented from taking her share of her father's property as stridhana because of her own existence, and if the legislature really meant such a result to follow he expected they would have made their intention clear by more appropriate language.

A construction which is sought to be put upon S. 8, Cl. 2 would lead to a somewhat similar result. One would have expected if a son was to be specifically chosen for being treated less generously vis-a-vis his mother as compared with the other more distant agnate or cognate relations, the legislature would have made it clear. I do not think the legislature would not have taken into consideration the usual and universally accepted notion among Hindus that the son occupies a very important position in the family and has onerous duties and responsibilities both religious and secular according to Hindu Law. Manu has emphasised the Vedic injunction regarding the necessity of a son thus:

"Through a son, he conquers the worlds; through a son's son, he obtains immortality but through his son's grand-son, he gains the world of the Sun. Because a son delivers his father from the hell 'put', he was therefore called 'putra' (a deliverer from 'Put')."

See Mayne on Hindu Law and Usage, 11th edition, para 66, p. 105.

(6) In my opinion, therefore what that sub-section means is that in the case of the mother she gets one-half of the share which a son would have got if, a son of hers was alive on the date of the partition, if she is claiming the share as a mother as against several sons and grand-sons; while in any other case or where she is claiming as a widow of her deceased husband, she would be entitled to one-half of what her husband, if he were alive, would receive as his share. In the illustration given to that section the shares at a partition of a father, his son, his mother and two daughters are given as 1, 1, ½ and ¼ respectively, and that I think is more in favour of the construction which would justify awarding half a share to the mother. In — '50 Mys H C R 171 (B)', sub-clauses (a) and (c) of Cl. 2 of S. 8 were applied in order to determine the shares at a partition between a mother and her two sons, i.e. two brothers, and the sons and daughters of another predeceased brother. While interpreting the expression 'shall relate to the share of' the deceased and treating one share as allotted and 'assigning therefrom' the share due to a female which are found in S. 8, Cl. 4 has been specifically noticed and relied upon.

(7) In the result, this appeal is allowed, the decisions of the Courts below are modified and the plaintiff is held entitled to a fourth share instead of one-third. The parties will bear their own costs in this second appeal.

B/D.H. Appeal allowed.

A.I.R. 1954 MYSORE 89 (Vol. 41, C.N. 41)

VASUDEVAMURTHY J.

Thimmarayappa, Plaintiff-Appellant v. Narayanappa and others, Defendants-Respondents.

Second Appeal No. 602 of 1950-51, D/- 13-1-1953, from decree of Addl. Sub-J., Bangalore, in R. A. No. 166 of 1950-51.

(a) T. P. Act (1882), S. 105 — Lease or licence — (Easements Act (1882), S. 52).

The term 'lease' imports that exclusive possession is given to the transferee of the premises conveyed, while licence on the other hand, is permission to do some act which without permission it would be unlawful to do.

The entire area of the large piece of Municipal land with numerous constructions on it was not delivered over to the possession of the plaintiff. The Municipality and the Public generally and other persons who had interest in the restaurant were free to move about in the area and the Municipality apparently retained full control over the land and its use and enjoyment in spite of the arrangement. Held that it was not a lease. 51 Mys HCR 47, Relied on. (Para 5)

Anno: T. P. Act, S. 105 Ns. 13, 14; Easements Act, S. 52 N. 4.

(b) Easements Act (1882), S. 52 — Lease or licence — (Deed — Construction — Lease or licence) — (T. P. Act (1882), S. 105).

Plaintiff applying to Municipality for grant of a lease-right for vending fruits on monthly rental — Recommendation of Market Superintendent forwarded by Managing Committee — Municipal Council at a meeting passing resolution and accepting Managing Committee's suggestion — Deed reciting that by resolution Municipality had agreed to lease the land to plaintiff — Recital in deed held was incorrect — Resolution held permitting applicant to vend fruits on the specified land and not granting land on lease — Deed held was merely a licence and not a lease. (Para 5)

Anno: Easements Act, S. 52 N. 4; T. P. Act, S. 105 N. 14.

(c) Easements Act (1882), Ss. 60, 61, 63 and 64 — Scope — (T. P. Act (1882), Ss. 105, 106).

There is no provision either in S. 60, 61, 63 or 64 for the issue of any notice, much less for giving any specified time as in the case of leases, before a licence can be revoked. There is no doubt that a Municipality is not outside the provisions of the T. P. Act and that if it has granted a lease, notice must be given before the same can be terminated.

it has been observed that the border line between a licence and a lease is often exceedingly thin and that even the use of expressions such as "temporary accommodation" and "compensation" instead of tenancy & rent is inconclusive of the circumstance whether the arrangement amounts to a lease. In — 'Indal v. Debi', AIR 1926 Nag 174 (F), there was an agreement to pay some grain periodically to the owner of a piece of land on account of damage to be caused to his land by the defendants using it to take their carts and cattle over it and that was construed as a lease mainly on the ground that the right was heritable and irrevocable, and it can have no application to the present case. It is a question of fact in each case whether a particular arrangement amounts to a lease or licence and other cases can merely be a guide in such interpretation. As already pointed out the proper interpretation to be put on Ex. 3 is that it is a licence and not a lease.

(7) In this connection, it has been urged for the respondents that Ex. 3 cannot be enforced if it is to be deemed as a lease of immoveable property; such a lease can only be granted by the Municipal Council under S. 41, Mysore City Municipalities Act; that in this case, the resolution Ex. 3 was only to the effect that the plaintiff should be permitted to vend fruits in the Bus Stand and any agreement that could be entered into with him thereafter by the Commissioner could only be in terms of that resolution and the Commissioner had no power to enter into an arrangement of lease with the plaintiff. Exhibit III is also, it is urged, not in accordance with the requirements of Ss. 251 and 252 of that Act. Under S. 251(c) no contract for the purchase, sale, lease, mortgage, or other transfer of immoveable property shall be entered into by the Municipal Commissioner except with the approval or sanction of the Municipal Council; and under S. 252(2) read with S. 41(7) such a contract should be in writing and signed by the President and attested by two other Councillors and sealed by the Municipality. These formalities not having been observed in this case, it is urged that the agreement Ex. 3 is void; and for that position reliance is placed on — '28 Mys C. C. R. 119 (G)', which supports it. It is, however, urged for the appellant that the later case in — '8 Mys LJ 412 (H)', would govern this case. But it is seen that in the latter case the defendant had enjoyed the benefit of the contract and collected tolls which the Municipality would have collected but for the contract with the defendant, and it was held that he was liable under S. 65, Contract Act to pay the balance of the rent due to the Municipality. The question of directly enforcing the terms of the contract did not therefore really arise in that case, and in fact it is observed at p. 418 of the report, that they were not concerned with a case where the contract was still executory and there was no need to consider the question whether non-compliance with the statutory formalities of the Municipal Act would prevent either party from enforcing performance against the other of such contract.

(8) The next contention of Mr. Kanakasabapathy is that an injunction had been granted against the Municipality by the Munsiff and as the Municipality had not appealed that decree had become final; and the present Respondents one to six who claim under the Municipality respondent seven could not, by filing an appeal of their own before the District Judge, get over or nullify the effect of the decree against the Municipal Council. This contention no doubt at first sight appears to be somewhat formidable against the Municipality & defendants two to seven. But it has to be observed that the lower Appellate Court had powers even in such a case under O. 41, R. 33, C. P. C. to pass any decree or make any order which ought to have been passed or made by the trial Court and the power could be exercised by the lower appellate Court in favour of or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. Moreover, defendants two to seven were impleaded in the case by reason of the grant of permits in their favour before the plaintiff filed his amended plaint; and if the Municipality had so granted permits before the date when the suit must be deemed to have been filed against those defendants any decision which may be passed in the suit against the Municipality would not be binding on these defendants also as by that time the Municipality had already parted with certain rights in their favour. In fact on behalf of defendants 2 to 7, it was rather strongly argued that if the Municipality for instance had colluded with the plaintiff & not chosen even to defend the suit nevertheless defendants two to seven, who are grantees of certain rights, could on their own rights seek to defend the same. The respondents have also pointed out that in the appeal memo before this Court the appellant has taken no such ground and this, it is urged, shows that he himself thought that there was not much force in this contention.

(9) In this connection reliance has been placed for the appellant on — 'Chandrika Bakhsh v. Indar Bikram Singh', AIR 1916 P. C. 14 (I), and — 'Motilal Kanji & Co. v. Natvarlal M. Jhaveri', AIR 1932 Bom 78 (J). In the first case it was admitted by the defendant concerned, and found by the Sub-Judge, that the contesting defendant had no title of his own to protect and was a mere 'impertinent intervener' in another person's affair. It was therefore held by their Lordships of the Privy Council that he could not have maintained an appeal before the Judicial Commissioner to whom he had appealed. In the latter case which was one arising under the Companies' Act the appellant's interests were in no way affected by the order of the lower Court and therefore it was rightly held that he had no right to appeal against the decision. That can certainly not be said of defendants two to seven who have rights of their own to defend and a real stake in the litigation. In this court it has been held that, though powers under O. 41, R. 33, C. P.C. should be cautiously applied, e.g. in cases where but for the recourse to it the ends of justice would be defeated and the rule should not be allowed to be invoked in favour of a litigant so as to enable him to effect the provisions of other statutes such as Limitation Act, Court-fees Act and other provisions of the Code of Civil Procedure, recourse to which may have given him requisite relief, still such powers could properly be invoked to do justice between the parties; See '31 Mys. C. C. R. 218 (K) and — 'Rangachar v. Srinivasa Rangachar', 45 Mys. H. C. R. 450 (L). If in the circumstances of this case it is found that an injunction, not to grant licences, could not have been made in favour of the plaintiff against the Municipality much less against defendants two to seven it is difficult to accept the argument for the appellant that the injunction could be retained as against the Municipality while cancelling the same so far as it affects defendants two to seven. Defendants two to seven who were clearly affected by the decree of the Munsiff appealed in time and the Municipality was also impleaded in the appeal. I think it is not an unreasonable contention on their part

as Respondent 2. The appeal came to be heard by the Additional Subordinate Judge, Bangalore, who reversed the Munsiff's decision and dismissed the plaintiff's suit. The plaintiff has come up in Second Appeal.

(3) The appeal has been argued fully and at considerable length by Counsel who appeared for the appellant as well as for the Corporation and for defendants 2 to 7. I do not see any reason, however, to interfere with the Judgment of the lower Appellate Court.

(4) Mr. Kanakasabapathy, learned Counsel for the appellant, contends that the rights in favour of the Plaintiff under Ex. III is really in the nature of a lease and not a mere licence. He represents that though it is termed an agreement in the opening paragraph it has referred to the agreement to 'lease' the schedule land in accordance with the resolution of the Municipality dated 2-12-1948. A monthly 'rent' payable by the 5th of each month has been provided and there is a provision that a 'schedule' has been given in which the land known as Kalasipalyam Bus Stand has been described, and it has been further provided that the plaintiff will not 'sub-let' it to others or use it for any purpose other than vending fruits. The agreement is also on a stamp paper of the value of Rs. 3-12-0 which is the proper stamp for a lease deed and not a mere agreement, and there is a specific provision in para. three of it that the Municipality reserves the right to resume it if the plaintiff committed any act in violation of the agreement. He urges that the last provision shows that the Municipality could have resumed the land or taken possession only for any default on the part of the plaintiff. As against this, it is contended for the respondents that there is no conveyance of the land in question and that what is granted under Ex. 3 is merely the right to vend fruits in accordance with Ex. 8, the resolution dated 2-12-1948, of the Municipal Council which in turn accepted the recommendation of the Chairman of the Managing Committee that the plaintiff may be permitted to do so on a monthly rent of Rs. 32/-. I am inclined to agree with the respondents' contentions in this matter.

(5) A lease of immoveable property has been defined as a transfer of a right to enjoy such property made for a certain time express or implied or in perpetuity. In — '51 Mys H. C. R. 47 (A)', it has been held that the term 'lease' imports that exclusive possession is given to the transferee of the premises conveyed, while licence on the other hand, is permission to do some act which without permission it would be unlawful to do. In that case an arrangement between the parties to raise casuarina trees by one of them on a piece of land belonging to one of them with a view to dividing the proceeds between them, was held not to amount to a lease. The distinction between a lease and a licence it was observed depended upon whether sole and exclusive possession is given to the transferee and if no such exclusive possession was given, and if the transferor still retained control over the land, it would amount to a licence and not a lease. The entire area of the large piece of Municipal land included in the boundaries given in the schedule known as Kalasipalyam Bus Stand with numerous constructions on it including a restaurant was certainly not delivered over to the possession of the Plaintiff. The Municipality and the public generally and other persons who had interest in the restaurant were free to move about in the area and the Municipality apparently retained full control over the land and its use and enjoyment in spite of the arrangement. The Plaintiff applied as per Ex. X requesting the grant of "a lease right for vending fruits" in the Bus Stand and offered to pay a rent of Rs. 32/- per month. That application was considered by the Market Superintendent who made a report as per Ex. 9 to the Managing Committee recommending that the Plaintiff may be permitted to vend fruits in the Bus Stand on that rent. His recommendation was accepted by the Managing Committee and they forwarded their opinion to the Municipal Council who at a meeting held on 2-12-1948 passed a resolution accepting the Managing Committee's suggestion. Thereafter, Ex. 3 came to be executed. In Ex. 3, a specific reference has been made to the resolution of the Municipal Council of 2-12-1948; it has been recited in Ex. 3 that by that resolution the Municipality had agreed to lease the schedule land to the plaintiff. This was clearly incorrect. The resolution was that the plaintiff shoud be permitted to vend fruits and not that the land should be granted to him on lease. It is rather unfortunate that this mistake should have occurred and that has given rise to all this litigation. But there is no doubt that the Plaintiff must have been fully aware of the exact implications of the Municipal Council granting his application to vend fruits on a monthly rental in the Bus Stand. It must therefore be held that Ex. 3 merely evidences a licence and not a lease.

(6) There is no stipulation in Ex. 3 that the Plaintiff should have the monopoly of vending fruits in the Bus Stand or that the Municipality had no right to issue similar licences to others. The Plaintiff has come to Court with a specific plea that he was granted such monopoly rights and has let in no evidence apart from Ex. 3 in favour of such a claim. If the arrangement is not a lease but a licence, under Ss. 60 and 61, Easements Act, the same may be revoked at any time by the grantor either expressly or by implication unless it is coupled with a transfer of property and such transfer is in force or the licencee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution. Where such a licence is revoked, the licencee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property and even where a licence has been granted for a consideration & the licencee without any fault of his own, is evicted by the grantor before he has fully enjoyed under the licence the right for which he contracted he is entitled to recover compensation from the grantor; see — 'Dominion of India v. R. B. Sohan Lal', AIR 1950 EP 40 (B). There is no provision either in Ss. 60, 61, 63, or 64 for the issue of any notice, much less for giving any specified time as in the case of leases before a licence can be revoked. Mr. Kanakasabapathy has cited — 'Amimullah v. Emperor', AIR 1928 All 95 (C), for the position that a Municipality is not outside the provisions of the Transfer of Property Act and that if it has granted a lease, notice must be given before the same can be terminated. There is no doubt it is so. In — 'Mohamed Rowther v. Tinnevelly Municipal Council', AIR 1938 Mad 746 (D), also cited by him the right to collect the fees of slaughter houses and fish bazaars was held to amount to a profit arising out of land & therefore fell within the definition of immoveable property as given in S. 3, Cl. (25) of the General Clauses Act. There the rents or profits were clearly attributable to the shops or bazaars and it was not a mere right to vend things within an open area. He has referred to — 'O. G. Ganguly v. Kamalpat Singh', AIR 1947 Cal 236 (D) where

(K) (V24) AIR 1937 Mad 140: 169 Ind Cas 26 15
(L) 27 Mys CCR 155 23
(M) 42 Mys HCR 163 23
(N) 49 Mys HCR 530 23
(O) 51 Mys HCR 112 23
(P) ('37) 15 Mys LJ 230 23, 26
(P1) (V38) AIR 1951 Mys 126: ILR (1951) Mys 414 24
(Q) (V13) AIR 1926 PC 105: 53 Ind App 204 (PC) 24
(R) ('73-74) 1 Ind App 321: 14 Beng LR 187 (PC) 24, 26, 29
(S) ('78-79) 6 Ind App 88: 5 Cal 148 (PC) 24
(T) ('04) 27 Mad 243: 14 Mad LJ 84 (FB) 26
(U) ('82) 4 Mad 1 (FB) 26
(V) 4 Mys CCR 26 26
(W) 5 Mys CCR 69 26
(X) 7 Mys CCR 15 26
(Y) 10 Mys CCR 71 26
(Z) 21 Mys CCR 145 27
(Z1) (V38) AIR 1951 Mys 38: ILR (1951) Mys 259 (FB) 27
(Z2) (V38) S. A. No. 499 of 1951-52 (Mys) 30
(Z3) (V36) AIR 1949 All 685: ILR (1951) 1 All 62 (FB) 30
(Z4) (V6) AIR 1919 Mad 75: 42 Mad 711 (FB) 30
(Z5) (V6) AIR 1919 Mad 1175: 41 Mad 136 30
(Z6) (V8) AIR 1921 Pat 447: 62 Ind Cas 132 (FB) 30
(Z7) (V9) AIR 1922 Pat 450: 1 Pat 506 30
(Z8) ('35) 14 Mys LJ 510 30
(Z9) ('39) 18 Mys LJ 113 30
(Z10) ('39) 18 Mys LJ 133 30

MEDAPA C. J. :

The facts of the case which led up to this appeal have been set out in full in the judgment of the trial court as also in the judgment of my learned brother Justice Sri B. Vasudevamurthy which I have had the advantage of perusing; they need not therefore be reiterated. This appeal was directed to be placed before a Full Bench as its disposal involved a consideration, rather a reconsideration of the views of this High Court on a very important point of Hindu Law, regarding which a definite view had been taken from a long time. The necessity for the reconsideration arose on account of the decision of the Supreme Court reported in — 'Pannalal v. Mt. Naraini', AIR 1952 SC 170 (A). The important point of Hindu Law referred to above is whether the pious obligation of a son to discharge his father's debt arises during the lifetime of his father. The point, as already stated, was well settled in Mysore. The views of the High Courts outside the State were also equally definite and well settled and the importance which this matter has now assumed, is due to the fact that the view of our High Court is diametrically opposed to the view held in the other High Courts.

(2) A marked and distinctive feature of Hindu Law is that a son acquires by birth a right in the joint family property. That right is not affected by any transfer effected by any other member of the joint family including the manager, even though the manager happens to be a father unless the transfer is for family benefit or necessity when the son is a minor and, if a major, unless he consents to the said transfer. Another distinctive feature of Hindu Law is that a son is under a pious obligation to discharge the debts of his father, not incurred for illegal or immoral purposes. This obligation on the son to discharge the debt of his father arose, according to orthodox Hindu Law, only after the death of the father or where the father was as good as dead on account of the circumstances which will be referred to later. This was also the view taken in the early decisions of the High Courts, in what was prior to the Constitution known as British India, and also of the Privy Council, till the latter changed its view and the High Courts in British India had to follow and did follow the lead so given. It will be sufficient to give the following extract from the commentary in Mulla's Hindu Law, 10th Edition, at P. 349 to show the trend of the view of these Courts :

"There arose recently a conflict of opinion whether there was any pious obligation on the part of the sons to pay the father's debts in the lifetime of the father, or whether the obligation arose for the first time after the father's death. The conflict arose out of some observations of the Judicial Committee in — 'Sahu Ram Chandra v. Bhup Singh', AIR 1917 PC 61 (B). Following those observations, the Allahabad High Court held that the obligation did not arise until after the father's death. On the other hand the Madras and Bombay High Courts held that the liability arose even in the father's lifetime, and that the observations in — 'Sahu Ram's case, (B)', were mere obiter dicta and they did not affect the law as laid down by the Judicial Committee itself in a long line of decisions.

In a later case, that of — 'Brij Narain v. Mangal Prasad', AIR 1924 PC 50 (C), their Lordships of the Privy Council held that the observations in — 'Sahu Ram's case', referred to above were not necessary for the decision of the case, and that the sons were liable for the father's debts whether the father was alive or dead when the liability attached."

(3) As pointed out in Mayne's Hindu Law and Usage, Eleventh Edition, p. 417 :

"On account of conflicting decisions, a Full Board of the Judicial Committee examined the whole subject in — 'Brij Narain v. Mangala Prasad, (C)' and Lord Dunedin laid down the following five propositions :

(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) if he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt;

(3) if he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate;

(4) Antecedent debt means antecedent in fact as well as in time, that is to say that the debt must be fully independent and not part of the transaction impeached; and

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

(4) The result is that according to the view of the High Courts outside Mysore, the interest of a son cannot be proceeded against, when the father without any legal necessity or unless in discharge of an antecedent debt sells a joint family property or borrows money under a mortgage deed while the entire interest of the father as well as that of his son can be proceeded against in execution of a decree obtained against the father for the recovery of an unsecured debt unless the debt was

contracted for illegal or immoral purposes. This position of the law gives an unsecured creditor greater advantage than that given to a secured creditor. Conversely it follows that while the father cannot borrow money straightway on the security of the interest of his son except for legal necessity, he can nevertheless borrow money without security and later on effectively mortgage or sell the interest of his son, on the ground that he is doing so for discharging an antecedent debt.

(5) The High Court of Mysore has on the other hand consistently held from 1893, that is to say for over half a century, that there is no obligation on the part of the son to discharge the debts of his father during the latter's lifetime unless the debt had been incurred for family benefit or with the son's consent. This was the view of the majority of the Judges in the case reported in — '16 Mysore LR 116 (FB) (D)'. This view was confirmed by an unanimous decision of a later Full Bench reported in — '15 Mys CCR 233 (E)'. It was there held that :

"It was open to the son to plead that in the absence of proof that the debt was incurred for the sake of the family, his interests were not affected by the sale.'

There is hardly any doubt that the ancient texts of Hindu Law support the view taken by our High Court. A fuller but needlessly lengthy discussion may conveniently be avoided by inviting a reference to the judgment of Setlur J. in the above Full Bench case. The following extract from West and Buhler's criticism on the Privy Council decisions is apposite :

"None of the texts..... nor any of the commentators on them say that a son's liability for his father's debts arises during the father's life ..... There are many texts which imply the contrary. Vishnu says the sons and grandsons must pay when the debtor is dead or has been absent twenty years, that is, when he may be presumed to be dead, not before. Manu says simply when the father is dead. Brihaspati says the sons must pay even in the father's life but only in cases in which he is incapable of acquiring property or retaining it. The exception here is conclusive as to the rule, at least as it was understood by the school that produced this Smriti, which is sacred everywhere. The same observation occurs as to Katyayana's text ..... so as to Narada's text on the subject.

The whole series quoted by Jagannatha imply a liability only after the father's natural or civil death or its equivalent, and so they have invariably understood by native lawyers reading them with the context. The case may be stated even more strongly. There is no text imposing on sons a liability during their father's life for debts incurred even for the benefit of the family except in cases in which the father is not capable of managing the estate and affairs of the family and the sons are.

It is impossible that of the numerous texts treating of debts contracted for the family and of the sons' liability as survivors of their father all should have omitted to mention their liability during the father's life, had the liability been recognized. But the father is regarded as alone responsible, and alone having administrative control as the head of an undivided family ..... The Vyavahara Mayukha, the chief local authority of Bombay dwells elaborately on the debtor's obligations, but says nothing about any obligation of the sons except on their father's death or prolonged absence. The Mitakshara itself in commenting on the texts of Yajnavalkya ....construes them as imposing a duty only on the father's death, his absence for twenty years or on his imbecility."

(6) Mulla's commentary on the point at p. 349 (10th edition) is succinct and deserves reference :

"It may here be observed that under the old Hindu Law the liability of the son to pay the father's debt did not arise until after the father's death. Under Hindu Law as interpreted by the British Courts the liability exists even in the lifetime of the father. To this extent the British Courts have extended the liability of the son."

(7) It will thus be noticed that the view of our High Court prevailing for over 60 years fortified as it has been by two Full Bench decisions, is in consonance with the texts of Hindu Law and that the view of their Lordships of the Privy Council has brought about a change in this branch of the law in the rest of India. The change however cannot be said to be advantageous as it brings about a distinction between a secured creditor and an unsecured creditor, the latter being placed in a more advantageous position than the former. The father is allowed to alienate the property of his son by merely borrowing money before alienating the property of the joint family. It enables, in a way not contemplated by Hindu Law, a father to defeat the rights that a son gets by birth by intentionally borrowing money and by that device to ultimately alienate his son's interest without the son's consent even though there was no legal necessity for the loan.

(8) It has been observed in — 'AIR 1952 SC 170 (A)', that :

"It can now be taken to be fairly well settled that the pious liability of the son to pay the debts of his father exists whether the father is alive or dead."

The law as laid down in this decision and in — 'Sidheshwar v. Bhubneshwar', AIR 1953 SC 487 (F), by their Lordships of the Supreme Court is binding on us. Article 141 of the Constitution makes this position doubly clear. It is besides desirable that the law applicable to all parts of India is made uniform as far as possible for more reasons than one and in Mysore this need for uniformity has now become more imperative than even before, as some parts of what was known as British India, have as a result of integration of the States and the creation of new Provinces, come under the jurisdiction of this High Court. It follows that unless and until the Supreme Court thinks it necessary to reconsider the position in view of the strong and pertinent criticisms such as those of West and Buhler, the long existing view in this State enunciated in the two Full Bench decisions of this Court referred to above has to yield ground to the view expressed by the Supreme Court based on what must be taken as well established law in all the Courts outside Mysore and which was also the view of their Lordships of the Privy Council.

(9) The decree of the lower Court is accordingly modified in the manner indicated by my learned brothers in their judgments.

VENKATA RAMAIYA J. :

(10) The facts relating to the appeal are fully stated in the judgment of my learned brother Vasudevamurthy J. The controversy is of the familiar type between purchasers of joint Hindu family property and the members of the family about the validity of the sales as regards those who were not parties to the sales with the additional feature of the mother and unmarried

daughters of the vendor having joined his sons in attacking the sales and claiming shares in the properties. The claim of the mothers and daughters rests on the provisions of Hindu Law Women's Rights Act (No. 10 of 1933) and that of the sons of the Law of Mitakshara. Adopting the considerations applied hitherto in such cases the learned Sub-Judge held that the Appellants have acquired only the interests of the vendor in the properties conveyed to them and granted a decree for partition of the properties and possession of the shares due to the mother, daughters and sons according to law. It is contended for the appellants who are two of the purchasers that the decision is erroneous as the principles laid down in former decisions of this Court on which it is based need reconsideration and revision. The contention raises questons of importance and I shall briefly state my views about it.

(11) The powers of a Hindu father under the law of Mitakshara to alienate family property and contract debts binding on the sons and other members of the family are discussed in a number of cases with special reference to the ancient texts. While it is agreed that discharge of debt is enjoined as a sacred duty and that the obligation is cast not merely on the father but also on the sons there is divergence of opinion about the duty of the son concerning this when the father is alive. The view which has prevailed in Mysore so far is that :

> "the liability of the Hindu son for the debts of his father does not arise as long as the debtor himself is alive and is not so disabled by disease or other physical disability as not to be able to discharge it himself or has been absent so long as to raise a presumption of death."

This was laid down so far back as 1909 by a Full Bench in — '15 Mys CCR 233 (E)', where the question was whether a son who was not a party to the suit for enforcement of a mortgage effected by the father with respect to ancestral property can resist the claim of the purchaser in execution of the decree, for possession of the property, on the ground that his interest in the property is not affected by the sale in the absence of proof that the debt was incurred for the sake of the family. That was a case in which the father was alive when the liability of the son's share in the property for recovery of the mortgage debt was disputed.

For payment of unsecured debts of the father the accepted rule is that the pious duty of the sons does not arise when the father is alive but does arise when he is dead, unless the debts are proved to be illegal or immoral and that family properties in the possession of the sons may be proceeded against for recovery thereof. The obligation extends to the grandsons for the payment of such debts of the grand-father and family properties are similarly liable. See — '36 Mys HCR 416 (G)'.

There is a qualification of the rule for payment of debts contracted by the father mortgaging family property as it is considered that the liability of the sons for mortgage debts does not arise by reason of the death of the father and that their interests in the property mortgaged would be liable under the mortgage whether the father is alive or dead, only if the debt was incurred for the necessity or benefit of the family that in the absence of such necessity or benefit, the sons' liability arises if the father is dead and the creditor obtains a personal decree. It is enough to refer to three cases concerning this — each of a separate Division Bench — '41 Mys HCR 382 (H)' and — '45 Mys HCR 26 (I)' and — '45 Mys HCR 83 (J)'. In each of these the mortgagee sought payment of the money due under a mortgage by the father of the family properties, and the sons who were not parties to the mortgage denied liability of their shares in the family property for the debt. In the last case the father was dead when the suit was filed and in the first two cases he died after the institution of the suit. As legal necessity or family benefit for the mortgage or for the prior debts which it purported to discharge was found to be wanting, it was held in all the cases that the shares of the sons in the properties were exempt from liability under the mortgage.

As regards pious liability of the sons to discharge the debt after the father's death Chari J. in — '41 Mys HCR 382 (H)', at p. 389, expressed :

> "....a mortgage is an alienation of interest possessed in the mortgaged property and as such the doctrine of pious obligation is not applicable to it; in other words even if the father is dead it would still be the duty of the creditor to prove that the debt was borrowed for legal necessity or for the benefit of the family."

This view was affirmed in the two later cases, 'at pp. 26 (I) and 83 (J), of 45 Mys HCR'. But in — '45 Mys HCR 83 at p. 87 (J)', Reilly C. J. added:

> "....If there were a balance left to be recovered from the father's estate as a personal debt after his death then no doubt the pious obligation of his son would apply to that balance and it could be recovered from the son's interest in what had been the joint family property of himself and his father if the remedy against him is not time barred."

Another point to be noticed in these and other cases where family property was alienated by the father for discharging debts previously incurred by him is the emphasis placed on the ascertainment of the need for such debts.

(12) The effect of the decisions of this Court is:

1. The pious duty of the sons for payment of the father's debts does not arise during the lifetime of the father;

2. After death of the father the pious obligation of the sons arises with respect to simple money debts (not avyavaharika) and not mortgage debts.

3. Interests of the sons in family property mortgaged by the father for a debt contracted by him are not liable for payment of the debt in enforcement of the mortgage unless the mortgage is shown to be for legal necessity and for this it makes no difference whether the father is dead or alive. But family properties in the possession of the sons may be proceeded against, if the father is dead, in execution of a personal decree obtained by the mortgagee.

4. Discharge of an antecedent debt by means of an alienation of family property effected by the father is not sufficient by itself to render the alienation valid. It must be proved that the prior debts were incurred for the necessity or benefit of the family or that the creditor made reasonable inquiry to be satisfied about the need for the debts.

(13) In this case as in others where the validity of alienations by a Hindu father of family properties for discharging debts contracted by him is to be determined, the decision of the Supreme Court in — 'AIR 1952 SC 170 (A)', is referred to as laying down principles at variance with those summarised above. As Art. 141, Constitution of India states that the law declared by the Supreme Court shall be binding on all Courts within the

territory of India, it is necessary to see if the law applicable to the matters in issue here is enunciated in the case mentioned. The decision of the Supreme Court relates to a case in which the suit was filed for enforcement of a mortgage but the claim to a mortgage decree was given up and a decree was passed by consent for payment of money by the defendant. Later on, the defendant died and his sons who were impleaded as legal representatives objected to the execution of the decree against the properties in their possession on the ground that these belonged to them absolutely as a result of the partition between them and their father. It was held that the amount payable under the decree was a pre-partition debt which the sons were liable to pay provided it was not illegal or immoral and no arrangement was made at the partition for payment of the debt. In the course of the judgment it is observed :

> "It can now be taken to be fairly well settled that the pious liability of the son to pay the debts of his father exists whether the father is alive or dead. Thus it is open to the father during his lifetime to effect a transfer of any joint family property including the interest of his sons in the same to pay off an antecedent debt not incurred for family necessity or benefit provided it is not tainted with immorality.... According to the strict Hindu theory the obligation of the sons to pay the father's debts normally arises when the father is dead, disabled or unheard of for a long time. No question of alienation of the family property by the father arises in these events although it is precisely under these circumstances that the son is obliged to discharge the debts of his father."

(14) In — 'AIR 1924 PC 50 (C)', referred to as supporting some of the above statements and which is also relied upon in — '41 Mys HCR 382 (H)', the sons impeached a decree obtained by a creditor of the father on the foot of a mortgage. A Full Board of the Privy Council after reviewing the cases bearing on the question declared that the mortgage was binding on the sons as it was effected in order to pay antecedent debts due under two older mortgages.

(15) There is provision in the texts for alienations only in case of distress, benefit or good of the family, (Apathkale, Kutumbarthe, Dharmarthe) and the theory that discharge of antecedent debts is a justification for the alienation of family property by the father seems to have developed as a corollary to the doctrine of pious obligation of the sons. As stated in — 'AIR 1924 PC 50 at p. 54 (C)':

> "On the one hand there is the general rule of the Mitakshara Law that the manager cannot burden the estate for his own purposes..... on the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty..... It is enough to say that both principles are firmly established by long trains of decisions and it certainly occurs to the view that the term "antecedent" debt represents a more or less desperate attempt to reconcile the conflicting principles."

It is mentioned as an exception to the general rule, in — 'AIR 1917 PC 61 (B)' thus:

> "Although the correct and general principle is that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt"; and that it is intended to protect alienees for onerous consideration and in good faith."

It is unnecessary to pursue the inquiry as the point is concluded by the explicit statement in the judgment of the Supreme Court that

> "There is no question that so long as the family remains undivided the father is entitled to alienate for satisfying his own personal debts not tainted with immorality the whole of the ancestral estate."

In — 'Shanmukam v. Nachu Ammal', AIR 1937 Mad 140 (K) a mortgage of family property by a junior member of the family whose father was alive was challenged by the sons. Varadachariar J. who delivered the judgment of the Bench held that the mortgage was binding on the son's share in the hypothecated properties to the extent to which the debts referred to in the mortgage deed were antecedent debts although the father was not the manager and in respect of the balance of the mortgage amount the plaintiff was entitled to relief as on a money claim. The judgment directed that if after the sale of the father's share in the hypothecated properties for the full amount and of the son's share in the properties for the amount held binding, the decree amount is not fully realised the plaintiff was entitled to proceed against the son's interest in the joint family properties for the recovery of the balance.

(16) Whether the mortgage is treated as a transaction of debt as in — '15 Mys CCR 236 (FB) (E)' or as an alienation as in — '41 Mys HCR 382 (H)' or of both, it is evident that legal necessity or family benefit cannot be the sole criterion for the interests of the sons in the mortgaged properties being affected by a transaction of the father according to these decisions. Although there was no question regarding sale in the case before the Supreme Court the decision postulates principles vital for ascertaining the extent and scope of the authority under the Mitakshara Law of a Hindu father to deal with family property and declares that there are no such limits as are prescribed in the cases of this Court. In spite of the strict Hindu theory that the pious duty to discharge the father's debts springs up after his death existence of the duty in the father's lifetime is stated to be well settled. Cases in which there are statements to the contrary cannot be of assistance or be cited as precedents now whatever may have been their value in the past and principles of stare decisis can have no application to these. The change wrought by the Constitution in regard to the finality of the decisions of this Court, the expansion of jurisdiction of this Court over areas in which people are accustomed to the application of Mitakshara Law as interpreted differently and need for avoiding confusion and conflict make it impossible now for this Court to steer a lonely course and adhere to opinions expressed in its former decisions.

The liability of the shares of the sons in family properties for recovery of the debt due by the father has been considered also in a case recently reported in — 'AIR 1953 SC 487 (F)'. The debt in that case was incurred by the father under a pronote executed by him and the creditor in execution of a decree obtained against the father alone, got the family property including the interests of the sons sold. The question was whether the sale was effective in conveying the shares of the sons to the purchaser when the sons were not parties to the proceedings. On the view that the father was a junior member of the family and as such had no right of disposition over the in-

terests of the sons and could not represent them in the proceedings the High Court held that the purchaser in the execution sale was entitled only to the share of the father.

The Supreme Court declared that this was not correct and that the purchaser acquired the interests in family property of not merely the father but also of his sons as it was found from the execution proceedings that the creditor intended to attach and sell the interest of the sons as well and the debt was not shown to be such as the sons were not liable to pay under Hindu law. It is stated in the course of the judgment, as regards the liability of the sons' share in the property to be proceeded against for recovery of the decree debt

"The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious the interest of the sons in the coparcenary property can always be made liable for such debt.."

It is a special liability created on purely religious grounds and can only be enforced against the sons of the father and no other coparcener. The liability has therefore its basis entirely on the relationship between the father and the son .....

So far as the legal liability of the sons is concerned as the debts incurred by the father are not shown to be illegal or irreligious it must be held under the rule of Hindu law there is a legal liability on the part of the sons to discharge their debts and the creditor can enforce this liability by attachment and sale of the sons' interest in the same manner as it was a personal debt due by them. The fact that the father was not the karta or manager of the joint family or that the family did consist of other coparceners besides the father and sons does not affect the liability of the sons in any way.....

Without being a karta he could as a father completely represent his branch of the coparcenary consisting of himself and his sons...."

(17) Having regard to the views expressed by the Supreme Court and the approving reference therein to — 'AIR 1924 PC 50 (C)' and other cases, the rules governing liability of sons for debts of the father and alienations of joint family properties by the father may be stated as follows:

1. The sons have a pious duty to discharge the father's debt whether the father is dead or alive.

2. An alienation of family property by way of mortgage or sale by the father is valid if it be for legal necessity or for discharge of an antecedent debt:

3. If the debt due under a mortgage by the father is not realised by sale of the mortgaged property, the amount left due may be recovered from the shares of the sons in the family properties:

4. The liability of the sons is however subject to the law of limitation and the debt not being shown to be illegal or immoral.

(18) In applying these rules, it is necessary to bear in mind the importance of examining whenever discharge of a debt is relied upon to justify the alienation, without proof of necessity or benefit for the family, whether the debt is really "antecedent" or only set up as a cover to defraud the family. To constitute 'antecedent debt' according to — 'Brij Narain's case (C)' "the debt must be truly independent and not part of the transaction impeached" and as required in — 'Sahuram's case (B)' "there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact". It may be that in some cases the family properties are subject to the risk of being alienated by the father for discharging debts imprudently contracted by him earlier. Such instances must, if at all, be as rare in the case of a father "his natural relation to his children entitles him to more than ordinary confidence: his transactions may be strongly presumed to be intended for the good of the family." (See pp. 595 and 596 of West and Buhler's Hindu Law).

(19) The result of applying these principles to the two sales under Exhibits III and V in favour of the Appellants may now be considered. The executant of both documents is defendant 6, the son of the 1st plaintiff and father of the other plaintiffs, and the purpose mentioned in each is discharge of prior debts. Admittedly the properties are ancestral and there is no proof of necessity or benefit for either sale. The interests of the sons can be affected, if at all, to the extent the purpose mentioned in the deeds is made out. This is lacking in the case of Ex. III as there is nothing more than a bare reference in the deed to a previous debt. The bulk of the consideration for Ex. V is however shown to have been applied for discharge of prior debts of defendant 6 though there is no proof of the balance of the amount having been required or utilised for any purpose binding on the family. I agree that the decree of the lower Court is to be modified as stated by my learned brother.

VASUDEVAMURTHY J.:

(20) The five plaintiffs who are the mother, two minor daughters and two minor sons respectively of defendant 6 brought a suit for a declaration that certain sales effected by defendant 6 in favour of the other defendants are not binding on their shares in the joint family properties described in the plaint schedule and for their shares being divided off and delivered to them and for mesne profits. They pleaded that defendant 6 had been extravagant and had incurred debts and effected alienations which were neither for legal necessity nor benefit to the family. Defendant 5 is the mother of plaintiffs 2 to 5 and defendants 1 and 4 are also closely related to the family. They were ex parte and though the alienations in their favour have been set aside by the Court below they have not appealed and their cases do not arise for consideration.

Defendants 2 and 3 contested the plaintiffs' suit. They pleaded that they were purchasers from defendant 6 of item 4 and item 2 respectively and that those alienations were binding on the plaintiffs as they were made for discharging earlier debts which had been incurred by defendant 6 for family necessity and benefit and for other similar beneficial purposes. They also pleaded that neither plaintiff 1, the mother, nor plaintiffs 2 and 3, the daughters, were entitled to claim shares and that as neither of the plaintiffs 4 and 5 were born on the date of the alienations, they could not question them. The Subordinate Judge who tried the suit has held that the sales in favour of defendants 2 and 3 are not binding on the plaintiffs and has granted a decree in favour of the plaintiffs; and defendants 2 and 3 have appealed.

(21) The learned Subordinate Judge has held that plaintiffs 2 and 3 who are daughters of defendant 6 cannot question the alienations and that plaintiffs 4 and 5 had been born on 2-11-43 and 28-11-45 and could therefore question the sales in favour of defendants 2 and 3. These

findings are not seriously questioned before us. So that we are only concerned with whether these two sales are binding on the plaintiffs. The sale in favour of defendant 2 is under Ex. III, a sale-deed dated 6-12-1944 for Rs. 275/- and is in respect of item 4. The reason for the sale, as recited in the sale-deed, was in order to discharge a prior hypothecation debt of Rs. 300/- due to one Koppal Boregowda under the original of Ex. XI. The original of Ex. XI has not been produced with an endorsement of discharge and Koppal Boregowda has not been examined. In fact defendant 2 examined as D. W. 7 admits that that debt has not been discharged and that defendant 6 received the purchase money himself saying he would discharge the earlier debt. In these circumstances the lower Court has rightly held that that sale has not been shown as having been made for any benefit or necessity.

It was urged for the appellants that the purchaser was not bound to see to the application to the purchase money but seeing that the sale was expressly for discharging an earlier debt and that debt has admittedly not been discharged it is difficult to accept that contention which seems rather extreme on the facts and in the circumstances of this case. If such an argument is accepted in this case, the minors and their other properties may run the risk of being still subject to the debt, while the item of property alienated would have passed out of the possession of the family. The finding of the Subordinate Judge regarding the sale in favour of defendant 2 under Ex. 3 must be affirmed; and the appeal so far as it concerns him is dismissed.

(22) Defendant 6 has sold item 2, a garden, to defendant 3 by the sale-deed Ex. 5, dated 9-3-1945. The sale is for Rs. 2500/- and the purpose of the sale as recited in the sale-deed, is in order to discharge three prior debts due by him, viz., of Rs. 900/- due to defendant 3 himself under Ex. 4, a hypothecation deed dated 20-11-44, Rs. 300/- due to defendant 3 on an on demand pronote Ex. XII, dated 22-11-44 and Rs. 650/- due on an on demand pronote Ex. 6, executed by defendant 6 in favour of one Channegowda, and for the balance to be utilised for buying bullocks and carts for agricultural purposes, to repair the family dwelling, which is described as being in a dilapidated condition, and to meet the expenses of planting cocoanut trees. Rs. 900/- and Rs. 200/- were to be adjusted out of the purchase money. Rs. 650/- was left with the purchaser for payment to Channegowda and Rs. 750/- was received by defendant 6 before the Sub-Registrar.

(23) It is not disputed before us, and it cannot be disputed, that defendant 6 owed the two amounts of Rs. 900/- and Rs. 200/- respectively to defendant 3 and Rs. 650/- to Channegowda. They are evidenced by Exs. 4, 12 and 6. Channegowda has been examined as D. W. 3 and he has deposed that the debt due to him under Ex. 6 was paid off as per Ex. 6 (b) his endorsement of discharge dated 10-3-45. The learned Subordinate Judge has held that these 3 prior or antecedent debts have not been shown to have been incurred by defendant 6 for purposes of legal necessity or benefit and that there is no evidence that the balance of Rs. 750/- was utilised for any of the purposes mentioned in Ex. 5 and that according to the rulings of this Court, beginning with — '15 Mys CCR 233 (FB) (E)' and which has been followed in numerous later decisions viz., — '27 Mys CCR 155 (L)'; — '42 Mys HCR 163 (M)'; — '49 Mys HCR 530 (N)'; — '51 Mys HCR 112 (O)'; — Urugejjegowda v. Central Co-operative Bank Ltd.', 15 Mys LJ 230 (P), the sale under Ex. 5 cannot bind the shares of the minor sons of defendant 6. These findings are not challenged before us. Defendant 3 has let in no evidence worth the name to show that the prior debts or the sum of Rs. 750/- received by defendant 6 were incurred or utilised for any purposes of necessity or benefit.

(24) As against this, it is contended by Mr. V. Krishnamurthi learned Counsel for the appellants, that the law as laid down in those cases with regard to the liability of Hindu sons for the debts of their father and during the latter's life time has to be reconsidered by this Court in view of a decision of the Supreme Court in —'AIR 1952 SC 170 (A)'. He urges that under Art. 141, Constitution of India the law declared by the Supreme Court is binding on all the Courts within the territory of India and must now be followed in preference to any other view which might have been taken by this Court. There is no doubt about the soundness of this contention, and we have had occasion to make a reference to it in — 'Narayana Rao v. Karibasappa', AIR 1951 Mys 126 (P1), while dealing with a case of the application of S. 53A, T. P. Act relating to the doctrine of 'part performance'.

In — 'AIR 1952 SC 170 (A)' their Lordships Sayid Fazl Ali, Mukherjea and Vivian Bose JJ. held that a son is liable even after partition for the pre-partition debts of his father, which are not immoral or illegal and for the payment of which no arrangement was made at the time of the partition. The judgment of the Court was delivered by Mukherjea J. and in the course of his judgment at p. 174 of the reports he observes as follows:

> "We now come to the other two points raised by Mr. Kunzru and as they are inter-connected they can conveniently be taken up together. These points involve consideration of the somewhat vexed question relating to the liability of a son under the Hindu Law other than that of the Dayabhag School to pay the debts of his father, provided they are not tainted with immorality. In the opinion of the Hindu Smriti writers, debt is not merely a legal obligation, but non-payment of debt is a sin, the consequences of which follow the debtor even after his death. A text, which is attributed to Brihaspathi, lays down:
>
> 'He who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped.'

There are other texts which say that a person in debt goes to hell. Hindu Law-givers therefore imposed a pious duty on the descendants of a man including his son, grandson and great grandson to pay off the debts of their ancestor and relieve him of the afterdeath torments consequent on non-payment. In the original texts a difference has been made in regard to the obligation resting upon sons, grandsons and great grandsons in this respect. The son is bound to discharge the ancestral debt as if it was his own, together with interest and irrespective of any assets that he might have received. The liability of the grandson is much the same except that he has not to pay any interest; but in regard to the great grandson the liability arises only if he received assets from his ancestor. It is now settled by judicial decisions that there is no difference as between son, grandson

and great grandson so far as the obligation to pay the debt of the ancestor is concerned; but none of them has any personal liability in the matter irrespective of receiving any assets.

The position, therefore, is that the son is not personally liable for the debt of his father even if the debt was not incurred for an immoral purpose and the obligation is limited to the assets received by him in his share of the joint family property or to his interest in such property and it does not attach to his self-acquisitions. The duty being religious or moral, it ceases to exist if the debt is tainted with immorality or vice. According to the text writers, this obligation arises normally on the death of the father; but even during the father's life-time the son is obliged to pay his father's debts in certain exceptional circumstances, e.g., when the father is afflicted with disease or has become insane or too old or has been away from his country for a long time or has suffered civil death by becoming an anchorite.

'It can now be taken to be fairly well settled that the pious liability of the son to pay the debts of his father exists whether the father is alive or dead. Thus it is open to the father during his lifetime, to effect a transfer of any joint family property including the interests of his son in the same to pay off an antecedent debt not incurred for family necessity or benefit, provided it is not tainted with immorality.'

It is equally open to the creditor to obtain a decree against the father and in execution of the same put up to sale not merely the father's but also the son's interest in the joint estate. The creditor can make the sons parties to such suit and obtain an adjudication from the Court that debt was a proper debt payable by the sons. But even if the sons are not made parties, they cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes. These propositions can be said to be well recognized and reasonably beyond the region of controversy."

In support of his observations, he has referred to Colebrooke's Digest I, 228, — 'Masit Ullah v. Damudor Prasad', AIR 1926 PC 105 (Q), Mayne's Hindu Law, 11th Edition, p. 403, where it is stated "The law is now well established that under the Hindu Law, the pious obligation of a son to pay his father's debts exists whether the father is alive or dead." 'AIR 1924 PC 50 (C)'; — 'Girdharee Lall v. Kantoo Lall', 1 Ind App 321 at p. 333 (PC) (R) and — 'Suraj Bunsi Koer v. Sheo Persad Singh', 6 Ind App 88 (PC) (S). See also Mulla's Hindu Law (10th Edn.), p. 348, para. 290 (4), where he refers to — 'AIR 1924 PC 50 (C)' and other cases and says "The liability of the sons to pay the father's debts exists whether the father is alive or dead" and his note at p. 349.

(25) The question of the sons' liability for the debts of their father came up for consideration again before the Supreme Court in — 'AIR 1953 SC 487 (F)' and it was held by the Supreme Court that the question whether the sons of a judgment-debtor who was a junior member of a coparcenary are liable in law to discharge the decretal debt due by their father could be answered only with reference to the doctrine of Mitakshara Law which imposes a duty upon the descendants of a person to pay the debts of their ancestor provided they are not tainted with immorality. Mukherjea J., with whom the other two Judges agreed, observes at p. 489 of the report:

"This doctrine, as is well known, has its origin in the conception of Smriti writers who regard non-payment of debt as a positive sin, the evil consequences of which follow the undischarged debtor even in the after-world. It is for the purpose of rescuing the father from his torments in the next world that an obligation is imposed upon the sons to pay their father's debts. The doctrine as formulated in the original texts, has indeed been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the sons is not a personal obligation existing irrespective of the receipt of any assets; it is a liability confined to the assets received by him in his share of the joint family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious the interest of the sons in the coparcenary property can always be made liable for such debts."

(26) In — '15 Mys CCR 233 (FB) (E)' which has laid down the law now prevailing in Mysore that a Hindu son is not liable for the debts of his father so long as the father is alive unless it is shown that they were incurred for purposes of legal necessity or benefit to the family. Setlur J., who wrote the leading judgment considered the original texts, including Vijnaneswara's commentary on Yajnavalkya and referred to the rule in Mitakshara which is to the effect that when a father without discharging a debt owed by him dies or has gone to a distant country or is stricken by an incurable disease or the like, then the debt incurred by him when notified shall, by reason of their being his son and grandson, be paid by the son and grandson, even when he has left no paternal estate. He referred to the case reported in — 'Periasami Mudaliar v. Seetharama Chettiar', 27 Mad 243 (FB) (T) and to — '1 Ind App 321 (PC) (R)' and the uniformity of the course of decisions of the High Courts in India thereafter. He however preferred to follow the views expressed in — '16 Mys LR 116 (FB) (D)' and of Muthuswamy Iyer J. expressed in — 'Ponnappa Pillai v. Pappuvayyangar', 4 Mad 1 (15, 40) (FB) (U) though that view was opposed to the decision of the Privy Council in — '1 Ind App 321 (R)'. The necessity to refer the matter to the Full Bench then arose as even in Mysore it had been held or assumed in some earlier cases, viz., — '4 Mys CCR 26 (V)'; — '5 Mys CCR 69 (W)'; — '7 Mys CCR 15 (X)' and — '10 Mys CCR 71 (Y)' that the sons were bound by an alienation which was effected to discharge an earlier debt irrespective of whether the earlier debt was incurred for family benefit or necessity.

The law laid down in — '15 Mys CCR 233 (FB) (E)' has been followed in Mysore in later cases and it is unnecessary to refer to all of them. I might, however, refer to a case decided more recently and reported in — '15 Mys LJ 230 (P)'. In that case the plaintiff, which was a co-operative bank, advanced certain sums of money to a defendant, the father of a joint Hindu family. A portion of the money advanced was used to pay off previous mortgages. Reilly C. J. and Sreenivasa Rao J. held that the plaintiff though one stage removed from the debts under the original mortgages cannot be let off more lightly in the matter of showing necessity or benefit for the money advanced so as to make payments under the deed binding upon the junior members of the defendant's family and that the plaintiff must show that those previous debts so paid off were binding

on the junior members of the defendants' family before he can make his own advances binding upon those junior members.

The principle laid down in this decision has been applied quite strictly in later cases by some of the Judges who have called upon a creditor to prove that the earlier debts which might have been incurred long before the alienation were also for legal necessity or benefit. They have also often expressed in those cases that the recitals in the document regarding the purposes for which the loans were borrowed may not be of much use and cannot be strongly relied upon by the creditor though of course in other cases it has been laid down that such recitals, particularly in old documents, must be given due weight. The strict application of this rule has, it must be admitted, led to considerable collusive litigation by junior members either during their minority or just after their attaining majority and often times after quite a long time had elapsed after the alienations to bring suits to question them.

(27) This hardship to the alienees was recognized and led to the view which has been taken in some cases, e.g., — '21 Mys CCR 145 (Z)' and — 'Channabasavegowda v. Rangegowda', AIR 1951 Mys 38 (FB) (Z1) that if all the adult male members of a family join in making an alienation it may be presumed that it was for family benefit or necessity thereby attempting to somewhat lighten the burden on the alienee to prove that each one of the previous debts or the purposes mentioned in the documents were true. The father in such cases is usually ex parte and not examined as a witness for the plaintiffs and it has been found that the creditor or the alienee finds it extremely difficult to prove such legal necessity or benefit though the alienations have gone to discharge old, real and bona fide debts which there was little reason to suspect were incurred by the father imprudently or otherwise than in the usual course of family management. The question now arises whether we should still consider ourselves bound by the decisions of this Court or are bound to apply the law which the Supreme Court have now declared as the law of the country. I am of opinion that the interpretation of the Hindu Law texts and law as laid down by the Supreme Court (I have extracted above) is fully binding on us according to the Constitution and must be followed in Mysore also.

(28) There are also other circumstances which render such a course both necessary and desirable. The area now known as the Civil Station in Bangalore District and which was formerly known as C. and M. Station had been acceded to British India under a treaty by the Maharaja of Mysore. The Hindu Law which was being applied in that area was the law as laid down by the Privy Council and which was current in Madras which of course is the same as now stated by Mukherjea J. After the British left, that area is now ceded to Mysore. The Mysore High Court has now jurisdiction over Coorg under the Mysore High Court Amendment Act and in Coorg which was a Chief Commissioner's province before the Constitution, the law, as laid down by the Privy Council, was of course the prevailing law. Recently a large part of the Bellary District, which was a part of the Madras State has been ceded to Mysore and the law prevailing there also was the law laid down by the Privy Council.

It would be very difficult and anomalous and lead to great confusion in mercantile transactions and in respect of titles to property if the interpretation of Mitakshara law relating to debts and alienations is to be applied differently in different parts of Mysore. It is necessary that as far as possible there should be uniform law in these vital matters in the whole of India. Debts may be incurred or alienations made of properties situate say in Madras and in Mysore, the consideration being the discharge either partially or wholly of an antecedent debt, and in a suit arising for recovery of monies charged on such property or for declaration of rights in respect of such property it can easily be imagined what difficulties would arise if suits or other proceedings which may come to be filed either in Madras or in Mysore, different interpretations of the same Hindu Law texts are to be applied.

(29) Under Art. 261 (3) of the Constitution of India:

> "Final judgments or orders delivered or passed by civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law."

The rapid advancement of trade and commerce throughout the country requires a common rule in respect of such vital matters of every day interest. It may be argued that the rights of minor sons in a joint Hindu family might thereby be jeopardised; but if that is the law that is prevailing all over India and has been accepted from the date of 1 Ind App 321 (PC) (R) as proper and binding, it is difficult to see any reason why we should not also come into line with that law and why it should be thought or considered that only a Hindu father in Mysore cannot be trusted to be either prudent or capable of looking after his own interests and those of his sons during the course of the management of the family property. We felt that as the law as laid down in 15 Mys CCR 233 (FB) (E) had been in force for such a long time in Mysore, it was desirable that the question which has now arisen should be considered by a Full Bench and accordingly the matter has been heard by the Full Bench.

(30) Another point which was raised before us for the respondents was that the debt due under Ex. 6 was a mortgage debt and not a simple debt and that it has been laid down in some cases of this court that a mortgage is an alienation and not a debt, and that the mortgagee must establish the legal necessity or benefit if the mortgage is to be upheld. Sitting as a single Judge I had occasion to consider this matter recently in S. A. No. 499 of 1951-52 (Mys) (Z2) then came to the conclusion that a debt must be held to include both simple and mortgage debts and have referred to a case reported in — 'Hiralal v. Puran Chand', AIR 1949 All 685 (FB) (Z3) where Misra J. observes at p. 687:

> "A debt secured by a mortgage, it seems almost axiomatic, is as much a debt of the father as an unsecured debt and considered in the light of the spiritual need which the doctrine of pious obligation was designed to meet, there would in principle, be scarcely any difference between the two transactions. The security would merely provide a means of recovery, and if the payment of a debt is obligatory on the debtor, and therefore on his sons, the payment of a mortgage debt is also morally and religiously obligatory."

This view is also supported by — 'Arumugam Chetty v. Muthu Koundan', AIR 1919 Mad 75 (FB) (Z4); — 'Venkanna v. Sreenivasa', AIR 1919 Mad 1175 (Z5); — 'Mathura Misra v. Rajkumar Misra', AIR 1921 Pat 447 (FB) (Z6); — 'Hari Prasad Singha v. Sourendra Mohan', AIR 1922 Pat 450

(Z7) and 'AIR 1924 P.C. 50 (C)'. The cases of this Court reported in — 'Nanjaiya v. Chowdegowda', 14 Mys LJ 510 (Z8); & — 'Bank of Mysore Ltd., Banglore City v. Mayakonda Veerappa', 18 Mys LJ 113 (Z9) and — 'Rudrappa Setty v. Rangojee Rao', 18 mys LJ 133 (Z10), which have followed that decision are all cases where a Mortgagee sued and sought to obtain a mortgage decree against specific property mortgaged to him. But those cases do not lay down that a mortgage debt is not an antecedent debt which can support later alienations and have no bearing on the question now before us. In this view of the law it must be held that the alienation under Ex. 5 is binding on the shares of plaintiffs 4 and 5 in the joint family property to the extent of Rs. 1,750/- as it has gone to discharge the antecedent debts of the father though he is still alive.

(31) The next question that arises for consideration is what is the relief which should be granted to the plaintiffs. The sale was for Rs. 2,500/- and a major part of the consideration has been held to be for purposes binding on the minors. The property sold is a cocoanut garden. Defendant 3 claims to have improved the property and though the learned Subordinate Judge has not accepted his evidence in this matter I think there might be some truth in that statement because defendant 6 was running into debts and could not have looked after the cocoanut garden efficiently and it is quite likely that he had allowed it to deteriorate for want of proper attention. The 1st plaintiff never appears to have claimed any interest in this property. It also appears from her conduct as if she had waived her rights to this item and allowed defendant 6 to deal with it as he pleased. From the evidence it is not also clear that defendant 6 was the sole surviving coparcener of the joint family when her husband died. The plaintiffs have nowhere suggested that the price of Rs. 2,500/- was not the proper market value at the time.

In these circumstances I think the plaintiffs ought not to be given a share in item 2 and that defendant 3 should be directed to pay them a part of the purchase money which, it has been held, was not for purposes binding on minor plaintiffs 4 and 5. The counsel for defendant 3 has agreed before us that defendant 3 will pay Rs. 1,000/- instead of Rs. 750/- to plaintiffs 4 and 5 which may be taken to cover Rs. 750/- plus interest and costs of this litigation. Accordingly I direct that defendant 3 should pay this amount into Court within six months from this date. There will be a charge for this sum on item 2.

(32) The parties will bear their own costs both here and in the Court below. The Court-fee payable to Government by the plaintiffs will be recoverable from them and will be a charge on the property which has been decreed in their favour.

A/D.R.R. Order accordingly.

A.I.R. 1954 MYSORE 102 (Vol. 41, C.N. 43)

MEDAPA C. J. AND BALAKRISHNAIYA J.
(11-1-1954)

T. Nagappa, Petitioner v. T. C. Basappa and others, Respondents.

Civil Petn. No. 29 of 1953, to quash the proceedings of Election Tribunal, Shimoga, in Shimoga Election Petn. No. 1 of 1952-53.

(a) Constitution of India, Arts. 329(b) and 226 — Art. 329(b) does not exclude petition under Art. 226 — Writ can issue to quash proceedings of Election Tribunal — (Representation of People Act (1951), S. 105). AIR 1953 Nag 357, Examined and dissented from.

The phrase "notwithstanding anything in this Constitution" in Art. 329(b) does not exclude the applicability of the provisions of Art. 226 in any manner whatsoever. These words in Art. 329(b) make it quite clear that they can apply only to the limited purpose of calling in question the election to either House of Parliament or to the House of the State Legislature. It can have no application to or bearing on the proceedings after the completion of the elections and a perusal of the words used in S. 74, Representation of the People Act, makes it clear that elections are completed before the Election Tribunal is set up. (Para 6)

Article 329(b) does not specifically or expressly refer to the proceedings of the Election Tribunal which comes into being only after the completion of the elections. Prayer for the issue of a writ for quashing the proceedings of the Election Tribunal and not for calling in question the election to the Legislature, which alone is dealt with under Art. 329(b) can be granted. The issue of a writ as prayed for may and will result in certain consequences just as an adjudication of a successful candidate in an election as an insolvent may and will produce the same or similar consequences. It does not however follow that because of the effect on the result of the elections, the petition for the issue of a writ or the adjudication of the successful candidate as an insolvent, can strictly be said to be petitions which call in question an election to a Legislature. Case law Ref. AIR 1953 Nag 357, Examined and dissented from. (Para 6)

It cannot be disputed that the provisions of the Constitution must prevail over the provisions of the Representation of the People Act. Consequently the words in S. 105 "every order of the Tribunal made under this Act shall be final and conclusive" do not oust the jurisdiction of the Courts to issue writs. (Para 10)

(b) Constitution of India, Art. 226 — Parties — Writ to quash proceedings of Election Tribunal — Election Commission is not a necessary party. AIR 1953 SC 210, Distinguished. AIR 1953 Mys 59, Foll. (Para 11)

(c) Constitution of India, Art. 226 — Parties — Quashing proceedings of Election Tribunal.

Petition under Art. 226 to quash proceedings of Election Tribunal — Election Tribunal made party — The fact that Election Tribunal has become functus officio, held did not prevent issue of writ, since the record of the proceedings of the Election Tribunal were lodged before the District Judge of the Division in which the election had taken place and were at the time before the High Court. (Para 11)

Moreover, there is no specific provision in the Representation of the People Act to support the view that the Election Tribunal becomes functus officio after the pronouncement of the order. (Para 11)

(d) Constitution of India, Art. 226 — Certiorari, when can issue.

Apart from questions of jurisdiction, a writ of certiorari can also be issued where a Tribunal has committed mistakes apparent on the face of the record or committed flag-

rant violation of law. AIR 1952 SC 192, Relied on. Indian and English case law Ref. (Para 12)

(e) Representation of the People Act (1951), S. 83 — Election Tribunal's power to allow amendment of election petition sent to it by Election Commission — (C. P. C. (1908), O. 6 R. 17) — (Constitution of India, Art. 226). AIR 1953 Bom 293, Commented on and not followed.

A perusal of the provisions of the Representation of the People Act shows that several provisions of Civil P. C. have been specifically and expressly embodied in the same, cf. Ss. 83(1), 90, 92. The legislature has thus by implication made it clear that all provisions of Civil P. C. do not apply to the proceedings before the Election Tribunal.

The failure to so embody Order 6 and the rules thereunder and in particular R. 17 seems to make it clear that the Legislature did not intend the Election Tribunal to make use of the said provision to amend the petition sent to it for disposal by the Election Commission.

The amendment by the Election Tribunal of the election petition sent to it by the Election Commission must therefore be held to be an amendment made without jurisdiction. AIR 1953 Bom 293, Commented and not followed. AIR 1954 Mad 336, Explained. (Para 13)

When the amendment related to prayer portion, in that the prayer portion in the original petition was substituted as per the amendment, the original petition sent by the Election Commission to the Election Tribunal can no longer be said to be before the Election Tribunal. The mere fact that the new prayer included the old prayer does not make the amended petition, which the Election Tribunal heard and disposed of, the original petition sent to it by the Election Commission. (Para 14)

Anno: Civil P. C., O. 6 R. 17 N. 1.

(f) Representation of the People Act (1951), Rules under, R. 119 — Presentation of election petition not later than 14 days from the date of publication of notice — Computation of time — Applicability of Ss. 9 and 10, General Clauses Act — (General Clauses Act (1897), Ss. 9 and 10).

The relevant words in R. 119 of the Representation of the People Act relating to the time when an election petition has to be presented, are "not later than 14 days", while the relevant words in S. 9, General Clauses Act are "from" and "to" and in S. 10 the words are "within the prescribed time." The words in R. 119, Representation of the People Act being entirely different from the words found in Ss. 9 and 10, it follows that the provisions of Ss. 9 and 10 of the General Clauses Act can have no application to the computation of time for the presentation of an election petition. (Para 15)

Anno: Gen. Clauses Act, S. 9 N. 1; S. 10 N. 3.

(g) Representation of the People Act (1951) — Rules under, R. 119 — Election Tribunal's power to extend limitation.

Election Tribunal has no power to extend limitation for filing election petition — Amendment of petition long after limitation, is without jurisdiction. (Para 15)

CASES REFERRED: Paras

(A) (V40) AIR 1953 Madh-B 197 6
(B) (V40) AIR 1953 Vindh-P 51 6
(C) (V39) AIR 1952 Bom 277: ILR (1952) Bom 785 6
(D) (V40) AIR 1953 Pepsu 133 6
(E) (V41) AIR 1954 Sau 1: 6 Sau LR 258 6
(F) (V40) AIR 1953 All 633: 1953 All LJ 323 6
(G) (V40) AIR 1953 Nag 357: ILR (1953) Nag 772 6
(H) (V39) AIR 1952 SC 64: 1952 SCJ 100 (SC) 6
(I) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 6, 11
(J) (V40) AIR 1953 Mys 59: ILR (1953) Mys 287 11
(K) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 12
(L) (V38) AIR 1951 SC 115: 1951 SCR 145 (SC) 12
(M) (V39) AIR 1952 SC 192: 1952 SCR 583 (SC) 12
(N) (V40) AIR 1953 SC 58: 1953 SCR 302 (SC) 12
(O) (V40) AIR 1953 Mys 8: ILR (1953) Mys 58 12
(P) (1910) 1910-2 KB 165: 79 LJ KB 595 12
(Q) (1951) 1951-1 KB 711 12
(R) (1952) 1952-1 All ER 122: 1952-1 KB 338 12
(S) (V40) AIR 1953 Bom 293: ILR (1953) Bom 865 13
(T) (V41) AIR 1954 Mad 336: 66 Mad LW 908 13

A. R. Somanatha Iyer and S. Gundappa, for Petitioner; S. K. Venkatarangiengar, for Respondent No. 1.

MEDAPA C. J.

It will be necessary for a proper consideration of the arguments advanced in the case to set out in some detail the facts and circumstances which have led up to, and relevant for the disposal of this petition.

The petitioner and the respondents were duly nominated candidates for election to the Mysore State Legislative Assembly from the Tarikere Constituency at the general elections held in this State on 4-1-1952. Respondents 5 to 9 withdrew their candidature within the prescribed time and as a result only the petitioner and respondents 1 to 4 contested the elections. In the elections the petitioner secured 8093 votes as against 8059, 6239, 1644 and 1152 votes obtained by respondents 1 to 4 respectively. The Returning Officer thereupon declared the petitioner as the successful candidate in the election and the said declaration was published in the Mysore Gazette on 11-2-1952 as per the provisions of S. 67, Representation of the People Act, 1951.

The petitioner lodged his election expenses with the necessary declaration with the Returning Officer and the same was published in the Mysore Gazette on 31-3-1952. The petitioner was sworn in as a Member of the Legislative Assembly and thereafter began to discharge his duties as such member.

(2) The 1st respondent preferred an election petition to the Election Commission for obtaining a declaration that the election of the petitioner was void and that he himself had been duly elected. It will be pertinent at this stage to mention that in this petition the 1st respondent did not seek for a declaration that the election was wholly void. The said petition was received by the Election Commission on 14-4-1952 and came up for hearing before the Election Tribunal on 25-10-1952.

The 1st Respondent then filed an application under O. 6 R. 17 C. P. C. before the Election Tribunal for the amendment of the election petition presented by him to the Election Commission in the following manner:

"1. That in the body of his petition, averments have been made (in particular, the aver-

ments made in paras 5 and 6 of the petition) to the effect that there has been a violation of the fundamental requirements of the Election Law such that the election itself has been vitiated.

"2. In the prayer para of the petition the petitioner has prayed that the election of the 1st respondent be declared void and as a further relief the petitioner be declared to be duly elected candidate at the election.

"3. In view of the averments made in paras 5 and 6 alternative prayer that the election itself is rendered void is necessary and by inadvertence it is omitted in the prayer para of the petition.

In order to clarify matters, the tribunal may be pleased to permit the petitioner to amend the prayer portion in the following manner, the same being substituted for the present prayer:

"He prays that the election itself be declared void and further prays that if the election itself cannot be declared void and set aside for the violation of the fundamental requirements of the election law, the election of the first respondent be declared void and set aside, the petitioner being declared only elected candidate at the said election".

The application for amendment was opposed by the petitioner on the ground that the Tribunal had no jurisdiction to entertain an application such as the one made before it but the Tribunal overruled the objections and directed the amendment to be made.

(3) The Tribunal, on the averments in the pleadings, framed as many as 27 issues and, after recording the evidence adduced and hearing the arguments advanced for the parties, pronounced their order on 15-1-1953. The Tribunal in their order unanimously found Issues 2, 3, 4, 7, 8, 9, 10 and 13 in favour of the petitioner but on Issues 1, 5, 6, 11, 12 and 14 they were divided, the majority finding these issues against the petitioner.

It will be useful and even necessary to note down the said issues. They are:

(1) Has there been infringement of the rules relating to the time of commencement of poll by reason of the fact that polling at Booth No. 1 for Ajjampur fixed at Ajjampur to take place at 8 A. M. did not really commence until about half an hour later as alleged in para 4 of the petition?

(5) Did the 1st respondent (Petitioner before us) hire and procure a motor bus which was a service bus running between Tarikere and Hiriyur, belonging to one Ahmed Jan, as alleged in para 1 of the list of particulars and thereby commit the corrupt practice referred to in it?

(6) Did the 1st respondent (petitioner before us) take the assistance of a number of Government servants to further the prospects of his election as alleged in para 2 of the list of particulars?

(11) Is the return of election expenses lodged by the 1st respondent (petitioner before us) false in material particulars & has the 1st respondent (petitioner) omitted to include in the return of election expenses, expenses incurred by him in connection with the election which would easily exceed the sanctioned limit of Rs. 5,000/- as per particulars stated in para 7 of the list of particulars?

(12) Has the election of the 1st respondent (petitioner) been procured and induced by the said corrupt practices with the result that the election has been materially affected?

(14) Would the petitioner (1st respondent) have obtained a majority of votes had it not been for the aforesaid corrupt and illegal practices on the part of the first respondent?

The majority of the members of the Tribunal consisting of Sri. B. R. Ramalingaiah and Sri Mir Iqbal Hussain, on the strength of their findings on these issues, declared the election of the petitioner void and the 1st respondent duly elected while the learned District Judge Sri C. V. Channappa, who was the other Member of the Tribunal, came to a different conclusion and dismissed the petition of the 1st respondent.

The present petition has been filed under Art. 226 of the Constitution for the issue of a writ of certiorari or such other writ or direction or order as this Court may deem fit in the circumstances of the case to quash the proceedings of the Election Tribunal.

The petitioner in support of his prayer has urged the following grounds:

(1) The Tribunal had no jurisdiction or at least exceeded its jurisdiction in permitting the 1st respondent to amend his election petition after it was forwarded to the Election Tribunal by the Election Commission.

(2) The petition, both when presented to the Election Commission and when the 1st respondent applied for its amendment, was barred by the law of Limitation. The Election Tribunal therefore clearly exceeded its jurisdiction.

(3) The Election Tribunal exceeded its jurisdiction in setting aside the election on the ground that the polling commenced in Municipal Booth No. 776/16, 25 minutes after the time prescribed therefor.

(4) The Tribunal exceeded its jurisdiction and acted perversely in setting aside the election of the petitioner without a clear and definite finding that the 1st respondent had in fact received the majority of the valid votes cast in the election or that but for the votes obtained by the returned candidate by corrupt and illegal practices the 1st respondent would have obtained a majority of the valid votes.

(5) The findings of the Tribunal that the petitioner committed corrupt practices had been without jurisdiction and even otherwise on mere speculations and conjectures relating to matters which were not put into issue and therefore perverse. Its findings on these matters therefore amount to errors of jurisdiction and errors apparent on the face of the record.

(6) The finding of the Tribunal that the petitioner lodged a false return of election expenses before the Returning Officer is also without jurisdiction and based on averments which were not put into issue and therefore perverse.

(4) The 1st respondent, who was the only respondent that contested this petition, filed no counter-affidavit traversing the contentions of the petitioner.

(5) The learned Counsel for respondent 1 relied upon the provisions of Art. 329 (b) and contended that this petition for the issue of a writ under Art. 226 of the Constitution is not maintainable.

Art. 329 (b) reads —

"Notwithstanding anything in this Constitution
....
(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature".

(6) The contention is that the phrase "notwithstanding anything in this Constitution" excludes the applicability of the provisions of Art. 226 in any manner whatsoever if they in any way call in question any election and that therefore this petition should be dismissed 'in limine'. I am unable to accept this contention for the words seen in Art. 329 (b) make it quite clear that they can apply only to the limited purpose of calling in question the election to either House of Parliament or to the House of the State Legislature. It can have no application to or bearing on the proceedings after the completion of the elections and a perusal of the words used in S. 74, Representation of the People Act, viz., —

..... there shall be notified by the appropriate authority in the Official Gazette, as soon as may be after the date or the last of the dates fixed 'for the completion of the said elections' the names of the members elected for the various Assembly constituencies at the said elections ....."

make it clear that elections are completed before the Election Tribunal is set up. Art. 329 (b) does not specifically or expressly refer to the proceedings of the Election Tribunal which, as already pointed out, came into being only after the completion of the elections.

The powers conferred on courts by Art. 226 are very extensive; there is no proviso to limit its jurisdiction such as the proviso to Art. 227 which excludes the superintendence of the High Courts over tribunals relating to Armed Forces. The prayer of the petitioner is for the issue of a writ for quashing the proceedings of the Election Tribunal and not for calling in question the election to the Legislature, the latter of which alone is dealt with under Art. 329 (b). The issue of a writ as prayed for by the petitioner may and will result in certain consequences just as an adjudication of a successful candidate in an election as an insolvent may and will produce the same or similar consequences. It does not however follow that because of the effect on the result of the elections, the petition for the issue of a writ or the adjudication of the successful candidate as an insolvent, can strictly be said to be petitions which call in question an election to a Legislature.

The view that the provisions of Art. 329 should or should not be deemed to be a bar for the issue of a writ has been the subject matter of consideration in several reported decisions viz., — 'Jamnaprasad Mukhariya v. Lachhiram Ratan-Mal', AIR 1953 Madh. B. 197 (A), — 'Jagdish Chandra v. Prakash Narain', AIR 1953 Vind. P. 51 (B); — 'Shankar Nanasaheb v. Returning Officer, Kolaba District', AIR 1952 Bom 277 (C); — 'Hukam Singh v. Sardul Singh', AIR 1953 Pepsu 133 (D); and — 'Hamirkha Alarkha Hasan v. Returning Officer, Jamnagar', AIR 1954 Sau 1 (E). (Vide also — 'Sheo Kumar v. V. G. Oak', AIR 1953 All 633 (F). These decisions are clearly opposed to the view put forward on behalf of the respondent.

The learned counsel for the respondent laid special stress on a decision reported in — 'Ramkrishna v. Daoosing', AIR 1953 Nag 357 (G), in which it is laid down that the High Court has no jurisdiction to issue writs in a proceeding like the one before us because of the provisions of Art. 329 Cl. (b). This decision fully supports the view advanced by the learned counsel for the 1st respondent and as such merits and demands a detailed consideration.

Reference has been made in paragraph 12 of the judgment to cases which lay down the proposition that the process of election begins with the filing of nomination papers and ends with the declaration of the result. Among the many cases referred to in that paragraph, the judgment of the Supreme Court reported in — 'H. P. Ponnuswami v. The Returning Officer, Namakkal' AIR 1952 S. C. 64 (H), is one. The same decision has been referred to again in paragraph 14 of the judgment to support the view that the word "election" cannot be understood in a restricted sense as was done by Mudholkar J., in an unreported decision of the same Court. This judgment of Fazl Ali J., which is also reported in — 'AIR 1952 S. C. 64 (H)', seems to me to make it clear that an election is completed before it is attacked by means of an election petition. At page 68 the learned Judge observes as follows:

"The question now arises whether the law of election in this country contemplates that there should be two attacks on matters connected with election proceedings, one, while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), & another, after they have been completed by means of an election petition".

Again at page 69 the learned Judge observes as follows:

"That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by the election petition to be presented after the election is over and there is no remedy provided at any intermediate stage."

The view of the Supreme Court therefore is that an election becomes complete before it is assailed. This pronouncement of the Supreme Court which must be regarded as authoritative, precludes, in my opinion, a consideration of the question whether an election can or cannot be said to be over after the declaration of the result under S. 74, Representation of the People Act.

Again in paragraph 20 of the judgment the view has been expressed that under S. 105, Representation of the People Act an Election Commission must be deemed to adopt the order of the Election Tribunal and in para 22 of the judgment which is the only part of it actually dealing with the meaning of the word "Election", the learned Judges expressed the view that an election becomes complete only when the Election Tribunal officially declared the result of the election and that an election continues until such declaration is made.

The learned Judges in paras 23 and 24 of the judgment point out that the object underlying Art. 329(b) of the Constitution was to forbid a rival procedure for the decision of an election dispute and in paragraph 25 of the judgment it is stated that an Election Tribunal is nothing more than an amanuensis of the Election Commission and therefore its order when adopted by the Election Commission becomes conclusive

and incapable of being quashed by a writ of the High Court as pointed out by the Supreme Court in — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (I).

(7) It is thus clear that while the High Court has addressed itself to consider the meaning of the word "election" which had been clearly interpreted by Fazl Ali J., the two principal reasons which influenced their decision that an election continues until the Election Tribunal pronounces its order under S. 98, Representation of the People Act were:

(a) That in the view of the High Court an Election Commission adopts the order of the Election Tribunal which is only an amanuensis of the Election Commission; and

(b) that the Election Tribunal when it makes an order under S. 98 of the Representation of the People Act finally declares the result of an election.

I find it difficult to accept or agree with either of the two reasons.

In the first place the Election Commission under S. 86(1), Representation of the People Act only appoints the Election Tribunal and under S. 106 of the Election Commission only forwards copies of the orders of the Election Tribunal to the authorities specified in that section and also causes the publication of the order in the Gazette. Nowhere does the Act state that an Election Commission adopts the order of the Election Tribunal or that the Election Tribunal is only an amanuensis of the Election Commission.

On the contrary, the scheme of Chapter 3 of the Act indicates that the order of the Election Tribunal continues to be only its order at every stage and does not become transformed into an order of the Election Commission. This seems to follow from a perusal of the following sections of the Representation of the People Act:

(a) Under Sec. 86, the Election Commission appoints the Election Tribunal;

(b) Under Sec. 88 the place of the trial is selected by the Election Commission, but the Tribunal has the discretion to sit at any other place in the State;

(c) Section 90 prescribes the procedure to be adopted by the Tribunal;

(d) Section 91 provides for the appearance of a party by a pleader;

(e) Section 92 enumerates the powers of the Tribunal;

(f) Sections 93, 94 and 95 lay down special rules of evidence;

(g) Section 97 provides for a recriminatory case at the instance of a returned candidate;

(h) Sections 98 and 99 mention the orders which a Tribunal could make at the conclusion of the trial;

(i) Section 102 prescribed the procedure to be adopted in case of equality of votes;

(j) Section 103 provides for the communication of the orders of the Tribunal to Election Commission and for the transmission of the records of the case to the District Judge;

(k) Section 104 provides that in the event of a difference of opinion among the members of the Tribunal the opinion of the majority should prevail;

(l) Section 105 declares every order of the Tribunal to be final and conclusive; and

(m) Finally S. 107 provides that an order of the Tribunal shall not take effect until it is published in the Gazette of India under Section 106.

It is therefore clear that the Election Tribunal is the exclusive authority appointed for the decision of the dispute and for making an order on the election petition. The provisions of Ss. 105 and 107 of the Act, which do not appear to have received adequate consideration, show that the order which is final and conclusive and the order which takes effect after the publication in the Gazette of India is the order of the Tribunal and not the order of the Election Commission.

(8) The second reason advanced for holding that an election continues until the Tribunal makes its final order also seems to me unacceptable for the following reasons:

(a) The attention of the Judges does not appear to have been drawn to the words "after the date or the last of the dates fixed for the 'completion' of the said election" appearing in Sec. 74 of the Representation of the People Act. It has also not been pointed to them that the word "elected" is used in the past tense when providing for the notification in the official Gazette of the results of the election.

(b) Likewise the importance of the words "After the elections held in pursuance of the "notifications" occurring in Sec. 71, 72, 73, 74 and 75 of the Act does not seem to have been pointed out to them.

(c) Similarly attention of the Court does not seem to have been drawn to the fact that Part 5 of the Act deals with the conduct of the elections and Part 6 deals only with disputes regarding elections.

(d) Attention does not appear to have been drawn to the importance of the phraseology of Art. 324 of the Constitution, which shows that an election is something different from a dispute or doubt arising out of or in connection with an election.

(e) No attention seems to have been invited to the fact that an Election Tribunal does not conduct an election and that when it makes an order under Sec. 98 its order does not declare the result of an election, but only decides a dispute arising out of it. This becomes clear when one examines the result that follows when the entire election is declared void; in such an event a re-election has to be ordered and no one can suggest that when the Tribunal declares an election void under S. 100(1), Representation of the People Act it finally declares the result of an election.

(9) It therefore appears to me that the decision, with great respect to the Judges who decided the same, runs counter to the observations in the judgment of Fazl Ali J. and also to the provisions of the Representation of the People Act and the Constitution.

(10) The learned counsel for respondent 1 next relied upon the provisions of S. 105 of the Representation of the People Act in support of his proposition that this petition is not maintainable. That section reads:

"Every order of the Tribunal made under this Act shall be final and conclusive."

The argument of the learned counsel is that because of the words in the section — "Every order of the Tribunal made under this Act shall be final and conclusive" it follows that the jurisdiction of the Courts to issue writs is ousted. I am unable to accept this view.

It cannot be disputed that the provisions of the Constitution must prevail over the provisions of the Representation of the People Act. Further, it was admitted by the counsel for the parties that in a similar matter special leave to Appeal under the provisions of Art. 136 of the Constitution has been granted by the Supreme Court. The grant of special leave to appear under Art. 136 of the Constitution seems to negative the contention of the learned counsel for the respondent that the provisions of Art. 329 (b) of the Constitution and S. 105 of the Representation of the People Act bar the application for relief under Art. 226 of the Constitution.

(11) The learned counsel for the respondent urged that the Election Commission is a necessary party to the petition and the failure to implead the Commission is fatal to the case of the petitioner. His argument is that no purpose would be served by the issue of a writ when the Election Commission is not before the Court and have had no chance of putting forth their pleas for the consideration of this court.

He next argued on the strength of the case reported in AIR 1953 SC 210 (I) that even if the Election Commission had been made a party no writ could be issued to the Election Commission.

He submitted that the Election Tribunal has become functus officio and as such no writ could be issued to the Tribunal.

I am unable to accept any of these contentions. The decision referred to by the learned counsel 'Saka Venkatarao's case (I)', does not appear to me to be apposite for that was a case where a writ was sought against the Election Commission to prevent the Governor from performing the duties enjoined on him under Art. 192(2) of the Constitution which reads as follows :

> "192(2)— Before giving any decision on any question whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Art. 191, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

The duty is enjoined on the Governor to obtain the opinion of the Election Commission and the Election Commission in furnishing its opinion to the Governor cannot be deemed to be doing any act or performing any duty or functioning within the jurisdiction of the Madras High Court. The facts in that case are entirely different and have no bearing or similarity to the facts of the case before us. The Election Commission in the case before us has to perform certain duties within the jurisdiction of this Court, such as for instance the publication of the order of the Election Tribunal in the Mysore Gazette. This point has besides been covered by a decision of this Court in — 'Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Labour Appellate Tribunal of India', AIR 1953 Mys 59 (J).

The contention that the Election Tribunal has become functus officio and that as such it cannot be made a party, even if accepted, does not in my opinion in any way affect the effectiveness of a writ that may be issued to quash the proceedings of the Election Tribunal. The record of the proceedings of the Election Tribunal are lodged before the District Judge of the Division in which the election has taken place and are at present before this Court. There does not appear to be any specific provision in the Representation of the People Act to support the view that the Election Tribunal becomes functus officio after the pronouncement of the order. Apart from these considerations, it is noticed that the Election Commission, who had been intimated about the notice of the petition, has not chosen to appear before the Court. The attitude of the Election Commission is — which apparently appears to be correct — that it has no interest either to oppose or support the petition.

(12) It will be appropriate at this stage to consider the law bearing on the issue of the writ of certiorari.

The learned counsel for respondent 1 submitted that a writ of certiorari is an exceptionally rare writ and should not be invoked lightly. He submitted that a writ of certiorari should not be issued unless there is a total want of jurisdiction in a Tribunal and that want of jurisdiction must be apparent on the face of the record.

He argued that an Election Tribunal is specially created for disposal of all disputes relating to elections and that the High Court should not in a case like the one before us interfere by means of a writ and quash the proceedings of the Tribunal. He urged that the Election Tribunal was set up for the sole purpose of determining the dispute that had arisen in the election and that as such it cannot by any means be contended that the Election Tribunal had no jurisdiction to determine the disputes that had admittedly arisen between the parties.

In support of this view he referred to the decisions of the Supreme Court as also of some other Courts prior to those decisions.

It was, on the other hand, contended by the learned counsel for the petitioner that the writ of certiorari is by no means so rare and so exceptional, as contended by the learned counsel for the 1st respondent and this court could and should interfere, to set aside the proceedings of the Election Tribunal if the said Tribunal has had no jurisdiction to decide any question or exceeded its jurisdiction in deciding any question and also to relieve grave injustice consequent on an error of law or fact apparent on the face of the record.

The law relating to the issue of writ of certiorari can be culled out from the four decisions of the Supreme Court referred to below and it seems to me unnecessary to traverse beyond the decisions of the Supreme Court and to refer to decisions of courts which are subordinate to the said court or to the decisions of the English courts.

The decisions of the Supreme Court, which are brought to my notice relating to the law on the subject are — (1) — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 (K); (2) — 'Rai Brij Raj Krishna v. S. K. Shaw & Bros.', AIR 1951 SC 115 (L); (3) — 'G. Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 (M); and (4) — 'D. N. Banerji v. P. R. Mukherjee', AIR 1953 SC 58 (N).

It was held in the first decision referred to above that absence of jurisdiction or excess of jurisdiction would justify the issue of a writ. This decision was followed in a decision of our court reported in — 'J. T. Gopalakrishnan v. H. S. Raja Iyengar', AIR 1953 Mys 8 (O).

Justice Fazl Ali in the second case referred to the observation of Sir James Colville in paragraph 6 of his judgment, viz.,

"Accordingly, the authorities .... establish that an adjudication by a Judge having jurisdiction over the subject-matter is, 'if no defects appear on the face of it', to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found,"

and pointed out that a defect in the impugned order would also justify the issue of a writ.

The Supreme Court in the third case went a step further and held that the writ could be issued not only when the Tribunal had acted without jurisdiction or in excess of jurisdiction but also when its decision was wrong and contained errors apparent on the face of the record and also when it violated rules of natural justice.

It was indicated in the fourth case that a flagrant violation of law would justify the issue of a writ.

It therefore follows that, apart from questions of jurisdiction, a writ of certiorari can also be issued where a Tribunal has committed mistakes apparent on the face of the record or committed flagrant violation of law. This view is also in consonance with the principles enunciated in English Courts in the following cases, viz. (1) — 'Rex v. Board of Education', 1910-2 KB 165 at p. 178 (P); (2) — 'Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw', 1951-1 KB 711 (Q); and (3) — 'R. v. Northumberland Compensation Appeal Tribunal Ex parte Shaw', 1952-1 All ER 122 (R).

(13) The petitioner's contentions in support of his prayer for the issue of a writ may now be considered. The first contention of the learned counsel for the petitioner is that the Tribunal had no jurisdiction to amend the petition sent to it by the Election Commission. His argument is that the provisions of the Code of Civil Procedure as such and in toto are not made applicable to the proceedings before Election Tribunals and that the Election Tribunal acted without jurisdiction in invoking the provisions of O. 6. R. 17, to amend the petition sent to it by the Election Commission.

A perusal of the provisions of the Representation of the People Act shows that several provisions of the Code of Civil Procedure have been specifically and expressly embodied in the same.

Section 83(1) relates to the contents of the election petition and lays down that the signing and the verification of election petitions should be done in the manner prescribed in the Civil P. C. of 1908 for the verification of pleadings.

Section 90 relates to the procedure to be followed by the Tribunal in the trial of the election petition. It lays down that the Election Tribunal should try the petition as nearly as may be in accordance with the procedure laid down in the Civil P. C. of 1908 and proceeds to mention the way in which witnesses are to be summoned, etc.

Section 92 relates to the powers of the Tribunal and lays down a limitation to the powers vested in a court under the Civil Procedure Code of 1908 when trying a suit in respect of the following viz.—

(a) discovery and inspection;

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence taken on affidavits; and

(g) issuing commission for the examination of witnesses, and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a civil court within the meaning of Ss. 480 and 482, Criminal P. C., 1898.

The Legislature has thus by implication made it clear that all provisions of the Civil P. C. do not apply to the proceedings before the Election Tribunal. This position will become even more clear if S. 109 which provides for the withdrawal of election petitions and Ss. 112 to 116 which deal with the abatement of the election petitions and the substitution of legal representatives of the parties are perused. The Civil P. C. has also provisions relating to abatement, withdrawal and substitution of legal representatives of the parties; but those provisions of the Civil P. C. as such have not been specifically referred to or embodied in the Representation of the People Act. This appears to be very significant. The Legislature has also made it clear what provisions of the Civil P. C. will apply and those provisions have, as already pointed out, been specifically embodied in the Representation of the People Act.

The failure to so embody O. 6 and the rules thereunder and in particular R. 17 seems to make it clear that the Legislature did not intend the Election Tribunal to make use of the said provision to amend the petition sent to it for disposal by the Election Commission.

This view receives corroboration from S. 83(3) which specifically gives powers to the Election Tribunal "to allow the particulars included in the said list amended or order such further or better particulars in regard to any matter referred to therein" required to be furnished by the petitioner under S. 83(2). The Legislature which thought it fit to specifically empower the Election Tribunal to amend the list required to be furnished by S. 83(2) would not, and could not be deemed to, have forgotten to specifically empower the Election Tribunal to amend the election petition itself, if actually it intended to, so empower the Election Tribunal. It would, if that was the intention, have referred to and embodied O. 6, R. 17, Civil P. C. in the Representation of the People Act. The amendment by the Election Tribunal of the election petition sent to it by the Election Commission must therefore be held to be an amendment made without jurisdiction.

The learned counsel for the 1st respondent cited two cases in support of the contention that the Election Tribunal had the power to permit the amendment to the election petition. The first of them is reported in — 'Sitaram Hirachand v. Yograj Singh', AIR 1953 Bom 293 (S). In this case the Tribunal permitted the verification of the election petition and also the addition of a party. The Bombay High Court was obviously not invited to consider the effects of S. 83(3) under which the only amendment permitted is the amendment of the particulars including the list attached to the election petition.

The second case reported in — 'A. S. Subbaraj v. M. Muthiah', AIR 1954 Mad 336 (T) does not help the respondent because Venkatarama Iyer J., who decided that case, clearly says that the matter was not free from difficulty and that he

would not decide it. It must be mentioned that even in this case the amendment related only to the verification of the petition.

(14) It was urged that if the application for amendment had been rejected and is considered as rejected, the decision of the Tribunal would be, and must on that account be deemed to be, good inasmuch as the amendment related only to the reliefs claimed and not to the substance of the petition. I am unable to accept this view because when the prayer portion in the original petition was substituted as per the amendment, the original petition sent by the Election Commission to the Election Tribunal can no longer be said to be before the Election Tribunal. The mere fact that the new prayer includes the old prayer does not make the amended petition. which the Election Tribunal heard and disposed of, the original petition sent to it by the Election Commission.

(15) It was next urged that the Election Tribunal had no jurisdiction to enlarge the time prescribed for the presentation of the Election Petition. Rule 119 of the Representation of the People Act prescribes the period within which an election petition should be presented. viz. :

> "not later than 14 days from the date of publication of the notice in the official Gazette under rule 113 that the return of election expenses of such candidate and the declaration made in respect thereof have been lodged with the Returning Officer."

It is not disputed that the return of election expenses were published in the Mysore Gazette on 31-3-1952 and that the Election Petition reached the Election Commission on 14-4-1952, that is to say, after the expiry of the time prescribed for the purpose. This petition was received by the Election Tribunal on 16-7-1952 and the amendment was made on 25-10-1952. There could therefore be no doubt that the amendment of the petition was made long after the time prescribed for the filing of the election petition.

It was contended for the respondent that the presentation of the petition to the Election Commission was not timebarred and even if it was timebarred the delay must be deemed to have been condoned by the Election Commission when the petition was despatched to the Election Tribunal by the Election Commission. The records do not show any order of the Election Commission extending the period of limitation and condoning the delay in the presentation of the petition. The argument of the learned counsel for the respondent that the forwarding of the petition by itself amounts to condonation of the delay is at best only an inference which is open to very serious doubt and therefore cannot be accepted.

It was argued that the words in S. 9, which relate to the commencement and termination of time, and in S. 10, which relate to the computation of time, of the General Clauses Act make it clear that the presentation of the petition was within time. The relevant words in the rules of the Representation of the People Act relating to the time when an election petition has to be presented have already been extracted above, viz. — "not later than 14 days", while the relevant words in S. 9 of the General Clauses Act are — "from" and "to" and in S. 10 the words are "within the prescribed time".

The words in R. 119 of the Representation of the People Act being entirely different from the words found in Ss. 9 and 10, it follows that the provisions of Ss. 9 and 10 of the General Clauses Act can have no application to the computation of time for the presentation of an election petition.

This apart, the fact remains that the amendment of the petition was admittedly long after the period of limitation was over and is therefore clearly out of time. The Election Tribunal has not been shown to have the power to extend the period of limitation and must therefore be held to have acted without jurisdiction when, by amending the petition, it enlarged the period prescribed for the presentation of the Election Petition.

(16) The learned counsel for the petitioner submitted that the Election Tribunal acted in excess of its jurisdiction in dealing with the allegations of corrupt practice said to have been indulged in by the petitioner.

The three corrupt practices actually found to have been committed by the returned candidate are :

(a) that the petitioner hired and procured a motor bus belonging to one Ahmed Jan as alleged in para 1 of the list of particulars;

(b) that the petitioner took the assistance of a Patel to further the prospects of his election as alleged in part 2 of the annexure; and

(c) that the return of election expenses lodged by the petitioner omitted to include many items of expenditure incurred by him.

(17) In regard to corrupt practice (a), the actual allegation made by the 1st respondent is in para 8(a) of his election petition and in part 1 of the annexure. The allegation is that the petitioner hired and procured a motor bus belonging to one Ahmed Jan for transporting voters to the booths. The allegation made in para 1 of the annexure is that the petitioner 'hired' a bus belonging to one Ahmed Jan for conveying voters from Gowrapur to Sollapur. The issue framed was whether the 1st respondent 'hired and procured' a bus belonging to Ahmed Jan.

In dealing with these matters the Election Tribunal said on page 33 in para. 23 (g) as follows :

> "There is no direct evidence on the side of the petitioner to prove that the first respondent hired the said bus for the said purpose".

Having said that, the Tribunal in clause (h) of that para said as follows at page 40.

> "For all these reasons we are led to the conviction that the said Ahmed Jan was acting on the election day as the first respondent's agent and hence the first respondent must be deemed to have procured the bus for the purpose through his agent, the said Ahmed Jan and hence he is liable for this corrupt practice."

(18) In clause (i) of that para at page 40 the Tribunal said as follows :

> "Even if the said Ahmed Jan was not an agent ..... the 1st respondent has connived at these acts of the said Ahmed Jan."

(19) On page 41 in clause (j) of that para. the Tribunal said that sixty passengers were conveyed in the bus of Ahmed Jan and that

> "it is reasonable to presume that all these persons must have voted in favour of the first respondent in whom as shown above the said Ahmed Jan was virtually his canvassing agent was interested."

In that clause of the order the Tribunal concludes as follows, at page 42 :

"If the said Ahmed Jan had not conveyed them in his bus they would not have voted at all."

and again on the same page (page 42)—

"In the result on the 5th issue we hold that the 1st respondent did procure the said H. I. H. service bus through Ahmad Jan, his agent, for conveying his voters to and from the polling station at Sollapur as per para 1 of the list of particulars and thereby committed the major corrupt practice referred to in sub-section 6 of Section 125."

(20) The actual corrupt practice alleged by the 1st respondent was the hiring or procuring of the bus by the candidate himself. The Tribunal held that the hiring was not established. It then went into the question of a connivance on the part of the petitioner and ultimately made a finding that the bus was procured through Ahmed Jan, his agent. It is undisputed that the petitioner had declared himself his agent. No one alleged that Ahmed Jan was the petitioner's agent and no question of connivance was pleaded.

(21) The next corrupt practice relates to issue (6) and to the assistance alleged to have been taken by the petitioner from a Patel for furthering the prospects of his election. This matter is discussed by the Tribunal in para. 24 of its order. The 1st respondent alleged that the petitioner took the assistance of two Government servants. The Tribunal found in clause (b) para 24 of its order that there is no evidence that the service of the officer of the Bhadravathi Iron and Steel Works was taken by the petitioner. But in clause (c) of para 24 it held that he did take assistance of the Patel for furthering the prospects of his election.

The allegations relating to this matter are contained in para. 8(b) of the Election Petition and in para 2 of the annexure. Para 8(b) states that the petitioner took the assistance of Patel Parameswarappa to further the prospects of his election, the particulars of which were stated to have been set out in para 2 of the Annexure.

(22) It will be seen from the Annexure that all that has been said about Parameswarappa is that—

(a) he accompanied the petitioner and actively canvassed for votes in several villages;

(b) that he openly canvassed at one polling centre on the polling day;

(c) that he went and sat in the car together with the 1st respondent in a procession held after the election; and

(d) that he gave a dinner to the petitioner.

Allegations (c) and (d) relate to matters which took place after the election, and allegations (a) and (b), even if believed, only establish that Parameswarappa actively canvassed for the petitioner. There is no allegation in para 2 of the Annexure that the petitioner took any assistance from Parameswarappa. The 6th Issue therefore relates to a matter which is not alleged in the annexure.

(23) In paragraph 24(e) (ii), page 44, the Tribunal states as follows :

"We shall first refer to the evidence .... P. W. 30 has not even been cross-examined."

This shows that Parameswarappa was a member of the K. M. P. Party and did some canvassing for it. This does not amount to the petitioner obtaining his assistance. In para 24(c) (iii) the Tribunal refers to the evidence of P. W. 54 to the effect that after doing election propaganda on behalf of the petitioner Parameswarappa was moving about in the petitioner's car and distributing hand bills. This allegation is not made either in the petition or in the annexure. The other evidence discussed by the Tribunal relates to matters not alleged in the petition. The finding on this matter is therefore an error apparent on the face of the record.

(24) The next corrupt practice alleged against the petitioner is covered by the 11th issue. The allegations in the petition relating to it are contained in para 8(g) of the petition and para 7 of the annexure.

(25) The actual corrupt practice alleged consists of—

(a) the omission to mention the petrol expenses for the canvassing tours;

(b) the omission to include the hiring charges in respect of seven vans said to have been hired by the petitioner; and

(c) the omission to show the dinner expenses and the expenses incurred in the hotel.

(26) In para 30 of its order the Tribunal found that a sum of Rs. 7566-11-0 had been omitted from his return of expenses. This sum relates to 6 items set out in page 69. Items 3 to 6 are not alleged in the petition or in the annexure. Part of Item 3 relates to voters. In regard to the hiring of 7 vans the Tribunal has not recorded a finding that any such hiring has been proved. It only refers to seven cars lent to him by his friends and it is held that the money value of the use of such cars including the cost of new tyres said to have been purchased for some of them and the repairing charges in respect of another should have been shown in the return of expenses. (See pages 53-62, para 29 clause (d) sub-clauses (1 to vii)).

(27) Then with regard to petrol expenses it is not denied he has shown a sum of Rs. 1083-3-0. The Tribunal has adopted a novel procedure for reaching the conclusion that some petrol expenses are omitted from the return. On page 63 in para 29 (8), the Tribunal points out that between 11-11-51 and 4-1-52 a sum of Rs. 3279-14-0 has been paid to the petrol bunk at Tarikare by the petitioner. The Tribunal makes an arbitrary calculation for making allocations of this sum of money and comes to the conclusion that a sum of Rs. 1250/- has been omitted from the return of expenses relating to the purchase of petrol. The finding is based on no evidence and rests only on mere speculations, more so because the petitioner, it is admitted, is a merchant who must perforce use cars for the conduct of his trade.

(28) In regard to the hotel expenses as pointed out already the allegation is made in the following words:

"The 1st respondent has also not shown the dinner expenses and the expenses incurred in the hotel."

The discussion relating to this matter is contained at pages 64, 65 and 66 in clause (f) of para 29 of the order. In sub-clause of this clause the Tribunal refers to certain expenses incurred by one Harulappa in the Hotel of P. W. 19 and considers the payments made by and on behalf of Harulappa as the expenses incurred by the petitioner. This Harulapa was himself a candidate.

(29) The next item of expenditure referred to by the Tribunal relates to the food supplied to the voters in the hotel of P. W. 38 (vide bottom of page 65). There is no allegation in the election petition that any voters had been enter-

tained by the petitioner. In sub-clause (ii) of this para the Tribunal again refers to the hotel expenses of certain voters. This cannot come within the return.

(30) It will be clear from the foregoing that the Election Tribunal acted without jurisdiction in —

1. (a) amending the election petition sent to it by the Election Commission,
   (b) hearing and disposing of the amended petition,
   (c) extending the period of limitation for the presentation of the election petition;
2. Acted in excess of its jurisdiction in —
   (a) going into and deciding questions not definitely pleaded and specifically put into issue, particularly allegations regarding corrupt practices,
   (b) setting aside the application of the petitioner without giving a definite finding that the 1st respondent has, as a matter of fact, obtained more valid votes than the petitioner or without the requisite materials for giving a finding that but for the corrupt practices indulged in by the petitioner, the 1st respondent would have secured more valid votes than the petitioner.
3. Committed errors apparent on the face of the record —
   (a) in holding that the commencement of polling at Booth No. 1, Ajjampur deprived the 1st respondent of the votes which he might have secured,
   (b) that the petitioner obtained the services of a Government servant to further the prospects of his election, and
   (c) that the petitioner lodged false return of expenses.

There can be no doubt that these findings which led to the setting aside of the election of the petitioner have caused grave and manifest injustice to the petitioner.

(31) We accordingly issue a Writ of Certiorari under Art. 226 of the Constitution and quash the proceedings and the order dated 15-1-1953 of the Election Tribunal. The costs of this petition will be paid by the 1st Respondent. Advocate's fee Rs. 200/- only.

A/R.G.D. Writ of Certiorari issued.

A.I.R. 1954 MYSORE 111 (Vol. 41, C.N. 44)

MEDAPA C. J. AND BALAKRISHNAIYA J.

(11-1-1954)

K. Lakkappa, Petitioner v. N. G. Narasimhegowda and others, Respondents.

Civil Petn. No. 78 of 1953, to quash the proceedings of Election Tribunal, Bangalore, in Election Petn. No. 67 of 1952.

(a) Constitution of India, Arts. 226 and 329 (b) — Application for issue of writ of certiorari for quashing proceedings of Election Tribunal — Maintainability — Representation of the People Act (1951), Ss. 74, 98 and 105 — AIR 1953 Nag 357, Dissented.

An application for the issue of a writ under Art. 226 for quashing the proceedings of an Election Tribunal which had declared the election to be void and set aside the election of the petitioner, is maintainable and is not barred either under Art. 329(b) of the Constitution or S. 105, Representation of the People Act. (Paras 6 and 10)

The words "notwithstanding anything in this constitution' in Art. 329(b) make it quite clear that they can apply only to the limited purpose of calling in question the election to either House of Parliament or to the House of the State Legislature. It can have no application to or bearing on the proceedings after the completion of the election. Section 74, Representation of the People Act makes it clear that an election is completed before the Election Tribunal is set up. It does not continue until an Election Tribunal pronounces its order under S. 98 of the Representation of the People Act. Article 329(b) does not specifically or expressly refer to the proceedings of the Election Tribunal which, come into being only after the completion of the elections. The powers conferred on courts by Art. 226 are very extensive; there is no proviso to limit its jurisdiction such as the proviso to Art. 227 which excludes the superintendence of the High Courts over tribunals relating to Armed Forces. AIR 1952 SC 64, Rel. on. AIR 1953 Nag 357, Discussed and dissented from. (Paras 6, 7 and 8)

The issue of a writ as prayed for by the petitioner may and will result in certain consequences just as an adjudication of a successful candidate in an election as an insolvent may and will produce the same or similar consequences. It does not however follow that because of the effect on the result of the elections the petition for the issue of a writ or the adjudication of the successful candidate as an insolvent can strictly be said to be petitions which call in question an election to a Legislature. (Para 6)

The contention that the Election Tribunal has become functus officio and that as such it cannot be made a party, even if accepted, does not in any way affect the effectiveness of a writ that may be issued to quash the proceedings of the Election Tribunal. The record of the proceedings of the Election Tribunal are lodged before the District Judge of the Division in which the election has taken place and are at present before the High Court. There does not appear to be any specific provision in the Representation of the People Act to support the view that the Election Tribunal becomes functus officio after the pronouncement of the order. AIR 1953 SC 210, Distinguished and AIR 1953 Mys 59, Rel. on. (Para 11)

(b) Constitution of India, Art. 226 — Writ of certiorari when can issue.

Apart from questions of jurisdiction a writ of certiorari can also be issued where a Tribunal has committed mistakes apparent on the face of the record or committed flagrant violation of law. AIR 1950 SC 222; AIR 1951 SC 115; AIR 1952 SC 192; AIR 1953 SC 58 and AIR 1953 Mys 8, Rel. on. (Para 12)

The Election Tribunal declared the election of the petitioner to be void on the ground that there was an implied contract for the supply of goods between the petitioner and the Government of Mysore at the time when he filed his nomination paper, which disqualified him for membership to the Mysore Legislative Assembly under S. 7(d), Representation of the People Act. The petitioner ap-

plied under Art. 226 for the issue of a writ of certiorari for quashing the proceedings of the Election Tribunal. The admitted facts before the Tribunal were that there was no subsisting contract between the petitioner and the Government of Mysore at the time of filing his nomination paper and that the alleged contract had already come to an end. The Tribunal however considered the question of the existence of an implied contract not alleged in the pleadings and not specifically put into issue and then gave a finding which was dead against the admitted facts. The Tribunal interred an implied contract from the mere fact that the firm of which the petitioner was a partner, had supplied certain goods to the Government of Mysore after the filing of the nomination paper.

Held that the order of the Election Tribunal, based on the finding that there was an implied contract, was both an error apparent on the face of the record and a flagrant error of law. The consideration of allegations not definitely pleaded and not specifically put into issue and a finding thereon was besides an excessive exercise of jurisdiction. The order of the Election Tribunal had resulted in grave and manifest injustice to the petitioner and therefore the proceedings should be quashed. (Paras 16, 17)

(c) Sale of Goods Act (1939), S. 4 — Contract for supply of goods — Representation of the People Act (1951), S. 7(d).

A contract for the supply of goods may and will result in the supply of goods but a supply of goods will not result in the creation of a contract for the supply of goods. (Para 15)

Anno: Sale of Goods Act, S. 4 N. 1.

CASES REFERRED: Paras

(A) (V40) AIR 1953 Madh-B 197 6
(B) (V40) AIR 1953 Vindh-P 51 6
(C) (V39) AIR 1952 Bom 277: ILR (1952) Bom 785 6
(D) (V40) AIR 1953 Pepsu 133 6
(E) (V41) AIR 1954 Sau 1: 6 Sau LR 258 6
(F) (V40) AIR 1953 All 633: 1953 All LJ 323 6
(G) (V40) AIR 1953 Nag 357: ILR (1953) Nag 772 6
(H) (V39) AIR 1952 SC 64: 1952 SCJ 100 (SC) 6
(I) (V40) AIR 1953 SC 210: 1954 SCR 1144 (SC) 6, 11
(J) (V40) AIR 1953 Mys 59: ILR (1953) Mys 287 11
(K) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 12
(L) (V39) AIR 1951 SC 115: 1951 SCR 145 (SC) 12
(M) (V39) AIR 1952 SC 192: 1952 SCR 583 (SC) 12
(N) (V40) AIR 1953 SC 58: 1953 SCR 302 (SC) 12
(O) (V40) AIR 1953 Mys 8: ILR (1953) Mys 58 12
(P) (1910) 1910-2 KB 165: 79 LJ KB 595 12
(Q) (1951) 1951-1 KB 711 12
(R) (1952) 1952-1 All ER 122: 1952-1 KB 338 12

C. Nagaraja Rao, for Petitioner: V. Krishnamurthy, (for No. 1) and Asst. Advocate-General, (for No. 3), for Respondents.

ORDER: The facts of the case leading to this petition are simple. The petitioner was one of the candidates for election to the Mysore State Legislative Assembly from the Chennarayapatna Constituency. There were objections to the acceptance of his nomination paper on the ground that he had at the time a subsisting contract with the Government of Mysore. The Returning Officer overruled and rejected the objection and the petitioner was declared to have been duly nominated. The petitioner contested the elections held on 16-1-1952 and was thereafter declared duly elected and the fact was notified in the official Gazette.

(2) The 1st respondent filed an election petition calling in question the election of the petitioner. He urged several grounds in support of the petition but it will be unnecessary to refer to all of them as all the members of the Tribunal were unanimous in overruling all the grounds excepting one. That ground related to the existence of a contract for the supply of goods between the Bharath Trading and Industrial Company of which the petitioner was a partner and the Government of Mysore at the time the petitioner filed his nomination paper. The majority of the Tribunal gave a finding that there was a subsisting contract between the petitioner's firm and the Government of Mysore at the time the petitioner filed his nomination paper and on that ground declared the whole election void and set aside the election of the petitioner. It will be necessary to state at this stage that the Chairman of the Tribunal differed from the majority of the Tribunal and gave a finding to the effect that there was no subsisting contract between the petitioner and the Government of Mysore at the time the petitioner filed his nomination paper.

(3) The petitioner has therefore approached this court for the issue of a writ under Art. 226 of the Constitution for quashing the proceedings of the Tribunal.

(4) In support of his petition the petitioner has urged the following two grounds:

(1) The decision of the majority of the Tribunal rests upon a matter that is not put in issue thereby violating the fundamental principles of natural justice;

(2) The majority of the Tribunal in holding that there was an implied contract acted contrary to law and in an unreasonable manner and in opposition to the case set up by the petitioner (1st respondent before us) himself.

(5 to 10) *(See paras. 5 to 10 in AIR 1954 Mys 102).

(11) The learned counsel for the 3rd and 4th respondents next urged on the strength of the case reported in — 'AIR 1953 SC 210 (I)', that no writ could be issued to the Election Commission, I am unable to accept this contention. The decision referred to by the learned counsel 'Saka Venkatarao's case, (I)', does not appear to me to be apposite for that was a case where a writ was sought against the Election Commission to prevent the Governor from performing the duties enjoined on him under Art. 192(2) of the Constitution which reads as follows:

"192(2)— Before giving any decision on any question (whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Art. 191), the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion".

The duty is enjoined on the Governor to obtain the opinion of the Election Commission and the Election Commission in furnishing its opinion to the Governor cannot be deemed to be doing any act or performing any duty or functioning within the jurisdiction of the Madras High Court. The facts in that case are entirely different and have no bearing or similarity to the facts of the case

(*These paras. are exactly same as paras. 5 to 10 in AIR 1954 Mys 102).

before us. The Election Commission in the case before us has to perform certain duties within the jurisdiction of this court, such as for instance the publication of the order of the Election Tribunal in the Mysore Gazette.

This point has besides been covered by a decision of this court in — 'Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Labour Appellate Tribunal of India', AIR 1953 Mys 59 (J). The contention that the Election Tribunal has become functus officio and that as such it cannot be made a party, even if accepted, does not in my opinion in any way affect the effectiveness of a writ that may be issued to quash the proceedings of the Election Tribunal. The records of the proceedings of the Election Tribunal are lodged before the District Judge of the Division in which the election has taken place and are at present before this court. There does not appear to be any specific provision in the Representation of the People Act to support the view that the Election Tribunal becomes functus officio after the pronouncement of the order. The objections are accordingly rejected.

(12) *(See para. 12 in AIR 1954 Mys. 102).

(13) The learned counsel for the petitioner submitted that the Election Tribunal, to support its order, went into and considered allegations not definitely set forth in the pleadings of the parties and not specifically put into issue. He further submitted that the Tribunal committed a flagrant violation of law in spelling the existence of an implied contract for the supply of goods between the petitioner and the Government of Mysore at the time the petitioner filed his nomination paper. It was also urged that there are manifest errors, relating to the existence of necessary and relevant facts, apparent on the face of the record on which the Election Tribunal has based its findings.

(14) A perusal of the allegations in the Election Petition and the issues (as stated by the Election Tribunal) make it clear that the pleadings and the issues are not as satisfactory as they should have been. The averments in paragraph 3 of the petition are:

> "As far as the petitioner is aware, this tender as well as the acceptance is not limited for any particular period nor has the standing order been terminated in any way by either the Firm or by the Government of Mysore through the Deputy Commissioner, Hassan, who accepted the standing order as stated above. On the contrary on 8-9-51, the Deputy Commissioner, Hassan, issued directions to the Bharathi Trading and Industrial Company, Hassan, to supply 8000 flat tiles 200 ridge tiles required for the reconstruction of the house destroyed by accidental fire in Sulgalale village in Belur Taluk, Hassan District. The Amildar of Belur was requested to instruct the Special Revenue Inspector to take delivery of the tiles and issue them to the grantees and also to make arrangements to pay the bills in his office. 'It will be seen that there was no other correspondence for any fresh contracts springing up in this connection between the Firm and the Deputy Commissioner. Hassan', and the petitioner states that it is and must be deemed that the 'order for the supply of the above materials dated 8-9-51 must be in pursuance of the standing contract referred to above.' "

It is thus clear that the case which the petitioner (respondent 1 before us) specifically put forward was that there was no contract except the one admitted by him, viz., a contract for the supply of goods for the year 1950-51. This contract ended on 31-3-1951. The two contracting parties, viz., the petitioner and the Government have both stated that the contract had ended. The earnest money deposited by the petitioner for the performance of the contract was admittedly returned to the petitioner by the Government and the accounts relating to the contract between the petitioner and the Government were also admittedly settled long before the date on which the petitioner filed his nomination papers.

There can therefore be no doubt that the said contract between the petitioner and the Government was not in force on the date the petitioner filed his nomination paper. The Bharath Trading Company, of which the petitioner was a partner, had not admittedly tendered for the supply of goods (tiles) to the Government for the year 1951-52 but that, on the other hand, one Krishnaiahsetty had tendered for the contract of supply of goods to the Government for the year 1951-52 and the same had been accepted by the Government. This contract between the Government and Krishniahsetty was formally embodied in an agreement (Ex. 29). The Election Tribunal in spite of all this and the petitioner's own averments in para. 3 extracted above took upon itself the task of considering the question whether there was an implied contract for the supply of goods (tiles) to the Government for the period 1951-52 and gave a finding that there was such an implied contract for the supply of goods notwithstanding the fact that the pleadings did not contain a specific averment that there was an implied contract for the supply of goods for the year 1951-52.

(15) The finding of the Election Tribunal that there was an implied contract for 1951-52 is based on the admitted fact that when Krishniahsetty failed to supply the goods required by the Government according to the contract entered into by him with the Government, the Deputy Commissioner purchased the tiles from the Bharath Trading Company as per the letter of the Rural Development Commissioner (No. R. 635-39, dated 13-8-1951). This will be clear from the order of the Election Tribunal at page 25:

> ".....general permission had been accorded to purchase tiles from the local factories on failure of the approved Firm to supply tiles of good quality within the time limit specified by him and has instructed him to adopt the same in the present case."

The fact that on the failure of Krishniahsetty to supply goods the Deputy Commissioner, in pursuance of the letter referred to above, requested the Amildars to purchase goods from the Bharath Trading Company and that, in pursuance of that direction, the Amildars place orders with the Bharath Trading Company for the supply of tiles does not and cannot lead to the conclusion that there was an implied contract between the Government and the Bharath Trading Company for the supply of goods. The distinction between a contract for the supply of goods and supply of goods has obviously been lost sight of entirely by the Election Tribunal. A contract for the supply of goods may and will result in the supply of goods but a supply of goods will not result in the creation of a contract for the supply of goods. It is obvious and cannot be disputed that, if the Bharath Trading Company failed to supply the goods according to the order placed by the Amildars, the other party to the contract, viz., the Government, could not have enforced that supply through courts. This position makes it clear that the finding of the

*This para. is exactly same as para. 12 in AIR 1954 Mys. 102.

learned Election Tribunal that there was an implied contract for the supply of goods for the year 1951-52 is manifestly wrong.

(16) The Tribunal has thus considered the question of the existence of an implied contract not alleged in the pleadings and not specifically put into issue and then given a finding which is dead against the admitted facts. The Election Tribunal has also, as shown above, committed flagrant error of law in inferring an implied contract on the mere fact that the Bharath Trading Company supplied goods according to the orders placed from time to time by the Amildars who had been requested by the Deputy Commissioner to make the purchase from Local firms. Section 7(d) of the Representation of the People Act reads—

"7(d) if, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by, the appropriate Government; (a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State)".

There was as pointed out above no subsisting contract for the supply of goods at the time the petitioner filed his nomination paper. The order of the Election Tribunal, based on the finding that there was an implied contract, is both an error apparent on the face of the record and a flagrant error of law. The consideration of allegations not definitely pleaded and not specifically put into issue and a finding thereon is besides an excessive exercise of jurisdiction.

(17) The very same objection to the nomination of the petitioner had been taken at the time of scrutiny and had been overruled and rejected by the Returning Officer. There can be no doubt that the order of the Election Tribunal has resulted in grave and manifest injustice to the petitioner.

(18) We accordingly issue a writ of certiorari and quash the proceedings and the order dated 24-2-1953 of the Election Tribunal. The costs of the petitioner will be paid by the 1st respondent. Advocate's fee Rs. 100/- only.

A/K.S.B. Application allowed.

A.I.R. 1954 MYSORE 114 (Vol. 41, C.N. 45)

VENKATA RAMAIYA AND BALAKRISHNAIYA JJ. (6-2-1953).

Tharumal Bhajandas, Plaintiff-Petitioner v. K. Narasimhiah, Defendant-Respondent.

Civil Revn. Petns. Nos. 233 and 234 of 1952-53, against order of Principal Dist. J., Bangalore, in R. As. Nos. 105 & 106 of 1951-52.

(a) Debt Laws — Mysore Money-lender's Act (13 of 1939), Ss. 1, 23 — Power of Civil Courts to punish for defaults.

The provisions of the Money-lender's Act do not confer jurisdiction on Courts deciding suits to punish persons who are in default under the Act. Their liability for violation of any of the provisions therein has to be determined in separate proceedings before the criminal Court. According to S. 23(3), the offence under the section is a cognizable offence for which a trial is necessary as prescribed under Criminal P. C. to justify a conviction.

Held that the levy of fine for breach of the Money-lender's Act imposed by the Civil Court in a trial of suit on promissory note was without jurisdiction. (Para 2)

(b) Civil P. C. (1908), O. 21, R. 46 — Attachment when effective.

The service of prohibitory notice as required under R. 46 of O. 21 is enough for the purpose of the attachment and it is not necessary that money should have been actually payable at the time to defendant. (Para 3)

Anno: C. P. C., O. 21, R. 46, N. 1, 2.

M. S. Krishna Iyengar, for Petitioner; Respondent in Person.

VENKATA RAMAIYA J.:

The petitioner in these two cases is the same. He sued the respondent for recovery of amounts due under two on demand promissory notes, and, in the course of one of the suits, applied for attachment before judgment of money due to the defendant under a bill tendered to the Executive Engineer, Buildings Division, Bangalore. No money, however, was received in Court or even found to be actually payable. The suits ended in decrees against the defendant and the application filed by the defendant for payment of compensation on account of the attachment being wrongful was dismissed by the trial Court. On appeal by the defendant, the decrees of the trial Court as regards the amounts payable under the pronotes were confirmed, but compensation of Rs. 250/- was allowed to the defendant on the view that the attachment was obtained on insufficient grounds. The learned Judge also directed the plaintiff to pay a fine of Rs. 100/- on the ground that he, as a money-lender, has not conformed to the requirements of the Money-lenders' Act. Against the order for payment of compensation and for payment of fine, these two petitions are filed.

(2) Mr. M. S. Krishnaiyangar, the learned counsel for the petitioner-plaintiff, contended, and we think rightly, that the provisions of the Money-lenders' Act do not confer jurisdiction on Courts deciding suits to punish persons who are in default under the Act, and that their liability for violation of any of the provisions therein has to be determined in separate proceedings before the criminal Court. A reading of Sections 20 to 23 shows that a limit of time is prescribed for prosecuting defaulters and the breach complained of should have occurred within one year. The learned Judge has given no finding that it was so. According to sub-s. (2) of S. 23 the offence under this section shall be a cognizable offence for which a trial is necessary as prescribed under the Criminal Procedure Code to justify a conviction. It seems to us that, without following the statutory provisions, the levy of fine on the plaintiff by the learned District Judge is not warranted. The order for payment of fine is, therefore, set aside and the fine, if paid, will be refunded.

(3) As regards payment of compensation, the materials available for consideration are very meagre. The main contention urged on plaintiff's behalf is that no attachment was effected at all, and in the absence of any attachment there can be no claim for compensation. Unfortunately, the point was not raised in the Court below and the records do not throw any light on this. What is required for the purpose of attachment under Civil P. C., (O. 21, R. 46) is that there should be a prohibitory order. It is not denied that a prohibitory order was issued, but the argument is that since no money was payable to defendant there was no attachment. No authority is cited to show

that service of prohibitory notices as required under R. 46 of O. 21 is not enough for the purpose of the attachment and that money should have been actually payable at the time to defendant. Since the question was not raised at the proper stage or investigated, it is difficult for us to know the real state of affairs in this case. The contention, if correct, requires that in such cases the Court has to embark on an investigation of the differences between the creditor and debtor and adjudicate upon these. This is not a course contemplated by the rule and not within its scope. The question at present is not whether the service of the prohibitory notices resulted in any benefit to plaintiff but how it affected the defendant. On the footing that there has been an attachment, the only point remaining for consideration is whether there was justification for it and if not, whether the amount awarded is excessive. The defendant is said to be a contractor, having a reputation in doing business. The learned District Judge has observed that no attempt was made by the plaintiff to substantiate the allegation made in the affidavit. The plaintiff must therefore be deemed to have acted without exercising the care necessary in seeking the extraordinary remedy, not realising the inam which may befall a man of business. Anyway considering that the plaintiff has substantially succeeded in both the suits, the defendant set up false pleas and the defendant is not shown to have suffered tangible loss, I think it would be sufficient to award a sum of Rs. 150/-. To this extent, the amount allowed by the learned District Judge is reduced.

(4) In the result, C. R. P. 234/52-53 is allowed and the order in C. R. P. 235/52-53 is modified by substituting the sum of Rs. 150/- for Rs. 250/-. Parties will bear their own costs in this Court.

B/D.R.R. Order accordingly.

A.I.R. 1954 MYSORE 115 (Vol. 41, C.N. 46)

VASUDEVAMURTHY J. (6-2-1953)

Narasimhaiah, Plaintiff-Appellant v. Chikkathimmaiah, Defendant-Respondent.

Second Appeal No. 473 of 1949-50, against decree of Addl. Sub. J., Tumkur, in R. A. No. 24 of 1948-49.

(a) Hindu Law — Joint family property — Alienation by one coparcener — Suit for partition by purchaser — Res judicata — (Civil P. C. (1908), S. 11).

A decree obtained by a member of a joint Hindu family governed by Mitakshara against an alienee for his share of the property alienated on the ground that the alienation is not binding on him does not bar by res judicata a subsequent suit by the alienee for a general partition and asking therein for allotment of the alienated property to the share of the alienating coparcener: AIR 1926 Mad 774, Rel. on. (Para 2)

Anno: C. P. C., S. 11 N. 36 Pt. 2.

(b) Hindu Law — Joint family property — Alienation of his share by one coparcener — Remedy of purchaser.

A purchaser of an undivided member's share in a joint family property need not always bring a suit for general partition as he is neither interested nor quite in a favourable position to discover all the items of family property. The proposition of law that an alienee from one of the coparceners get only an equity against other members of the coparcenary to work out his rights by a suit for general partition and his remedy is in all cases to institute such a suit is not accepted in Mysore. 9 Mys CCR 43, Foll. (Para 4)

(c) Hindu Law — Joint family property — Alienation by one coparcener — Suit by purchaser for partition — Equitable allotment.

Where a suit for partition is brought by a purchaser of an undivided members' share in a joint family property, at such a partition the purchaser can only obtain the rights of his transferor, and has got no right to strictly claim a share in a particular item, still as a matter of equity the Court should, unless there are insuperable objections to do so, adjust the different shares so as to give him what has been actually conveyed to him as being the share of the particular coparcener. The death of vendor-coparcener does not make any difference in the application of this equitable principle or stands in the way of allotting the suit land to the purchaser in lieu of the share attributable to the said coparcener at the time of the sale: 22 Mys CCR 293; 21 Mys LJ 206; 25 Mad 690 (FB), Rel. on. (Paras 4, 8)

CASES REFERRED: Paras

(A) (V13) AIR 1926 Mad 774: 96 Ind Cas 993 2, 3
(B) (V13) AIR 1926 Mad 241: 91 Ind Cas 863 2
(C) 9 Mys CCR 43 4, 7
(D) ('02) 25 Mad 690 (FB) 4, 6, 7
(E) 22 Mys CCR 293 4, 7
(F) ('42) 21 Mys LJ 206 5, 7
(G) ('80) 6 Ind App 88: 5 Cal 148 (PC) 6
(H) (V39) AIR 1952 Mad 419: ILR (1952) Mad 835 (FB) 6
(I) ('97) 21 Bom 797 7

Y. Siddappa, for V. Krishnamurthy, for Appellant; K. P. Muddappa, for Respondent.

JUDGMENT: The facts of this case are not in dispute. The defendant is the son of one Dodda Thimmian who was a member of Hindu joint family with him and who is now dead. During his lifetime, he had sold to the plaintiff a small piece of land measuring about an acre described in the A schedule to the plaint (which will be referred to hereafter as the suit land) and had put him in possession. After his death the defendant and another younger brother of his, who is also now dead, tried to disturb the plaintiff's possession and he therefore brought a suit in O. S. No. 3 of 42-43 on the file of the Munsif, Tumkur, against them for a permanent injunction. It was held in that suit that the plaintiff was entitled to retain possession of the suit land and that Dodda Thimmiah's sons might get their shares divided and separated by a suit of their own for partition if the alienation by their father was found not binding on them. Accordingly they filed a suit O. S. No. 208/44-45 against the plaintiff for partition and possession of their 2/3rds share. At that time, an appeal by the sons of Dodda Thimmiah against the decision in O. S. No. 3/42-43 was pending before the Subordinate Judge. The present plaintiff had pleaded in that suit that the alienation in his favour was fully binding on the sons of Dodda Thimmiah and that their suit must be dismissed. But later on, after the disposal of that regular appeal and a second appeal therefrom, he made an application in O. S. No. 208/44-45 for permission to amend his written statement and to ask that there should be a general partition

of the family properties which belonged to Dodda Thimmiah and his sons, that the suit land may be allotted to the share of the deceased Dodda Thimmiah and that he the plaintiff may be confirmed in its possession. That application was not allowed on the ground that the suit O. S. No. 208 of 44-45 was filed for partition of only the suit land and not for a general partition, a suit which the sons of Dodda Thimmiah were then entitled to bring. A decree was ultimately passed in that suit declaring that Dodda Thimmiah's sons were entitled to 2/3rds share of the property and for its partition. The plaintiff has therefore brought the present suit for a general partition of all the family properties of the plaintiff and Dodda Thimmiah. He had described in the B schedule all those other family properties and has prayed that he might be confirmed in his possession of the suit land after allotting it to the share of his vendor or that he may be granted an area equal in extent and value in all the family properties. The Munsiff granted a decree in his favour and allotted the suit land to the plaintiff. His decision was reversed on appeal by the Subordinate Judge of Tumkur and the plaintiff has come up in second appeal.

(2) The learned Subordinate Judge was of the view that the plaintiff's present suit was barred by 'res judicata'. For the appellant, it is contended that he was not bound, in O. S. No. 208/44-45, to have asked for a general partition, that he could not do so as an appeal was pending against the decision in O. S. No. 3/42-43 where he was claiming that the sale in his favour was binding on the entire suit land including the shares of Dodda Thimmiah's sons therein that that suit was by the present defendant and his brother for a limited relief, viz., for a partial partition, and that it was not incumbent on the plaintiff to seek for a general partition in that suit alone. Mr. Krishnamurthi, the learned Counsel for the Appellant, has relied on a case reported in — 'Kandaswami Udayan v. Velayudha Udayan', AIR 1926 Mad 774 (A) where, dissenting from — 'Sowrimuthu v. Pachia Pillai', AIR 1926 Mad 241 (B), it has been held that in a suit instituted by a coparcener of a joint Hindu family to set aside the sale of an ancestral immoveable property by his father or manager on the ground that the sale was not for family necessity and to recover possession of the property from the purchaser, the latter is not entitled to insist on the plaintiff submitting to a partition either of the item sold or of the entire family property. Though it is open to a Court where all the facts and all the persons interested are before it and where the suit is practically one for general partition, to allow a purchaser to retain the property sold to him it was neither expedient nor reasonable that the purchaser should be able to insist that such a suit should be converted into one for general partition as it would involve the presence of other parties and an enquiry into debts and liabilities of the family. It was also held in that case that a decree obtained by a member of a joint Hindu family against an alienee for his share of the property on the ground that the alienation is not binding on him does not bar a subsequent suit by the alienee for a general partition and asking therein for allotment of the alienated property to the share of the alienating coparcener. Their Lordships further pointed out that the proper course in such cases, where one of the coparceners has brought a suit for partial partition, is for the alienee to bring a separate suit of his own for general partition so that the suit for partition may be tried along with the suit for setting aside the alienation. If the alienation was found not binding on the impeaching coparcener's share but only on the alienor's share, the Court would be in a position to consider in the suit for general partition whether the property alienated should be allotted to the alienor's share or not. This Madras case does not appear to have been cited before the learned Subordinate Judge and he has proceeded merely on general principles as to what the plaintiff might or ought to have made the ground of defence or attack in the former suit.

(3) I think, with great respect to the learned Judges who have decided — 'AIR 1926 Mad 774 (A)', it lays down the correct principles which might be followed in such cases. As has been rightly pointed out by them, if a member of a joint Hindu family is allowed to bring a suit for partition against an alienee objecting to the alienation of a particular item and thereby his right to bring a suit for partition against the other members of the family is not affected and the principle of 'res judicata' would not avail against the alienating coparcener, it is difficult to hold that a suit by an alienee, who stands only in the shoes of the alienating coparcener for partition, would be so barred. I think also that to thereby force a coparcener convert a suit for partial partition which he is entitled to bring under such circumstances into a suit for general partition is neither reasonable nor required by law. Moreover, it would be going counter to decisions of this Court and in the other High Courts in which it has been held that a coparcener or his alienee in such a case cannot be compelled to sue for general partition. See Mayne's Hindu Law, 11th Edn., para. 388, pp. 489-490. The learned Subordinate Judge thought it unnecessary to consider any other aspect of the case in the light of his conclusion that the plaintiff's suit was barred by 'res judicata' though he also thought that no question of allotting a share to the alienor arose in this suit as the alienor was dead.

(4) It has been contended for the appellant that the death of the alienor ought to make no difference in this matter, and that the effect of the sale by the deceased coparcener, either of an item of property or his share therein, is to vest a right in the alienee to ask, either in a suit for his own or in the suit brought by other coparceners for the same reliefs which his alienor would have been entitled to ask as he has stepped into the shoes of the latter. I think the law in this matter has been fairly clearly laid down in Mysore. So far back as in 1904 it has been held by this Court in — '9 Mys C. C. R. 43 (C)' that a purchaser of an undivided member's share in a family property need not always bring a suit for general partition as he was neither interested nor quite in a favourable position to discover all the items of family property. The proposition of law that an alienee from one of the coparceners gets only an equity against other members of the coparcenary to work out his rights by a suit for general partition and his remedy is in all cases to institute such a suit was not accepted. In this case reference has been made with approval to the judgment of Sri Bhashyam Iyengar J. in — 'Aiyyagari Venkatramayya v. Ramayya', 25 Mad 690 (FB) (D) and the learned Judge have agreed with the principles enunciated therein to hold that at such a partition though the purchaser can only obtain the rights of his transferor, and has got no right to strictly claim a share in a particular item, still as a matter of equity the Court should, unless there are insuperable objections to do so, adjust the different shares so as to give him what has been actually conveyed to him as being the share,

of the particular coparcener. In — '22 Mys C. C. R. 293 (E)' in a suit by a coparcener to set aside an alienation of a specific item of family property it was found that the alienation was not binding on the plaintiff's share. The Subordinate Judge passed a decree for delivery to him of a half share in the property alienated to him. The plaintiff appealed on the ground that the Court ought to have ejected the alienee from the whole of the land and left him to obtain his rights by a suit for partition. Sir Leslie Miller C. J. and Chandrasekhara Aiyar J. while confirming the judgment of the Subordinate Judge held that in working out rights as between an alienee and members of the family who are not bound by the sale to him, the Court should endeavour to adjust the rights of the contending parties with the least possible inconvenience and without injustice to any of them.

(5) The above two cases have been referred to and followed in — 'Ramiah v. Siddalingappa', 21 Mys LJ 206 (F). In that case, the plaintiffs had purchased from one of the members of the joint Hindu family two small plots out of a large piece of land owned by the family which was possessed of other extensive immoveable properties. They filed a suit for possession of those specific lands against the alienor and other members of the family. It was contended for the latter that the suit, not having brought for a general partition by including all the properties which the family possessed, was not maintainable. It was held by this Court that no hard and fast rule can be laid down as applicable to such a case, the question to be decided being how the rights of the contending parties could be settled with the least possible inconvenience and without injustice to any of them. In the case before them, taking into account the nature and area of the plots sold, and that all the persons interested in the properties were already before them their Lordships held there was no need to drive the plaintiffs to a separate suit for general partition; and the plaintiffs were granted a decree for possession of the specific pieces of land which they had purchased. It was found that their vendor owned a fairly large plot in that same survey number as the lands involved in the suit say, and that even if the plaintiffs were awarded the very plots to which they were found entitled, the defendants would still have more than their own shares in the same number and neither the nature nor the value of the property stood in the way of such an equitable arrangement.

(6) Mr. Muddappa, learned Counsel for the Respondent, has urged that Dodda Thimmiah's death should make a difference in the application of this principle. He argues that the share of Dodda Thimmiah has devolved by survivorship on the other members of the family and that there is no longer any person in existence to whom the share of Dodda Thimmiah, even if it could be said to have existed as such, can now be allotted. It must be observed that the case in — '25 Mad 690 (FB) (D)' arose out of a suit by a purchaser of an undivided half in two plots of land from a member of an undivided family consisting of himself and his two nephews. The suit was instituted after the death of the alienor against the nephews for a general partition of all the family properties and for the allotment to the alienor's share a half share in the two plots conveyed by him. The nephews raised an objection that as the alienor had died the plaintiff's right based on equity was at an end. It was held by Bhashyam Iyengar J. that the vendee's claim is no doubt an equitable right in the sense that he must be a transferee for value. In cases where the transfer relates to a specific portion of the family property he has no legal right, any more than his transferor himself, to insist on that specific portion being allotted to the share of the vendor. Being a purchaser for value he was in equity entitled to have such portion, or so much thereof as was practicable, so allotted, if that could be done without prejudice to the other sharers. Such suit may at the option of the other members of the family assume the character of a family partition suit and a decree may be passed for partition among all the members of the entire family property. He also considered (following — 'Suraj Bunsi Koer v. Sheo Persad', 6 Ind App 88 (PC) (G)) that there was nothing to support the contention that the interest conveyed by an undivided member will lapse to the family after the death of the alienor unless the purchaser instituted a suit before the alienor's death. The effect of an alienation of an interest of a coparcener in a Mitakshara joint Hindu family and the rights of the alienee and the coparceners and how the equities are to be worked out in such cases has been discussed fully in — 'Paramanapakam Pillai v. Sivaraman', AIR 1952 Mad 419 (FB) (H).

(7) I think it unnecessary to further discuss the matter as in Mysore the law has been laid down clearly for all practical purposes in — '9 Mys C. C. R. 43 (C)', — '22 Mys C. C. R. 293 (E)' and — '21 Mys LJ 206 (F)'. In the last case also, the alienor one Jadiappa was dead when the suit was brought for partition and possession by his alienee and his death did not stand in the way of this Court granting a decree in favour of the plaintiffs and allotting to them the particular survey numbers which he had sold them as an equitable method by adopting which "no special harm" could be caused to the defendants. In Mayne's Treatise on Hindu Law and Usage (1950) 11th Edn., it has been observed in para. 324 at page 495 that both in Madras and Bombay it is settled that an actual alienation for the value in enforceable to the same extent by a suit after the death of the alienor as it would have been by a suit during his life, reliance being placed on — '25 Mad 690 (FB) (D)', — 'Gurulingappa v. Nandappa', 21 Bom 797 at p. 805 (I) and other cases. See also Mulla's Hindu Law, 1946 Edn., page 311.

(8) There is therefore no force in the objection for the respondent that the death of Dodda Thimmiah has made any difference in the application of this equitable principle or stands in the way of allotting the suit land to the plaintiff in lieu of the share attributable to Dodda Thimmiah at the time of the sale. It has not been shown that the learned Munsiff was wrong in doing so for any other reason such as its extent value or nature as compared with the other family lands.

(9) In the result I allow this appeal, set aside the judgment and decree of the learned Subordinate Judge and restore those of the learned Munsiff with costs throughout.

B/V.S.B. Appeal allowed.

A.I.R. 1954 MYSORE 117 (Vol. 41, C.N. 47)

VENKATA RAMAIYA AND BALAKRISHNAIYA JJ. (3-12-1953).

State of Mysore v. C. V. Gopala Rao, Accused-Respondent.

Criminal Revn. Petn. No. 119 of 1953, against Order of First Magistrate, Kolar, D/- 15-12-1952.

Evidence Act (1872), Ss. 73, 45—Power of Court.

It is open for the Court to direct the accused to give his writing in Court for the

purpose of comparison by the hand-writing expert and make such use of it as the Court is entitled to. AIR 1950 Cal 66, Followed. (Para 2)

Anno: Evi. Act, S. 73, N. 1; S. 45, N. 2.

CASE REFERRED: Para

(A) (V37) AIR 1950 Cal 66: 51 Cri LJ 376 2

Advocate General, for the State; N. Bheemacharya, for Respondent.

ORDER: In the course of the trial of the case against respondent for offences of cheating, forgery etc., the prosecution sought to prove the writing of accused by evidence of an expert based on comparison of the writing in question with that obtained during investigation, from the accused. This was objected to as being repugnant to Art. 20 (3) of the Constitution of India and tantamount to compelling the accused to give incriminatory evidence. The objection was upheld. Later the prosecution requested the Court to call upon the accused to give his writing in Court and make it available for comparison by the expert. This was also rejected. Hence this petition.

(2) Whatever may be said in regard to the writing given to the Police, there is preponderance of authority to justify the later application made to the Magistrate. The cases are collected in — 'Golam Rahman v. The King', AIR 1950 Cal 66 at pp. 71-72 (A). The effect of these as stated in the head note is:

"Section 73, Evidence Act is quite general in its terms and applies to all cases and there is no exception in favour of an accused person. If there is nothing in the Criminal P. C. which precludes its application to criminal trials there is no reason why the plain language of the section should not be given its full effect. Section 342, Criminal P. C. does not make S. 73, Evidence Act inapplicable to criminal trials. The procedure followed in taking specimen thumb impressions of the accused under the direction of the Court is in strict compliance with S. 73 and S. 45, ill. (c), Evidence Act."

With respect we agree that this is the proper view to be taken. The order of the lower Court is therefore set aside. It is open to the prosecution to renew the prayer and for the Court to direct the accused to give a writing for the purpose of comparison and make such use of it as it is entitled to.

B/H.G.P. Order accordingly.

A.I.R. 1954 MYSORE 118 (Vol. 41, C.N. 48)

MALLAPPA J. (5-2-1953).

Rudrappa, Plaintiff-Appellant v. Puttalakshamma, Defendant- Respondent.

Second Appeal No. 61 of 1950-51, against Decree of Sub. J. Civil Station, Bangalore, in R. A. No. 57/1949-50.

Civil P. C. (1908), O. 34, R. 7 — Default in making payment.

A preliminary decree in a suit for redemption of a usufructuary mortgage may, under Cl. (c)(i) of R. 7(1) of O. 34, fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property. AIR 1946 Pat 99, Rel. on. (Para 4)

Anno: C. P. C., O. 34, R. 7, N. 12.

CASE REFERRED: Para

(A) (V33) AIR 1946 Pat 99: 24 Pat 575 4

H. V. Narayana Rao, for Appellant; V. K. Govindarajulu, for Respondent.

JUDGMENT: This is an appeal against the judgment and decree of the Subordinate Judge, Civil Station, Bangalore, in R. A. No. 57/49-50 confirming those of the First Munsiff, Bangalore, in O. S. No. 178 of 47-48.

(2) The appellant was the plaintiff in the case. He filed a suit for redemption of the property mortgaged by his mother as his guardian for a sum of Rs. 2500/-. Out of this sum, it is not disputed, a sum of Rs. 700/- was paid for discharging the prior encumbrances created by the plaintiff's deceased father and a sum of Rs. 181/- was required for meeting funeral expenses of his deceased father. Plaintiff admits that there was legal necessity to this extent. Out of the balance of about Rs. 1619/- plaintiff's mother purchased a house for a sum of Rs. 1500/- and it is contended that even this house has been subsequently sold away for Rs. 3500/- and that the plaintiff is not liable to pay anything more than what was required for the funeral expenses and to discharge the debts contracted by his father. It has, however, to be remembered that under the Will executed by the deceased father of the plaintiff the debts had to be discharged and moreover it was necessary to meet the funeral expenses of the deceased. It is contended that it was open to the mother to have executed a usufructuary mortgage for a sum of Rs. 1000/- only and it was not necessary for her to have mortgaged the property for Rs. 2500/-. A little reflection will show that what the mother did was much more beneficial to the minor, as otherwise, by paying only a sum of Rs. 1000/- the respondent would have been in possession of the house. Under this arrangement the mother purchased a house and her act was prudent as it later on fetched more than double the amount she had paid. On the whole the act of the plaintiff's mother is prudent and is for the benefit of the minor. The lower Courts were therefore right in coming to this conclusion.

(3) The respondent claimed a sum of Rs. 159-8-6 on the ground that she spent that amount for repairing the house. There is no independent evidence to support this, and the appeal has to be allowed to the extent of disallowing this amount.

(4) There is one other matter in respect of which the decrees of the lower Courts have to be modified. According to the decrees of the lower Courts, the mortgagor forfeits the right of redeeming the property in case he does not deposit the amount due by him for redemption within the time fixed by the Courts. Order 34, R. (7) (c) (ii) a and b Civil P. C. contemplates a forfeiture of the right to redeem in some cases other than the cases of usufructuary mortgage and the clauses read:

"(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property."

But, as has been laid down in — 'Mahomed Azim v. Md. Sultan', AIR 1946 Pat 99 (A), a preliminary decree in a suit for redemption of a usufructuary mortgage may, under Cl. (c) (i) of Rule 7 (1) of

O. 34, Civil P C., 1908, fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property.

(5) In the result, the decrees of the lower Courts are modified by deleting the direction that the rights of the plaintiff are forfeited in case the amount is not deposited within three months' time . The parties will bear their own costs in this appeal.

B/D.H.Z. Order accordingly.

A.I.R. 1954 MYSORE 119 (Vol. 41, C.N. 49)

BALAKRISHNAIYA J. (30-9-1953).

L. K. Siddappa, Accused-Petitioner v. Lalithamma, Complainant-Respondent.

Criminal Revn. Petn. No. 73 of 1953, against decision of S. J., Mysore, in Criminal Appeal No. 5 of 1953.

Penal Code (1860), Ss. 463, 464, 465 and 29 — Forgery — Essentials — Printing and distributing false marriage invitations.

The two essential elements to constitute the offence of forgery under S. 463, Penal Code, are that there must be deceit or intention to deceive; secondly actual or possible injury caused to some person or persons. (Para 6)

What constitutes 'making' of a document, depends essentially upon the nature and the use it is intended for. Indeed the definition of a document does not necessarily require that it should be in every case to be in the writing or contain the signature or facsimile of any person but includes what is done by way of printing. (Para 5)

The accused got printed false marriage invitations issued under the names of two persons announcing the celebration of marriage of the accused with the complainant who was a young woman of about 20 years inheriting property worth about thirty to forty thousands. Neither the complainant nor the persons under whose names they were issued had authorised the accused to print such invitations and in fact no marriage was fixed between the accused and the complainant. The accused distributed these invitations to friends and relatives and also caused them to be published in the news-papers with intent to deceive and cause injury to the complainant.

Held that the marriage invitations were forged instruments and fell within the definition of false documents under S. 464, Penal Code and the accused was guilty of the offence of forgery under S. 463, Penal Code: 2 Mys CCR 252, dist. Case law Ref. (Paras 5, 6)

Anno: Penal Code, S. 29, N. 1; S. 463, N. 3; S. 461, N. 1.

CASES REFERRED:

	Paras
(A) 2 Mys CCR 252	4
(B) ('81) 7 Cal 352: 8 Cal LR 572	5
(C) (V38) AIR 1951 Cal 581: 52 Cri LJ 1480	5
(D) (V12) AIR 1925 Bom 327: 26 Cri LJ 1014	5
(E) (V15) AIR 1928 Lah 681: 29 Cri LJ 851	5
(F) (1896) 2 QB 310: 65 LJ MC 187	5
(G) ('37) 1937 Mad WN 1067	5

E. Kanakasabhapathy, for Petitioner; Mahesh Chandra Guru and M. Sadanandaswamy, for Respondent.

ORDER: One Lalithamma filed a complaint in the trial Court against the petitioner, Siddappa, alleging that false documents were got prepared notifying the celebration of marriage, between herself and the petitioner, who wilfully distributed the same to friends and relatives and also caused them to be published in the newspapers with intent to deceive and cause injury to her. The complaint was registered for offences under Ss. 465 and 500, I. P. C. The petitioner having pleaded not guilty the trial Court found on evidence that the accused had committed an offence under S. 465, I. P. C., and sentenced him to one year R. I. and a fine of Rs. 1.000/-. The conviction and sentence were confirmed in appeal.

(2) The question for consideration is whether the documents in question amount to the commission of the offence, complained of. It is necessary for the discussion of the point raised to set out a few facts proved in the case. Exhibits P-1 and P-2 are printed marriage invitations issued under the name of Patel Chickkiah (D. W. 2) and Veerathappa (P. W. 2) respectively, announcing the marriage of the accused with the complainant to take place on the morning of 28-6-51 in the house of one Patel Basappa at Handanahalli. Veerathappa (P. W. 2) swears that there was never any proposal of marriage between the persons named in the documents nor did he authorise his name to be inserted in the invitation. He is the mother's sister's husband of Lalithamma, and is actively helping Basalingamma, her mother, in the management of the properties and he is also being consulted in important affairs as the father of Lalithamma was dead.

Lalithamma is an young woman of about 20 years and lives with her mother as she is yet unmarried. She (P. W. 11) deposes that it is absolutely false that marriage between herself and the accused was fixed and denies that there was any authority either by her or by her mother to print and publish the marriage invitations. The proprietor of Ananda Press, Mysore (P. W. 1) where Exs. P-1 and P-2 were printed states that he is an astrologer and printer; that he fixed the date of marriage and printed the invitations on behalf of the petitioner. D. W. 2 Chikkiah avers that there was settlement of the marriage and that the original of Exhibits P-1 and P-2 indicate that the contract of marriage took place in his presence where the mother of Lalithamma as also her uncle Veerathappa were stated to have been present indicating thereby that they must have been responsible for having got printed the marriage invitations as per the original contract. This assertion remains unsubstantiated, and it is not even suggested to either the printer, or Lalithamma, or Veerathappa, D. W. 2 also does not affirm that he authorised the petitioner to use his name in the marriage invitation.

It is thus clear that the accused has got Exs. P-1 and P-2 printed without authority from either Basalingamma or Veerathappa or Patel Chikkiah, much less with the permission or consent of Lalithamma. The defence evidence that the originals of Exs. P-1 and P-2 were genuine contracts has rightly been discounted and Exs. P-1 and P-2 held as false documents prepared and published without any authority or basis whatsoever.

(3) Siddappa, the petitioner, did not content himself by merely getting up these documents but distributed them to friends and relatives and also arranged for publication of the same in newspapers. (After discussion of the evidence his Lordship proceeded:) In view of this evidence the

Courts below have rightly concluded that Exs. P-1 and P-2 are false documents intentionally got up by the accused and published with a view to injure the complainant.

(4) The short question that falls for consideration is whether the petitioner Siddappa has, by publishing the printed documents in question committed the offence under S. 465, I. P. C. Section 463 defines forgery (leaving out the details not necessary for this case) thus:

"Whoever makes any false document with intent to cause damage or injury to any person, commits forgery."

'Making a false document' is described in S. 464(1) as follows:

"A person is said 'to make a false document' who dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made by the authority of a person by whom or by whose authority he knows that it was not made."

The word 'document' as defined by S. 29, I.P.C., denotes any matter expressed or described upon any substance by means of letters, figures or marks, intended to be used or which may be used, as evidence of that matter. The said definition includes anything done by pen, by engraving, by printing or otherwise, whereby, it is made on paper, parchment, wood or other substance. Similar definitions of the word 'document' are found in S. 3, Evidence Act, and also in S. 3 (16), General Clauses Act. The word 'document' occurs in S. 464, I. P. C. and there is no doubt that the documents Exs. P-1 and P-2 fall within the definition of S. 29, I. P. C.

It is proved by the evidence of Veerathappa (P. W. 2) Lalithamma (P. W. 11), P. W. 1 and D. W. 2 that the documents were unauthorised and contain facts that are absolutely false. It is contended for the petitioner that the mere getting up a document printed under an unauthorised name does not make it a false document. Reliance is placed for that position on the decision of this Court in — '2 Mys CCR 252 (A)', where it was held that

"The dishonest making of a false document is forgery; but the mere fact of a document containing what is not true, is not sufficient to constitute the offence of forgery."

In that case, the document was accepted to be genuine and no dishonest intention was found. Intention being the gist of the offence the case is distinguishable from the facts of the present case, where it is found that false documents are found to have been dishonestly got up.

(5) It is next contended that mere printing of documents without autograph or fascimile signature does not amount to the offence of forgery. 'In the matter of Petition of Riasat Ali', 7 Cal 352 (B) is cited as an authority for the proposition. In that case a prisoner who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had been actually printed and the proof corrected by him; that the prisoner had had an intention of making such addition to the printed form as would make it a false document and that he did this dishonestly and with intent to commit fraud.

Sir Richard Garth, C. J. commented thus in the course of his judgment

"I consider that the 'making' of a document or part of a document, does not mean 'writing' or 'printing' it, but signing or otherwise executing it; as in legal phrase we speak of 'making an indenture' or 'making a promissory note' by which is not meant the writing out of the form of the instrument but the sealing or signing it as a deed or note. The fact that the word "makes" is used in the section in conjunction with the words 'signs, seals, or executes' or makes any mark 'denoting the execution etc.' seems to me very clearly to denote that this is its true meaning. What constitutes a false document or part of document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it."

Evidently, the printed receipt form in that case, was, without seal or signature, not complete so as to bring it under the definition of a document. What constitutes 'making' of a document, depends essentially upon the nature and the use it is intended for. Indeed the definition of a document does not necessarily require that it should be in every case to be in the writing or contain the signature or facsimile of any person but includes what is done by way of printing. Tested from this aspect, Exs. P-1 and P-2 contain subscription of the names in print and are sufficient to cause it to be believed that those documents were made by the authority of the person under whose name they appear. As marriage invitations they are documents complete in themselves. Besides, a person is said to make a false document under S. 464. I. P. C. if he makes, signs..... a document. The word 'makes' is more comprehensive than 'signs' and the use of the words 'makes' and 'signs' is not a mere tautology.

With reference to the decision in — '7 Cal 352 (B)', Dr. Whitley Stokes in his book "The Anglo-Indian Codes" (at page 269) has expressed his opinion in the notes under S. 464, I. P. C. thus:

"Garth C. J. in — '7 Cal 352 (B)' thought that the 'making' a document or part of a document means signing or otherwise executing it. Why then were 'makes' and 'made' used as well as 'signs', 'executes', 'signed', 'executed'?"

The Calcutta High Court have in a later case, (vide — 'Pramatha Nath v. The State', AIR 1951 Cal 581 (C), while noticing the criticism of Dr. Stokes, nevertheless preferred to follow the earlier Bench decision in — '7 Cal 352 (B)' as binding upon them. In the Bombay High Court — 'Emperor v. Krishtappa Khandappa', AIR 1925 Bom 327 (D), Macleod C. J. has observed with reference to — '7 Cal 352 (B)' that

"the learned Chief Justice (Garth C. J.) for the purposes of that particular decision did not consider the provisions of S. 29, I. P. C."

and dissented from it. A Bench of the Lahore High Court — 'Chatru Malik v. Emperor', AIR 1928 Lah 681 (686) (E), also discarded the view of — '7 Cal 352 (B)' and preferred to follow — 'AIR 1925 Bom 327 (D)'. Coldstream J. remarked in the Lahore decision that the word 'makes' in S. 464, I. P. C. does not mean anything "else than makes, that is to say, creates or brings into exist-

ence." It is undoubted that the word 'makes' does not mean mechanical reproduction; that 'involves a conscious act of the maker' as observed by Colin J. in — 'Dickins v. Gill', (1896) 2 QB 310 (F). The petitioner is proved to be the author of Exs. P-1 and P-2. The printer had the petitioner's authority to print but the mere process of mechanical production does not, by itself, fix the responsibility on him. It is the author or the creator of the documents that will be liable. The expression 'makes' which also occurs in S. 18 of the Press (Emergency Powers) Act is interpreted by Newsam J. thus, "prima facie a maker should refer to the creator and author and it would be straining the language of the section to hold that the printer is a maker" (Vide — 'Parakunni Kumaran v. Emperor', 1937 Madras WN 1067 (G)). In the light of the principles discussed above, I have no hesitation in holding that the petitioner who is proved to be the author and creator of the documents should be held liable.

(6) It is next contended that no injury is caused to the person nor is there any dishonest intention made out and that in order to establish the intention to defraud, there must be some person not only deceived but injured. Injury is defined by Section 44, I. P. C. as denoting any harm whatever illegally caused to any person, in body, mind, reputation or property. The two essential elements to constitute the offence are that there must be deceit or intention to deceive; secondly actual or possible injury caused to some person or persons. In the present case the complainant is represented to be handsome young woman of 20 years, inheriting property worth about Rs. 30,000/- to Rs. 40,000/- and is eligible for a suitable marriage.

The attitude of the petitioner indicates that he either wanted to coerce the complainant to consent to marry him, though he is already much-married, or simply black-mail her for his own nefarious purposes. Not only was there any whisper about the settlement of the marriage, but the petitioner even after publication of the invitations, wanted persons to believe that marriage is an accomplished fact. He is reported to have told P. W. 7 that marriage had already taken place in Nanjangud without the knowledge of complainant's mother. The fact of marriage is also got registered in the Congress Office by payment of a contribution. Such subsequent conduct can only point to the inference of his trying to show of as the married husband of the complainant, to assume control over her property.

The damage and injury likely to be caused to an unmarried woman in such circumstances are indeed incalculable. Not only does she suffer in public estimation, but her position even in her own family circles would be one of shame, vexation and distress. It may not be improbable that she will be under a cloud with her near relatives and the impression that a proposed marriage with a close relative (for, the petitioner had married her elder sister once) has fallen through, may defeat the prospects of her securing a suitable partner in life and the damage that results thereby may be beyond repair. Such risk is undoubtedly rendered possible apart from mental anguish and harm to self-reputation. There is thus possible injury or risk of injury to the person, mind or reputation of the complainant by the publication of the false documents Exs. P-1 and P-2, which were intended to deceive others into a belief that they were genuine documents properly authorised.

The intention to damage or injure the complainant may easily be gathered from the wilful use subsequently made by publication of the documents created. The evidence establishes beyond doubt that the petitioner has made a bold and deceitful experiment to trap a girl and force, without her consent, to marry him and also gain material profit for himself. In this view, there is no ground to disagree with the findings of the Courts below that the documents in question are forged instruments and fall within the definition of false documents under S. 464, I. P. C.

(7) In the result, the petition stands dismissed and the petitioner will surrender to bail and undergo the unexpired sentence imposed.

B/K.S.B. Petition dismissed.

A.I.R. 1954 MYSORE 121 (Vol 41, C.N. 50)

VENKATA RAMAIYA AND BALAKRISHNAIYA JJ. (8-12-1953)

Bommarasegowda, Plaintiff-Petitioner v. B. T. Gundappa, Defendant-Respondent.

Civil Revn. Petn. No. 456 of 1953, against order passed by Munsiff, Seringapatam, D/- 23-7-1953.

Mysore Court-fees Act (3 of 1900) (as amended by Act 18 of 1952), Sch. I, Art. 1A — "Cognisable" suit of Small Cause nature filed as original suit — Court-fee payable — (Debt Laws — Mysore Agriculturists' Relief Act (18 of 1928), S. 23) — (Words and Phrases — "Cognizable") — (Court-fees Act (1870), Sch. I, Art. 2 (Mad.)) — 31 Mys LJ 147, Overruled. (Para 2)

The word "cognisable" is not defined but cognizance is explained to mean jurisdiction or right to try and determine causes: "the right to take notice of and determine a cause." (Para 2)

Where a suit of a small cause nature and of the value not exceeding Rs. 500 is filed under the Mysore Agriculturists' Relief Act, such suit is, under S. 23 of that Act, to be tried as an original suit and cannot be said to be cognizable in the Court of Small Causes as it has no jurisdiction to deal with it. In such a case, the Court-fee prescribed for original suit is to be paid and not the one prescribed for suits of Small Cause nature under Sch. I, Art. 1A. It is not the nature and quantum of claim but the court in which the suit is filed that is material: 31 Mys LJ 147, Overruled. (Para 3)

CASES REFERRED: Paras

(A) 31 Mys LJ 147 3

(B) (V20) AIR 1933 Mad 178: 141 Ind Cas 533 3

S. Krishnappa, for Petitioner.

ORDER: This case has been referred to a Division Bench by my learned brother for decision of the court-fee payable in a suit triable by the Court of Small Causes, if the amount and nature of the claim are alone taken into account but which was sought to be and has been registered as an original suit. The suit is for recovery of Rs. 81-4-0 in respect of a loan and maintainable in the Small Cause Court, but for the defendant being alleged to be an agriculturist and the longer period of limitation provided for in the Mysore Agriculturists' Relief Act for such a suit being availed of. Section 23 of the said Act states that every suit under the Act shall be tried as an original suit.

(2) In view of Act 18 of 1952 — The Mysore Court-fee Amendment Act — there is a difference

in the court-fee payable in suits of Small Causes and Original Suits, the scale prescribed for the former being less under Article 1 (a). To have the benefit of this, the suit must be of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter does not exceed Rs. 500/-. The word "cognisable" is not defined but cognizance is explained in Law Lexicon of Ramanath Iyer to mean jurisdiction or right to try and determine causes: "the right to take notice of and determine a cause". The suit being one filed under the Agriculturists' Relief Act, and Section 23 being mandatory in requiring it to be tried as an original suit cannot be said to be cognizable in the Court of Small Causes as it has no jurisdiction to deal with it.

(3) In support of the contention that only the Court fee prescribed for a suit of Small Cause nature is due the case in — '31 Mys LJ 147 (A)' has been cited on behalf of the plaintiff. It is expressed in that case that for the application of the amended article what is material is the nature and quantum of the claim and not the Court in which the suit is to be filed. For this reference is made to — 'Secy. of State v. Ayyasami Chettiar', AIR 1933 Mad 178 (B), where the question was whether in a suit for two sums of Rs. 600/- and Rs. 400/- Court fee was to be paid separately on each or on the total amount. It was held that by virtue of S. 17 of the Court-fees Act, court-fee was to be separately assessed on each item and on this basis payment at the lower rate prescribed for Rs. 400/- was sufficient, since

> "the test in such cases is what is the amount that would be payable had separate plaints been filed for each of the several distinct claims, all of which the suit embraces."

This is not a case of clubbing together or consolidating two or more claims but a single claim and the suit for enforcement of this cannot be a small cause for one purpose and original for another.

When the procedure & incidents of an original suit not provided for in a small cause case are all applicable to the suit, the plaintiff cannot escape liability to pay the court-fee at the rate prescribed for an original suit. We are unable to agree with the view expressed in — '31 Mys LJ 147 (A)' that a case such as this is governed by Art. 1(a), Court-fees Act.

(4) The order of the lower Court directing payment at the rate prescribed for an original suit is correct. The petition is dismissed. No costs.

A/G.M.J. Petition dismissed.

A.I.R. 1954 MYSORE 122 (Vol. 41, C.N. 51)

MEDAPA C. J. AND B. VASUDEVAMURTHY J.
(5-10-1953).

In re Rangiah, Accused-Appellant.

Criminal Appeal No. 15 of 1953 with Criminal Revn. Case No. 13 of 1953 against conviction and sentence passed by Principal S. J. Bangalore in Tumkur Sessions Case No. 9 of 52-53.

Criminal P. C. (1898), Ss. 423 and 439 — Power of High Court to alter acquittal into conviction.

When the records of a criminal proceeding are brought to its notice by an appeal from a conviction the High Court can enhance the sentence in the exercise of its revisional jurisdiction under S. 439. In a proper case where it finds that there has been a miscarriage of justice and that the accused should really have been convicted of a more serious offence of which he had been charged and acquitted by the lower Court, the High Court can direct a retrial.

But if it finds that there is no need at all to order a retrial, that the entire available evidence has been placed before it and that no useful purpose except further harassment to the accused and waste of public time will be caused by a retrial, the High Court can use their powers under Ss. 439 and 423 conjointly so as to do substantial justice. The limitations set upon the power of revision found in S. 439, are sufficient safeguards against any possible misuse of the combined powers. (Para 20)

The argument that the accused has been acquitted and that some sacrosancy is attached to it cannot be upheld because the order of acquittal is by no means final. (Para 21)

The provision that the State alone should be empowered to appeal against an acquittal is no doubt a very necessary safeguard. But if by some oversight or otherwise such an appeal is not filed which is more likely especially in cases where the lower Court convicts for a lesser offence and does not acquit the accused altogether the High Court can interfere. Of course such power of interference would be used only in extraordinary circumstances and in very serious cases or where some vital principle of law is involved or where on the facts found the lower court has applied the law wrongly and its decision amounts clearly to a perverse one. (Para 21)

Held on the facts of the case that this was a clear case calling for interference and for altering the conviction under S. 323 to one under S. 304, Part II of the Penal Code. Case law reviewed. (Paras 20, 21, 22)

Anno: Cr. P. C., S. 423, N. 17, (see also N. 19).

1949 Mitra: S. 423, P. 1249, N. "Find him guilty" and S. 439, P. 1358, N. 1219A, "Converting..... conviction" — See also N. 13 and 25a(a) to S. 439 in AIR Com. (Notes in AIR Com., exhaustive and analytical).

Cr. P. C., S. 439, N. 13, (See also N. 25a(a)).

1949 Mitra: S. 423, P. 1249, N. "Find him guilty" and S. 439, P. 1358, N. 1219A, "Converting..... conviction" — See also N. 17 and 19 to S. 423 in AIR Com. (Notes in AIR Com. exhaustive and analytical).

CASES REFERRED: Paras

(A) (V1) AIR 1914 Mad 258: 37 Mad 119: 15 Cri LJ 180 — 9, 10, 11, 12, 15
(B) ('86) 9 All 134: 1886 All WN 322 (FB) — 9
(C) (V40) AIR 1953 SC 131: 1953 Cri LJ 668 (SC) — 9
(D) (V14) AIR 1927 Mad 582: 50 Mad 259: 28 Cri LJ 397 — 10
(E) (V9) AIR 1922 All 487: 44 All 332: 23 Cri LJ 202 — 10, 11, 12, 14
(F) (V15) AIR 1928 PC 254: 29 Cri LJ 828 (PC) — 11, 14, 15, 18, 20
(G) (V11) AIR 1924 Bom 456: 26 Cri LJ 830 — 11
(H) (V11) AIR 1924 Rang 93: 25 Cri LJ 247 — 12, 15
(I) ('04) 12 Pun Re Cr. 1904 — 12
(J) (V13) AIR 1926 Rang 154: 27 Cri LJ 1393 — 12
(K) (V5) AIR 1918 All 65: 20 Cri LJ 22 — 13, 14
(L) (V21) AIR 1934 Oudh 200: 35 Cri LJ 973 — 13
(M) (V25) AIR 1938 Sind 202: 40 Cri LJ 93 — 13
(N) (V39) AIR 1952 All 369: 1952 Cri LJ 751 (FB) — 13, 14
(O) (V24) AIR 1937 All 240: 38 Cri LJ 521 — 14, 16, 20
(P) (V31) AIR 1944 All 137: 46 Cri LJ 38 (FB) — 14

(Q) (V37) AIR 1950 All 380: 51 Cri LJ 1040 14, 16
(R) (V28) AIR 1941 Lah 465: 43 Cri LJ 235 (FB) 15, 16, 18
(S) ('96) 23 Cal 975 15
(T) (V38) AIR 1951 Pepsu 154: 52 Cri LJ 1413 (FB) 16
(U) (V35) AIR 1948 Lah 74: 49 Cri LJ 106 16
(V) (V22) AIR 1935 PC 35: 57 All 156: 36 Cri LJ 482 (PC) 20

K. N. Srinivasan, for Appellant; The Advocate General, for Government.

JUDGMENT: The appellant-accused was tried by the Sessions Judge, Bangalore Division, for an offence under S. 302, I. P. C. but was convicted under S. 323, I. P. C. and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 1000/- and in default to undergo rigorous imprisonment for a further period of three months. The case against him was that on the evening of 8th June 1952 he committed murder of one Rajagopal by squeezing his testicles near a mango garden beyond the limits of the Tumkur town. Of the three assessors, two were of the opinion that the accused was guilty while the third was doubtful.

(2) The learned Sessions Judge fully believed the occurrence. He held that the accused had waylaid the deceased Rajagopal and had assaulted him and used criminal force against him by squeezing his testicles as a result of which he died in his house a few hours later. He found that the motive which prompted the accused to assault Rajagopal was clearly established by evidence. The deceased had assaulted the accused's son a few days prior to the date of occurrence in connection with some difference in the matter of supply of stones by the latter. There is no evidence that the accused's son was in any way seriously hurt by the deceased and it appears to have been one of those incidents which would ordinarily have been ignored.

P. W. 8, Nemiraj, P. W. 11, Thopiah, P. W. 12 Chinnappa Naidu, P. W. 18 Raghunath, P. W. 22 Kariya were the eye-witnesses to the assault. The assault was apparently comparatively slight, but the accused appears to have become unduly incensed at it and owed vengeance against the deceased. He told P. W. 12, father of the deceased, that he would assault and finish his son as Rajagopal had assaulted his son. The accused expressed a similar intention before P. W. 21 who advised him not to do so and to have the matter settled by a panchayati. Subsequently P. W. 12 went to the Swamiji of Siddaganga Mutt and sought his intervention. P. W. 25 Mr. K. Shivananjiah has spoken about this. As directed by the Swamiji he sent for the accused, but the accused did not go to him. P. W. 9 Rashid, a jutka driver, was asked by P. W. 12 to warn the deceased against going to Tumkur as the accused was waiting to assault him. P. W. 12 approached the accused and begged him not to hurt his son but the entreaties apparently fell on deaf ears. The learned Counsel for the appellant did not seriously attempt to show that these facts were not true.

(3) That the accused waylaid the deceased with a view to assault him and did so and squeezed his testicles has been conclusively established by clear and disinterested evidence of the eye-witnesses against whom nothing has been elicited. P. W. 13 Virupakshiah, P. W. 14, Shivanna, P. W. 15 Rudradevaru, P. W. 16 Sadasivaradhya and P. W. 17 Narasimhamurthy are young students who had recently passed the S. S. L. C. examination. They were returning from Siddaganga High School and on their way back they saw the deceased and the accused quarrelling. The accused caught the testicles of Rajagopal, squeezed and pulled them. Rajagopal cried out and moved slightly back. Then the accused lifted his hand to hit at the private parts of Rajagopal. P. Ws. 13, 14 and 15 then went and stood between them and pacified them and by that time Narasimhamurthy, Sadasivaradhya and Gopaliah also came there running hearing the cries of the deceased. When they went and stood between the accused and the deceased the accused told Rajagopal.....

"ई हुडुगरु वरो होत्तिगे बचावा दे इल्लदिद्दरे निन्न मुगिसुत्ति दे."

Then the accused went away towards his house and Rajagopal and the witnesses went towards the Mutt. Rajagopal was limping, clenching his teeth and Narasimhamurthy asked him why the accused had assaulted him. He said that he had assaulted the accused's son near the quarry and out of that ill-will the accused had assaulted him. When the deceased returned to his house he was very much exhausted and P. W. 12, his father, questioned him what the matter was. He said that the accused had assaulted him and squeezed his testicles near Krishna Iyengar garden and that he had much pain. He was then put to bed and the Doctor, P. W. 1 was sent for. He saw the deceased, examined his testicles and gave him a coramine injection.

P. Ws. 12, 18, 19 the deceased's wife, and P. W. 1 Doctor have deposed in respect of these matters. P. W. 1 advised fomentation with hot water bottle, but a hot water bottle was not available and some fomentation was given with "कत्तेलद्दी." The deceased was then attempted to be removed to the Tumkur hospital in a jutka belonging to P. W. 8, but by the time he reached hospital he was dead as spoken to by P. W. 1 the doctor who examined him. P. W. 3 conducted the post mortem examination and discovered internal injuries in the testicles and he is of the opinion that death was due to shock as a result of internal injuries to the testicles.

(4) It is contended by the learned counsel for the appellant that there are some discrepancies in the evidence of the eye-witnesses P. Ws. 13 to 17 about the date on which they were given the S. S. L. C. cards and the date when they witnessed the incident. The learned Sessions Judge has discussed that portion of the evidence in detail. We have also been taken through it and we are in entire agreement with the learned Sessions Judge that those discrepancies are of a minor character and may be due to some confusion of dates or incidents. It is impossible to accept the argument of the learned counsel that all those witnesses, who are educated, young and thoroughly disinterested, would have made common cause to swear falsely about the incident of such an extraordinary character, and against the accused to whom they bear absolutely no bias or grudge, nor is it shown that they were in any way interested either in the deceased or P. W. 12 to make them depose falsely.

(5) It was next urged for the appellant that hot कत्तेलद्दी might have been applied to the testicles of the deceased and that it might have brought about his death. It has to be observed that at the post mortem no external marks of any such fomentation were discovered by the doctor. It is not even suggested to the doctor that there were

any such injuries which one would have expected if very hot poultice was applied.

(6) On the above evidence one would ordinarily have expected the learned Sessions Judge to have found the accused guilty of an offence under Section 302, I. P. C. It is clear from the evidence that the accused had threatened to do away with the deceased and that he bided his opportunity and deliberately assaulted him on a vital part of his body and was probably prevented from killing him on the spot by the coming on the scene of the eye witnesses. The learned Sessions Judge, however, thought that the accused might not have intended to kill the deceased, and for coming to that conclusion he has relied on a statement of the Doctor P. W. 1 that fomentation, if any, with much heated "कत्तेलद्दी" to the testicles might seriously complicate matters, and of P. W. 3, that generally squeezing of testicles might not result in death and that he himself had not come across any case where people had died as a result of the squeezing of testicles though in re-examination he, however, added that in the present case the injury caused to Rajagopal was sufficient to cause his death in the usual course of nature.

(7) When the appeal came up for hearing Mr. Ramachandra Rao, learned counsel for the appellant, took us through the entire evidence and argued the case. We also heard the learned Advocate-General and we ordered notice to issue under S. 439, Criminal P. C. as to why the sentence should not be enhanced and posted the case to another day. On that day the appeal was again further argued by Mr. Ramachandra Rao and he has again tried to show that the accused was innocent of any offence and that the prosecution evidence does not support the conviction. He also urged that the finding of the learned Sessions Judge that the accused is guilty of an offence under S. 323 is correct and that he is not guilty of any more serious offence including that under S. 302 with which he was charged. We are inclined, in the circumstances of the case though with some hesitation, to accept the learned counsel's argument that the accused may not have intended to kill the deceased and that he merely threatened to do so without intending it. But nevertheless we think the case would clearly fall under S. 304, Part II, I. P. C. This matter has been numbered as Criminal Revn. Case No. 13 of 1953.

(8) Mr. Ramachandra Rao has next urged that this Court cannot enhance the sentence in this case, even if it finds that the appellant has committed a more serious offence, as the learned Sessions Judge has already awarded maximum sentence of one year's rigorous imprisonment. His contention is that under S. 439, Criminal P. C. this Court has no power to convert an acquittal into a conviction, and as the learned Sessions Judge has in effect and substance, though he has not said so expressly, acquitted the accused of the offence under S. 302 this Court cannot in an appeal by the appellant convict him of that offence in order to enhance the sentence.

The question whether in the circumstances like the present the High Court has power to alter the finding and to convict the accused of the more serious offence with which he was originally charged and tried or any other offence which the facts as found disclose is not free from doubt and has been decided differently by some other High Courts though in Mysore the question has not arisen.

(9) The Madras High Court in — 'K. Bali Reddy v. Emperor', AIR 1914 Mad 258 (A) had a case before them of five accused persons who were charged with rioting armed with deadly weapons and with having murdered a man. The Sessions Judge found the accused not guilty of those offences but of simple rioting and of culpable homicide not amounting to murder under Ss. 147 and 304, I. P. C. The accused appealed against their sentence to the High Court and the High Court as a Court of Revision issued notice, altered the finding to one of murder punishable under S. 302 and awarded enhanced sentences.

Their Lordships on a reading of Ss. 423 and 439, Criminal P. C. held that S. 423 (b) gives power to the High Court, when hearing an appeal against a conviction, to alter the finding and S. 439 gives power to enhance the sentence so as to make it appropriate to the altered finding. They observed that S. 439, sub-s. (4), which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by S. 423, Cl. (b).

They followed two earlier decisions of their own Court and distinguished the case reported in — 'Queen Empress v. Balwant', 9 All 134 (FB) (B) on the ground that in that case there had been a "complete acquittal" and that there had been no appeal before the High Court against a conviction so as to make S. 423 (b) read with S. 439 applicable and the effect of that provision had not been considered. They also observed that the acquittal by the lower Courts in respect of the offence under S. 302 could not be relied on as a bar under S. 403, Criminal P. C. as the appeal was not a second trial but only a continuation of the trial in the Sessions case. See in this connection a recent case in — 'Kalawati v. State of Himachal Pradesh', AIR 1953 SC 131 at p. 132 (C) where a similar view has been taken in respect of an appeal against an acquittal while dealing with Art. 20 (2) of the Constitution.

(10) In — 'Subba Chukli, In re', AIR 1927 Mad 582 (D), a Division Bench of the same High Court which had only an application for revision before it held that it had no power in revision under S. 439 to convert a conviction under S. 304 (2) into one under S. 302 with which the accused had been charged and not convicted. They, however, set aside the judgment and directed a fresh trial. They dissented from — 'AIR 1914 Mad 258 (A)' and thought that the correct view had been enunciated in — 'Emperor v. Sheo Darshan Singh', AIR 1922 All 487 (E). They thought that a complete or partial acquittal could not be the ground for the application of S. 439. That case was also one under S. 439 only and there was no room for the application of S. 423 (1) (b).

(11) 'AIR 1914 Mad 258 (A)' came up for discussion in — 'Kishan Singh v. Emperor', AIR 1928 PC 254 (F). That was a case purely of a revision. The accused who had been charged with the offence of murder under S. 302 had been convicted by the Sessions Judge under S. 304 and sentenced to a term of imprisonment. The local Government did not appeal but applied to the High Court in revision. The High Court convicted the appellant of murder and sentenced him to death. On appeal under special leave their Lordships of the Privy Council held that in view of

the provision contained in S. 439, sub-s. (4) that nothing in that section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction — the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

Referring to — 'AIR 1914 Mad 258 (A)' which was pressed on their attention, their Lordships pointed out that the facts of that case were different from the facts of the case before them, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction and the High Court as a Court of Revision had given them notice to show cause why they should not be convicted of murder and sentenced for that offence. They also made an observation which has given rise to some controversy. They said:

> "It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in Sec. 439, sub-s. (4), refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision."

Those observations were, we think, necessary to be made even in order to lay down as the Privy Council did that while exercising powers of revision alone under S. 439 the High Court could not convert an acquittal into a conviction irrespective of whether in the trial the accused had been partly convicted of some other offence, i.e., he was not completely acquitted. Their Lordships referred with approval to — 'AIR 1922 All 487 (E)' and — 'Emperor v. Shivaputraya Durdandaya', AIR 1924 Bom 456 (G), which were both cases where the High Court was acting only as a Court of Revision under S. 439, and there were no appeals before them under S. 423 (1) (b) to attract the powers given under that section conjointly with those under S. 439.

(12) In — 'On Shwe v. Emperor', AIR 1924 Rang 93 (H) the Rangoon High Court held that where a man charged with murder has been convicted of a minor offence, the High Court can while acting both as a Court of Appeal and a Court of revision convict him of murder and sentence him to death but if it is acting solely as a Court of revision it cannot convert the acquittal of murder into conviction. The learned Judges relied on — 'AIR 1914 Mad 258 (A)' and a case decided by the Punjab Chief Court in — 'Bhola v. King Emperor', 12 Pun Re Cr 1904 p. 34 (I). They referred to — 'AIR 1922 All 487 (E)' which they said was "not parallel" since there the prisoner had not appealed and the High Court was merely acting under S. 439. In — 'Emperor v. Kan Thein', AIR 1926 Rang 154 (J) the learned Judges referred to — 'AIR 1924 Rang 93 (H)' and explained how they could not interfere in revision and convert an acquittal into a conviction as they had previously dismissed summarily an appeal by the convict.

(13) The Allahabad High Court had on an earlier occasion while deciding — 'Dulli v. Emperor', AIR 1918 All 65 (K) taken the view that it was open to a High Court to convict an appellant who had appealed against his conviction for a minor offence under S. 325, of a more serious offence under S. 302 with which he had been charged. They observed

> "It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire case, and that the appellate Court being empowerd to alter the finding under S. 423 (1) (b) may record a conviction in respect of an offence of which the trial Court has found the accused not guilty."

Their Lordships recognized fully that under S. 423 (1) (b) by itself, the finding could only be altered without enhancement of the sentence. The power to order enhancement was, however, given to the High Court under S. 439 and they felt no doubt that the High Court had authority to record a conviction under S. 302, I. P. C. and pass an appropriate sentence. Their Lordships eventually dismissed the appeal, altered the conviction to one under S. 302 and enhanced the sentence to transportation for life.

'Dulli v. Emperor (K)' has been followed in — 'Lakhan Singh v. Emperor', AIR 1934 Oudh 200 (L) by Nanavati J. In — 'Jado Rahim v. Emperor', AIR 1938 Sind 202 (M), which is quoted with approval by Waliullah J. in — 'Taj Khan v. Rex', AIR 1952 All 389 (N). David C. J. and Lobo J. considered that the better view to take was that Cl. (b) of S. 423 (1) does not apply to cases of acquittal, that it is only under Cl. (a) of S. 423 (1) that an appellate Court could convert an acquittal into a conviction and that such powers could only be exercised if there was an appeal by the Government against the acquittal and not otherwise. They gave as a reason for their conclusion that the exercise conjointly of the powers of the appellate Court under S. 423 and of revision under S. 439 could not depend upon a chance circumstance that in a case where the accused has been convicted of a lesser offence he has been given already the maximum sentence therefor.

With great respect to the learned Judges who decided that case it is not easy to follow that reasoning. The revisional powers of the High Court can be exercised in the case of any proceeding the record of which has been called for by itself or which has been reported for order or 'which otherwise comes to its knowledge'. The circumstance that the illegality found or injustice occasioned by a decision of a lower Court comes to the notice of the High Court during the course of their hearing of an appeal by one who has been convicted of a minor offence and been awarded the maximum sentence therefor cannot be more in the nature of a chance than the discovery of the same as a result of the perusal of the periodical reports or statements of cases decided by the Sessions Judges received by the High Court or on an appeal by the Government over which occurrences also the accused cannot claim any control.

(14) In — 'Sardaprasad v. Emperor', AIR 1937 All 240 (O), a person was accused of two offences but the trial Magistrate acquitted him of one and convicted him of the other. On appeal the Sessions Judge reversed the findings and convicted the appellant of the offence of which he had been acquitted. On a revision petition by the accused (and with no appeal by the Government against the acquittal. Sulaiman C. J. and Bennet J. held that the appellate Court's order was wrong and that he could not so alter the findings. They did not follow — 'AIR 1918 All 65 (K)' as the subsequent case of — 'AIR 1922 All 487 (E)' had been

approved by the Privy Council in — 'AIR 1928 PC 254 (F)'. There can be no doubt that the Sessions Judge who had no revisional powers under S. 439 could not act in the manner he did, his duty being to report the matter to the High Court which under its revisional powers could not order a retrial in that case.

'AIR 1922 All 437 (E)' was, as already noticed, also a case of the exercise by the High Court of revisional powers only. In — 'Zamir Qasim v. Emperor', AIR 1944 All 137 (FB) (P), a case heard by a Full Bench of five Judges, Iqbal Ahmad C. J., Ismail and Dar JJ. held that an appellate Court is subject to other provisions contained in the Criminal Procedure Code, empowered under S. 423 (1) (b) (2) to alter a finding of acquittal into one of conviction even though no appeal has been preferred by the Provincial Government. This power is, however, subject to the condition that the appellate Court cannot enhance the sentence imposed by the trial Court. But Mulla and Hamilton JJ. held that a Court of appeal is not empowered under S. 423 (1) (b) (2) to alter a finding of acquittal into one of conviction; the same could be done only on an appeal under S. 417. Iqbal Ahmad C. J. also observed that even in the absence of an appeal under S. 417 it is open to the High Court under S. 439 to set aside an acquittal and order a retrial. It was, he said

> "manifest that the mere omission of the Provincial Government to appeal against an order of acquittal does not, in all cases, attach finality to that order, and such order is liable to be set aside by the High Court in the exercise of its revisional jurisdiction. The contention that the omission to file an appeal under Sec. 417 renders an order of acquittal immune from attack is, therefore, not sustainable."

Ismail J. also thought similarly. He pointed out

> "There is no doubt that some sanctity should be attached to an order of acquittal but it cannot be disputed that it is liable to be set aside in more than one way (e.g.) on an appeal under S. 417 or in revision under S. 439 (by ordering a retrial)."

In that case no question of the combined use of S. 423(1)(b) and S. 439 arose and Hamilton J. expressly said it was unnecessary for the purposes of the reference to express any opinion in that matter. In — 'Mahammed Shariff v. Rex', AIR 1950 All 380 (Q), Agarwala and Bhargava JJ. held that where the accused is found not guilty and acquitted of the offence punishable under S. 302, Penal Code, but is found guilty under S. 304, the High Court as a Court of appeal has no power to convert the finding of acquittal into one of conviction under S. 302 and to enhance the sentence imposed upon him. They said they could have set aside the acquittal and ordered a retrial but did not feel called upon to do so in that case, but were content with enhancing the sentence.

In — 'AIR 1952 All 369 (FB) (N)', Wali Ulla and Agarwala JJ. held that it was not open to the High Court in an appeal from conviction under S. 323, Penal Code, to alter the conviction of the appellant to one under S. 302, Penal Code, with which he had been charged, and in exercise of its revisional jurisdiction after having previously given notice for enhancement of the sentence, to enhance the sentence of imprisonment to one of death or transportation for life. Harish Chandra J. disagreed. He was of the opinion that S. 439(4) did not in any way fetter the discretion of the High Court to convert a finding of acquittal into one of conviction while dealing with an appeal by a convict.

The qualification that a finding can be altered only as long as the sentence is not enhanced does not appear to be germane to the interpretation as the reversal or alteration of the finding cannot depend on the sentence which is to be awarded as the result of the finding, which again depends on the facts and circumstances of the case which go to constitute the offence either charged or found by the trial Court or by the appellate Court. The provision that the appellate Court must retain the sentence may be merely a limitation on the power of the subordinate appellate Courts in the interests of accused person only, the High Court acting under S. 439 being given the power to enhance sentence in proper cases.

(15) The Lahore High Court in — 'Bawa Singh Sawan Singh v. Emperor', AIR 1941 Lah 465 (R) (decided by a Full Bench of three Judges) unanimously held that it is open to a High Court hearing an appeal from a conviction by a convict who had been charged, as in this case, under S. 302, I. P. C., but convicted under S. 304 (part I) to alter the conviction from one under the latter section to under the former and then in the exercise of the powers conferred on the High Court under S. 439(1), Criminal P. C., to enhance the sentence to one of death.

In the course of their decision they referred to — 'AIR 1928 PC 254 (F)'. They thought that the general trend of judicial authority in India up to the date of that decision was to the effect that the High Courts had such a power (Vide — 'AIR 1914 Mad 258 (A)'; — 'AIR 1924 Rang 93 (H)' and — 'Queen Empress v. Jabanulla', 23 Cal 975 (S)). They observed that their Lordships in — 'AIR 1928 PC 254 (F)' had only held that under S. 439 the High Court in revision could not convert a finding of acquittal into one of conviction; they had however expressly left the point open whether while exercising appellate jurisdiction they could do so by reason of the combined operation of Ss. 423 and 439. They had merely said that the decision in — 'AIR 1914 Mad 258 (A)', which was pressed on their attention might or might not be correct, while pointing out that a portion of the reason of that ruling was not correct in that cl. (4) of S. 439 applied both to partial and complete acquittal.

(16) In — 'Fauja Singh v. The State', AIR 1951 Pepsu 154 (T), the same question came up before a Full Bench of that Court. Teja Singh C. J. with whom Kesho Ram Passey J. agreed, held that

> "in an appeal by a convict and without an appeal by the State Government, on the findings of fact at which it arrives in appeal, the High Court can alter the finding under S. 423(1)(b)(2) to any other finding it considers proper subject to the proviso that as regards the alteration of the finding under S. 423(1)(b)(2) the power of the High Court as the Court of Appeal is subject generally to other provisions of the Criminal Procedure Code."

Gurnam Singh J. who dissented from the majority was of the view that:

> "In an appeal by a convict and without an appeal by the State Government on the findings of fact at which it arrives in appeal, the High Court can alter the finding under S. 423(1)(b)(2) to any other finding it considers proper subject to the limitation prescribed in sections for joinder of charges. But in no case a finding of acquittal can be converted into conviction by the appellate Court by acting under S. 423(1)(b)(2)."

And the majority of the Full Bench further held that

"after altering the finding under S. 423(1)(b)(2), the High Court can enhance the sentence under S. 439 to any sentence it considers suitable in spite of the fact that S. 423(1)(b)(2) enjoins that in case of alteration of finding, the sentence cannot be enhanced by the appellate court in the appeal by the convict."

The majority quoted with approval the decisions of the Allahabad High Court reported in — 'AIR 1937 All 240 (O)' and — 'AIR 1941 Lah 465 (FB) (R)' and — 'Ranjha v. Emperor', AIR 1948 Lah 74 (U)'. They did not choose to follow the later decision of the Allahabad High Court in — 'AIR 1950 All 380 (Q)'.

(17) This difference of opinion has risen as a result of the interpretation placed on the words "reverse" and "alter" in S. 423(1)(a) and (b), the limitation in cl. (1)(b) of that section that while the finding may be "altered" the sentence may not be enhanced, and the express prohibition contained in S. 439 (4) that in revision an acquittal cannot be converted into a conviction. It may be that in S. 423(1)(a) while using the word "reverse" the legislature had in mind the case of an order of "complete" acquittal in the sense that the accused was found innocent or not guilty of any offence of any kind at all when on an appeal therefrom by the Government the acquittal order would have to be reversed, while in S. 423(1)(b) they used the word "alter" to deal with a case where the accused was found guilty of one offence rather than of another with which he was or could have been charged or found guilty subject of course to the further limitations contained in that section.

In the latter case the appellate Court could alter the finding so as to fix, on the facts found either itself or by the trial Court, the exact offence in law of which the accused could be convicted. The limitation on that power is that the appellate Court acting under S. 423(1)(b) cannot enhance the sentence. That power was given to the High Court alone under S. 439. The High Court could exercise that power either on its own motion or on some application by a party, aggrieved and who could not have appealed from the decision of the Court below, or on a report from the Sessions Judge. But even the High Court sitting in revision only cannot convert a finding of acquittal into one of conviction and can only set aside the acquittal and order a retrial if it finds that the same is necessary in the interests of justice.

(18) In — 'AIR 1928 PC 254 (F)', their Lordships merely decided that the High Court while exercising revisional powers under S. 439 could not set aside an acquittal. Their observation to the effect that no difference can be made between a partial or complete acquittal while applying this rule, does not militate against the meaning and interpretation suggested above and which has also found favour with the learned Chief Justice in — 'AIR 1941 Lah 465 (FB) (R)'.

(19) Apart from this interpretation when we come to examine the various arguments against the use of such combined powers by the High Court we think that such use is not only not prohibited but open to no real objection either in law or on any ground of public policy or principle of criminal jurisprudence. In some of the cases cited above the learned Judges have treated the words 'reverse' and 'alter' either as meaning much the same, or as substantially different, or the word "alter" as merely a less radical expression than the word "reverse" and meaning "change in form without changing the underlying character of the thing to be changed", conviction under one section in place of another being considered no more than a change in form. It is difficult to reconcile the various constructions placed on the use of those words in S. 423, Criminal P. C.

(20) The High Court can enhance the sentence in the exercise of its revisional jurisdiction under S. 439 when the records of a criminal proceeding are brought to its notice by an appeal from a conviction; see — 'Chunbidya v. Emperor', AIR 1935 PC 35 (V). That the High Court cannot without an appeal before it by either the Government or the convict in exercise of its revisional powers set aside an acquittal and pass an enhanced sentence must now be taken as well established; see — 'AIR 1928 PC 254 (F)'. That in a proper case where the High Court finds, while hearing an appeal from a convict that there has been a miscarriage of justice and that the accused should really have been convicted of a more serious offence of which he had been charged and acquitted by the lower Court the High Court can direct a retrial cannot also be disputed; vide — 'AIR 1937 All 240 (O)'.

Under the same circumstances if the High Court finds that there is no need at all to order a retrial, that the entire available evidence has been placed before the Court and that no useful purpose except further harassment to the accused and waste of public time will be caused by a retrial and, as in this case, even the learned counsel for the accused does not ask for such a retrial, it is difficult to see why the High Court cannot use their powers under Ss. 439 and 423 conjointly so as to do substantial justice for which the Courts exist.

The limitation set upon the power of revision found in S. 439; that no order shall be made to the prejudice of the accused unless he has had a full opportunity of being heard either personally or by a Pleader in his own defence, that no greater sentence shall be awarded than that prescribed under that section, that where an appeal lies from a conviction and sentence and no appeal has been brought, no proceedings by way of revision could be entertained at the instance of a party who could have appealed, that the convicted person to whom a notice has been given to show cause against the proposed enhancement of sentence shall while doing so be entitled to show that his conviction itself is bad, and that wholesome rule laid down for their own guidance by all the High Courts and the Privy Council that the Revisional Court may not ordinarily interfere with findings of fact and even on a question of sentence very rarely at the instance of a private party are all sufficient safeguards against any possible misuse of the combined powers.

(21) In the absence of such power the High Court would find itself in rather an unenviable and anamolous position of being unable to interfere where clear illegality or injustice has been committed. It is possible to lay too much stress on the argument that the accused has been acquitted and that some sacrosanctity attached to it. The order of acquittal is by no means final. It is open to appeal by the local Government and according to the ruling of the Supreme Court and our Court, the appellate Court can in proper cases practically re-hear the matter and evaluate the evidence. It can be set aside in revision and a retrial ordered. The accused has an opportunity of defending that order in the High Court when he receives notice and in proper cases there is no

doubt that if it is shown that a retrial is necessary it will be readily granted by the High Court.

The provision that the State alone should be empowered to appeal against an acquittal is no doubt a very necessary safeguard and they are expected to use that power very sparingly and in really deserving cases. But if by some oversight or otherwise such an appeal is not filed which is more likely especially in cases where the lower Court convicts for a lesser offence and does not acquit the accused altogether, we think we will be unduly denying to the High Court the undoubted powers and unquestionable jurisdiction it has to set right a clear and serious wrong if we say it cannot interfere. Of course such power would be used only in extraordinary circumstances and in very serious cases or where some very vital principle of law is involved or where on the facts found the lower Court has applied the law wrongly and its decision amounts clearly to a perverse one bearing in mind that the accused has been found innocent of that charge by a competent Court and in the opinion of the Government it is not a fit case to appeal.

(22) In our opinion, this is a clear case calling for our interference. We, therefore, alter the conviction of the accused under S. 323 and convict him for an offence under S. 304, Part II, I. P. C. The accused who is described in the evidence as a Pailwan or a Wrestler deliberately lay in wait for days and in spite of entreaties by the deceased's old father assaulted him in a particularly cruel and sadistic manner by which the deceased who was a young man must have suffered excruciating agony. At the trial and even subsequently he has merely denied the offence and has shown neither regret nor contrition. But nevertheless we do not wish to be too severe. In lieu of the sentence which has now been passed against him by the Sessions Judge we sentence him to rigorous imprisonment for 5 (five) years. The accused will surrender to his bail and serve out the sentence.

B/H.G.P. Order accordingly.

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MEDAPA C. J. AND VASUDEVAMURTHY J.
(2-2-1953)

C. D. Deviah and another, Appellants v. Karigowda, Respondent.

Regular Appeal No. 74 of 1949-50, against decree of Addl. Sub. J., Mandya, in O. S. No. 4 of 46-47.

(a) Hindu Law — Partition — Partial partition.

In a suit for a declaration that the plaintiff was entitled to a share in the properties and for partition and possession of the same, the burden is heavy on defendant to prove that there had been a partial partition and that the plaintiff had taken his share and gone out of the family, the ordinary presumption under Hindu Law being that a Hindu family is joint.

Where, therefore, the document regarding partial partition was not genuine, the oral evidence also was exceedingly thin and there was no provision for the maintenance of the mother, it could not be held that the plaintiff had become divided. (Paras 1, 4)

(b) Hindu Law — Partition — Shares.

If as a result of prior partition one of the branches could be treated differently from the other while allotting shares, the branch or the member of the branch which has acquired the shares of the other branches should be given the benefit of such accretion particularly when it is found that the acquisition was made for the purpose and with the clear and unequivocal intention of holding the same separately and as property in which the plaintiff's branch should not share: Case law discussed. (Para 15)

(c) Hindu Law — Alienation — Coparceners.

There can be no objection in principle why a particular item of property should not be sold by all or some of the other coparceners in favour of one of them if they can do so to a stranger. (Para 16)

CASES REFERRED: Paras

(A) (V17) AIR 1930 Mad 51: 53 Mad 188 11, 14
(B) ('78) 3 Bom 54 11
(C) (V32) AIR 1945 Mad 407: 1945-2 Mad LJ 17 11, 13
(D) 50 Mys MCR 177 11
(E) (V23) AIR 1936 PC 264: ILR (1937) Mad 1 (PC) 12, 13
(F) (V30) AIR 1943 Bom 397: 45 Bom LR 773 12, 13
(G) (V32) AIR 1945 Mad 142: ILR (1945) Mad 610 (FB) 12, 13
(H) ('07) 9 Bom LR 595: 17 Mad LJ 184 (PC) 12
(I) (V33) AIR 1946 Mad 353: ILR (1946) Mad 599 12
(J) ('02) 25 Mad 690 (FB) 13
(K) (V39) AIR 1952 Mad 419: ILR (1952) Mad 835 (FB) 13
(L) ('31) 10 Mys LJ 49 (FB) 15
(M) ('82) 5 Mad 362 15
(N) (V16) AIR 1929 Mad 865: 57 Mad LJ 685 (FB) 15
(O) (V2) AIR 1915 Bom 255: 39 Bom 734 15
(P) ('66-67) 11 Moo Ind App 75: 8 WR 1 (PC) 15

Mirle N. Lakshminaranappa, for Appellants; M. A. Gopalaswamy Iyengar, for Respondent.

JUDGMENT: The plaintiff is the adoptive son of one Davegowda who had three younger brothers Halligowda, the natural father of the plaintiff, Annegowda and defendant 1 Karigowda. He died about 10 years before suit. Thereafter the plaintiff and his uncles were living together as members of a joint Hindu family. The family is said to have owned moveable and immoveable properties described in the schedule to the plaint. Halligowda and Annegowda are said to have gone away from the joint family recently and had no right, title and interest in the suit properties. Defendant 1 had refused to give a share to the plaintiff and the suit has been brought for a declaration that the plaintiff was entitled to 2/5th share in the plaint schedule properties and for partition and possession of the same. Defendant 2 was later on added as a supplemental defendant and she is the adoptive mother of the plaintiff. She has joined the plaintiff in this appeal.

(2) Defendant 1 pleaded that the plaintiff had been married at the family expense and over Rs. 2000/- had been spent for the same. Thereafter he wanted to take his share and trade and live independently. He, therefore, did not want a share in the immoveable properties and received Rs. 1500/- by way of cash and certain money bonds in March 1942 and went away from the family and thereby became completely divided. Subsequently, the plaintiff's natural

father Halligowda and the other brother Annegowda had sold their shares to defendant 1 under registered deeds dated 29-6-1945. They had very shortly after set up the plaintiff to file a suit. The plaintiff was therefore not entitled to any share. The extent of the properties liable to division was also denied. Defendant 1 had also incurred debts amounting to Rs. 3000/- mainly for purchasing the shares of his brothers. Defendant 2 supported the plaintiff and also claimed a share.

(3) The Subordinate Judge of Mandya, before whom the suit was filed, dismissed it. He held that the partition set up by defendant 1 in the year 1942 at which the plaintiff is said to have taken his share and gone out of the family was true. We have been taken through the entire evidence and we think that the judgment of the Court below cannot be supported.

(4) The burden was heavy on defendant 1 to prove that there had been a partial partition in 1942 and that the plaintiff had taken his share and gone out of the family, the ordinary presumption under Hindu Law being that a Hindu family is joint. In his written statement defendant 1 merely stated that the partition between the plaintiff and the other members of the family was in March 1942. He gave no date of the same but in the course of the evidence in this case Ex. IV, a note book, and certain loose sheets Exs. V, VI and VII therefrom are relied upon in proof of that partition. Exhibit IV is a small pocket note book. Three sheets are said to have been cut out of that note book. In Exs. V and VI, two of those loose sheets, names of some persons who are said to be debtors of the family are given with the amount due by each. Exhibit VII concludes that by documents Rs. 1415/- and by way of cash Rs. 85/-, in all Rs. 1500/-, has been taken by the plaintiff who is said to have signed in English below it. The entries are dated 23-3-42. This book was produced not at the time of the written statement nor even at the time when documents were to be produced to Court, but after D. W. 1 was examined on 24-8-1948, i.e. more than two years after the plaintiff's application to sue in forma pauperis was registered as a suit. It is represented that even in the course of the proceedings relating to pauperism the exact date of the separation was not mentioned. The learned Judge has nevertheless believed this document. And we are inclined to think that his view is clearly not correct.

(5) If really the plaintiff had signed such a document it is impossible to believe that defendant 1 would not have taken it into his possession but would have allowed it to be taken by D. W. 2, the Patel. It is also most unlikely that after the suit was filed in forma pauperis defendant 1 would not have got the note book from defendant 2 and put it before Court at the earliest opportunity. (After discussing the evidence of the witnesses their Lordships continued:) We must say we are rather surprised that the learned Subordinate Judge should have so easily believed this document as genuine in spite of these suspicious circumstances and glaring improbabilities attending on its execution and late production into Court.

(6-7) Without the support of that document on the side of the defendant 1, oral evidence let in to prove the partial partition in 1942 is exceedingly thin. The bonds said to have been given to the plaintiff have not been admittedly endorsed over in his favour. They were pronotes it is said, and no other accounts relating to the debtors are produced. Exhibit XII is the deposition in the pauper miscellaneous case of one of the debtors who is now dead, and he says that no share was written on the pronote for Rs. 100/- he had executed and the pronote was returned to him and he has torn it off. Such evidence could easily be secured as neither the alleged debtor nor defendant 1 runs any risk of liability as the debt itself may be imaginary. It is not at all likely that these 8 debts which have been given to the share of the plaintiff were all collected in one lump within a day or two. It must have taken sometime and one would have expected the original documents with the share of discharge on them to be produced. Defendant 1 would have stopped payment if really the plaintiff had not executed a release deed within 15 days as promised. Defendant 1 also says that the exact amount due on the documents were not then calculated but only the probable amounts were mentioned in Ex. IV which again is improbable.

(8) No provision was apparently made for the maintenance or share of the adoptive mother at that partition. The plaintiff was just 21 or 22 years of age at that time, and there is a suggestion that he immediately took up some drama contracts. Defendant 1's case is that he wanted to do business and therefore wanted cash. D. W. 2 as well as defendant 1 say that they were all on friendly terms at that time. The two brothers of defendant 1 were still undivided and it would be surprising if neither defendant 1 nor those two brothers nor the Patel thought of making some provision for defendant 2's share or at least for her maintenance but left her to the tender mercies of her young adoptive son who was launching on some fresh business. Defendant 1 was doing money-lending business and it could not be said that he was not versed in business affairs and he could be expected to have taken a formal document of release or a sale of the plaintiff's rights which in fact he has done in the case of his two brothers.

(9) It is strongly urged for defendant 1 that in Exs. II and III which are sale deeds executed in his favour by his brothers including the natural father of the plaintiff, a reference has been made to the separation of the plaintiff. But a reading of those documents discloses that those two brothers were apparently old and were not in a position or mood to fight defendant 1 and were willing to put in any recitals he pleased. They say that they could not look after any share of immoveable property and therefore wanted cash; they had no male issue while defendant 1 is said to have six sons who seem to be helping defendant 1 in the management of his family affairs. It appears as though defendant 1 was able to dictate to them as he does not appear to have paid them in cash even according to the recitals in those documents and it is represented that he has made only part payments. If so it may be that the balance has not been paid on account of the plaintiff's suit but the fact remains that defendant 1 was and is in a much stronger position than those brothers. Defendant 1 could easily have examined his brothers in the light of the recitals made in those documents and they might have given valuable evidence about the partition. It is urged by Mr. Gopalaswamy Iyengar, learned counsel for the respondent, that it was the duty of the plaintiff to have done so; but in the light of the recitals in those documents that could not be expected of the plaintiff. We must, therefore, differ from the learned Subordinate Judge and hold that the plaintiff did not become divided

from defendant 1 and the other members of the family in 1942 as pleaded by defendant 1 and that he is entitled to a share in the joint family properties.

(10) The next question that falls for consideration is what is the share to which the plaintiff is entitled. Defendant 1 claims to have acquired their right, title and interest in all the family properties from his two other brothers under Exs. II and III. They are registered sale deeds dated 20-5-45 and 29-6-45 respectively, and for a consideration of Rs. 2000/- each the brothers have conveyed all their rights they had in his favour. It is not shown that they are nominal and sham documents and the plaintiff has admitted in the plaint that they have now no longer any interest in the family properties. It is contended here for him that the full amount of consideration has not been paid by defendant 1 to the executants, that only a part of it has been paid before the Sub-Registrar and that no receipt or other references have been produced by defendant 1 for having paid them the rest. They have not, however, been examined and there is no evidence or even a plea that they have not received the full consideration; nor do they appear to have taken any action to recover the balance from defendant 1. Even if any balance of consideration is still due to them that is a matter which cannot affect the legal effect of Exs. II and III in the matter of conveying away their title. It is also in evidence that defendant 1 has borrowed Rs. 3000/- from D. W. 6 and has executed Exs X and X-a, a pronote and consideration receipt dated 12-6-45 in his favour. D. W. 6 has deposed that the amount was borrowed by defendant 1 for the purpose of purchasing lands from his two elder brothers. It has not been shown by the plaintiff that this transaction is not a true one nor has the plaintiff been able to show how that fairly large sum of consideration for Exs. II and III was found by defendant 1 or that the same was contributed from the family chest or from the sale or mortgage of any family properties. Section 6(1) of the Hindu Law Women's Rights Act provides that property acquired by a member of a joint Hindu family without material and direct aid from property belonging to the joint family shall be deemed to be the separate property of such members notwithstanding that at any time previous to or at the time of his acquiring the property such member may have been maintained or supported at the expense of the joint family. On the facts and circumstances of this case, there is no doubt that the plaintiff has entirely failed to show that the acquisitions under Exs. II and III were with the aid of any joint family property and it must be held that they are his self-acquisitions.

(11) Mr. Lakshminaranappa, learned counsel for the appellant, has contended that no member of a joint Hindu family can acquire for himself by a purchase from any of his undivided coparceners any or all of their share in the joint family estate and that even if he purports to do so the same will enure to the benefit of all the other members of the family who may be remaining joint and undivided with him. It has been held in — 'Lakshumi Achi v. Narayanaswami Naicker', AIR 1930 Mad 51 (A) following — 'Balkrishna Trimbak v Savitri Bai', 3 Bom 54 (B), that if one of the coparceners sells his share in some of the family properties, not to a stranger but to another coparcener, he becomes divided from the latter in respect of the said properties without any right of survivorship thereto, and at p. 53 it has been observed that if a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties, but not in any other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and that so far as the properties in which the whole or part of the member's share is sold or concerned, he must be regarded as divided from the other members. In — '3 Bom 54 (B)', it has been held that the effect of a Hindu son relinquishing for a sum of money his share in the property of his father, natural or adoptive, and agreeing not to claim it during or after his father's lifetime, is to place him in the position of a separated son. It is not contended for the appellant that according to the Hindu Law as in force in Mysore one of the coparceners cannot alienate for value his interest in any specific item of joint family property, or even in all his joint family properties, in favour of a stranger; and we have not been shown any authority that he cannot do so in favour of another member of the coparcenary. On the other hand, in — 'Somu Achari v. Singara Achari', AIR 1945 Mad 407 at p. 409 (C), Somayya, J. has pointed out that there is nothing in the Hindu Law to prevent a member of a joint Hindu family from selling his share to another member. It may be that if he releases or relinquishes without consideration, or does so even for consideration, such rights under circumstances which would either expressly or by implication mean that he is doing so in favour of the joint family as a whole or if the consideration is found to have flowed from the family funds the benefit of such sale or release or relinquishment may enure to the benefit of the other members of the family excluding himself. But if as in the present case the conveyance is expressly in favour of one of the members of the family who has paid consideration for it under circumstances which would clearly make it his self-acquisition and he has purchased with the express intention of excluding any possible claims from the plaintiff, it is difficult to see how the other member of the family much less the plaintiff can also claim to benefit under that acquisition. It is not the plaintiff's case either that defendant 1 renounced or waives his rights in those purchases in favour of the family of himself and the plaintiff. A clear intention to waive such separate rights is required to be established and cannot be inferred even from acts which may have been done merely from kindness or affection or by mere physical mixing of the ancestral and self-acquired properties; see — '50 Mys HCR 177 (D)'.

(12) In this connection Mr. Lakshminaranappa has relied on a case reported in — 'Venkatapathi Raju v. Venkatanarasimha Raju', AIR 1936 PC 264 (E). In that case it has been held that where a member of a Hindu joint family governed by the Mitakshara Law relinquished his interest in the family property, the renunciation merely extinguished the renouncing member's interest in the family estate but did not affect the status of the remaining members quad the family properties and they continued to be coparceners as before. The only effect of such renunciation was to reduce the number of persons to whom the shares would be allotted if and when a division of the status took place. A similar view has been expressed in — 'Mahalingayya Basappayya v. Sangayya Chennayya', AIR 1943 Bom 397 (F), where it has been held that when out of two joint brothers one of

them renounced his interest, the question whether the two brothers really intended to separate depends not merely on the act of formal renunciation but from the intention as gathered from their conduct and that where a joint brother renounced his interest in the joint property, the person renouncing severs his connection with the family but such renunciation apart from extinguishing the interest of the renouncing member leaves the coparcenary itself intact. In — 'Subbanna v. Balasubba Reddi', AIR 1945 Mad 142 (FB) (G), also, relying on — 'AIR 1936 PC 264 (E)' and — 'Anandrao v. Wasantrao', 9 Bom LR 595 (PC) (H), it has been laid down that a member of a joint Hindu family cannot give his interest in the family estate to one of the several coparceners if they remain joint in estate. In such circumstances, he can relinquish his interest but the relinquishment operates for the benefit of all other members. The decision in — 'Chinnathayi v. Kulasakarapandia Naicker', AIR 1946 Mad 353 (I) is to the same effect.

(13) Mr. Lakshminaranappa has also tried to make a distinction between the case where there are only two coparceners and one of them makes an effective alienation in favour of another and the case where there are more than one coparcener, and has referred to — 'AIR 1945 Mad 407 (C)' in this connection. The decisions in — 'AIR 1936 PC 264 (E)', — 'AIR 1948 Mad 142 (G)' and — 'AIR 1943 Bom 397 (F)' are all cases of renunciations or gifts and not sales or releases for consideration. It is contended for the appellant that all alienations including gifts and renunciations must be treated alike and as there can be no gift or renunciation by one coparcener in favour of another there cannot also be such a sale for consideration. It is too late in the day to contend that at least in Mysore, Madras and Bombay where alienations by a coparcener for consideration have been upheld, that such alienations for value stand on the same footing as gifts or bequests. 'AIR 1945 Mad 407 (C)', which has been referred to for the appellant, happens to be a case where there were only two coparceners and does not lay down any general rule that different considerations would apply if there were more than one coparcener; and it expressly recognizes the right of a coparcener to buy a share of another and that, by a deed, which though it was termed a "release", was for consideration and was held really to amount to a sale. The decision in — 'AIR 1943 Bom 397 (F)' only means that a sole surviving coparcener in a joint Hindu family, in whose favour another brother had renounced his interest, would still be subject to certain rights and liabilities by virtue of his having been a member of such coparcenary. He has also urged that an alienation by a coparcener does not terminate the coparcenary where the property alienated is either the whole or only a part of his interest in the family property and that notwithstanding the alienation the alienor continues to be undivided with the other members of the family, with rights of survivorship between him and the other members of the family in respect of other properties of the family, has been laid down by Bhashyam Iyengar, J. so far back as in — 'Aiyyagari Venkataramayya v. Aiyyagari Ramayya', 25 Mad 690 (FB) at p. 717 (J), and still continues to be good law. See also — 'Peramanayyakam Pillai v. Sivaraman', AIR 1952 Mad 419 (FB) (K). That, however, does not solve the point now to be decided.

(14) Mr. Lakshminaranappa represents that if a member of a joint Hindu family is enabled to sell his share to another member, either in a particular property or in all the joint family properties and such a purchaser can claim a larger share than the others by virtue of that sale, it will lead to confusion and difficulty in the matter of common enjoyment of the properties of the family as well as while allotting shares at the time of any future partition. As regards the first point, if a member of the coparcenary purchases the rights of another coparcener and the right he has purchased is to be treated as his self-acquisition as pointed out in — 'AIR 1930 Mad 51 (A)', it is difficult to see how such a position is very much different from the ordinary case of a coparcener being allowed to have and possess and enjoy separate self-acquired property while still being a member of the joint family and having a common interest and enjoyment in other joint property. The mode in which such property will be enjoyed is a matter for the members of the joint family. It may even be open to the member who has acquired the share of the coparcener to later on waive his interest in it and bring into the family hotchpot; but so long as there is no prohibition against a member of a joint Hindu family owning separate property it is difficult to see any force in this argument. The right which every member has to separate himself even by a mere declaration and ask for his own share by a partition is always open to him as a solution for any grievance he may feel in the matter of enjoyment of the properties.

(15) As regards any difficulty which may be met at the time of partition in allotting shares such situations are not unknown to Hindu Law. 'Sadashiva Rao v. Subba Rao', 10 Mys LJ 49 (FB) (L) is a case in point. There, in a Mitakshara joint Hindu family comprising several branches, a member of one branch alone had separated himself from the coparcenary taking away his share at a partition effected for the purpose. The other members continued to live in jointness as before. At a subsequent partition, among all the branches, it was held that deduction should be given to the share withdrawn by one member in the earlier partition in the share to be allotted to his branch, — 'Manjanatha v. Narayana', 5 Mad 362 (M) and — 'Narayana Sah v. Sankar Sah', AIR 1929 Mad 865 (N) being followed and — 'Pranjivandas Shivlal v. Ichharam Vijbhukhandas', AIR 1915 Bom 255 (O) being dissented from. It was observed that the rule that partition should be made 'rebus sic standibus' as on the date of subsequent partition had no application to cases of partial partition among the branches. That was a case converse to the present as it dealt not with the enlargement of the share of one branch but its depletion by a share being carved out at an earlier partial partition. Rama Rao, J. in his order of reference to the Full Bench pointed out the difficulty now envisaged for the appellant. At page 55 he observed:

"If the Madras rule should be accepted, it may be argued that an account will have to be maintained as to the persons who divided and the properties available and actually allotted at each succession for guidance in future partitions, which is obviously not in consonance with the general rule of Hindu Law of equality of shares per stirpes at the time when the coparceners seek a division. If on account of the particular motives or attitude of one or more members of a particular branch who desire to withdraw, there is room to apprehend prejudice to the interest of the other branches, relief is

always open to claim a partition among all the members....."

These difficulties did not appeal to the Full Bench in — '10 Mys LJ 49 (L)', which chose to follow — 'AIR 1929 Mad 865 (FB) (N)'. That latter case affirmed an earlier decision of the same Court in — '5 Mad 362 (M)'. It was then urged that the case in — '5 Mad 362 (M)' had been wrongly decided because it went counter to the principle of Hindu Law, that no member or branch of an undivided family could be said to have a definite share until a partition was actually effected, a principle laid down in — 'Apoovier v. Ramasubba Aiyar', 11 Moo Ind App 75 at p. 79 (PC) (P); and that even as regards equality, it could not be secured by taking a previous division into account and that it was impracticable in execution. These objections did not find favour with the Full Bench of the Madras High Court. It was observed by Coutts-Trotter C. J. that partial partitions themselves were not recognized in Hindu Law texts, and that once partial partition had been permitted, it was necessary on considerations of equity, that the branch concerned, one of whose members had taken away his share at such partial partition should be compelled to bring into account that portion of the family property which had gone to their share, or that the branch should be debited that fractional share that had been so taken away, at the ultimate reckoning. Wallace J. also observed that equity demands that the alienor should make good to the joint family so far as he can the sacrifice he has made it suffer; hence the system of accounting and debiting against the coparcener had a sound foundation in equity and the principle was not different for a branch; that in such case "a mental though not a real ledger is maintained against the appropriating coparcener or branch even while the joint family remains joint." He therefore saw no difficulty in applying a rule of equity in the matter of such allotting of shares among the branches as he thought that any other principle would in the circumstances result in inequitable division unfair to the branches which had remained whole in the joint family. Ananthakrishna Iyer, J. observes at p. 880 that what the fractional share to which any branch would be entitled is, would depend on the circumstances that exist at the time of the partition. In the present case the plaintiff belongs to one branch while defendant 1 and his sons belong to another branch. The plaintiff has claimed division per stirpes as between the two branches. If as a result of prior partition one of the branches could be treated differently from the other while allotting shares, it is not easy to see why on the same equitable principle the branch or the member of the branch which has acquired the shares of the other branches should not be given the benefit of such accretion particularly when it is found, as in this case, that the acquisition was made for the purpose and with the clear and unequivocal intention of holding the same separately and as property in which the plaintiff's branch should not share.

(16) There can be no objection in principle why a particular item of property should not be sold by all or some of the other coparceners in favour of one of them if they can do so to a stranger. The family owning a number of items of immoveable property may find it necessary to raise money by the sale of one of the items and we do not see why one of the members of the family who is in more affluent circumstances should not be able to buy the items for himself and make it his own self-acquisition. It may often times be much more advantageous to do so than to sell it to a stranger. To hold otherwise would be going contrary to the right of every member of the family to own and possess self-acquired property. To permit a stranger who may immediately sue for partition and possession and thereby disrupt the family compulsorily, to purchase the rights or share of a coparcener in one or more items of the properties of the joint family, appears to be more risky and less advantageous to the family than being able to sell the same to one of the coparceners and would not expose the family to loss or depreciation in value of the joint family property.

(17) The circumstances under which the sales under Exs. II and III in favour of defendant 1 have been effected clearly show that the intention of defendant 1 was to acquire those shares for himself and not for and on behalf of the family. We have already found that those rights he has purchased must be treated as his self-acquisitions. The result is that the plaintiff would be able to recover only one-fourth in the joint family properties and not 2/5ths as he has claimed. Out of this 1/4th defendant 2 would be entitled to her share which will be 1/4th of the same under S. 8, Cl. 2(a) of the Hindu Law Woman's Rights Act; (see S. A. No. 443/51-52 recently decided by one of us).

(18) The Court below has not considered the other points raised by defendant 1 regarding the nature and extent of properties liable to division and these will now have to be determined by the lower Court.

(19) In the result we allow this appeal, set aside the judgment and decree of the Subordinate Judge. There will be a preliminary decree in favour of the plaintiff declaring that he is entitled to 3/16th share in the joint family properties, defendant 2 being entitled to 1/16th share in the same. As regards costs, as neither party has succeeded in full we think the parties may bear their own costs both here and in the Court below and we order accordingly. The Institution-fee due to Government will be payable by the plaintiff and will be recovered from his share.

B/H.G.P. Order accordingly.

A.I.R. 1954 MYSORE 132 (Vol. 41, C.N. 53)

MALLAPPA J. (12-1-1953)

H. R. Snow, Petitioner v. P. C. Bose, Respondent.

House Rent Control Revn. Petn. No. 142 of 1952-53, against order of Addl. Dist. J., Bangalore, D/-22-2-1952.

Houses and Rents — Mysore House Rent Control Order (1948), S. 4 — Discretion of Controller — (Houses and Rents — Mysore House Rent and Accommodation Control Act (30 of 1951), S. 4).

The House Rent Controller has powers of discretion to reduce the rent agreed upon even where no application is filed within time; but the discretion must be used judicially, and it must only be in extraordinary cases of injustice and when failure to file application in time is shown to be due to unavoidable reasons as in cases in which delay is condoned under the Limitation Act. that the House Rent Controller might use his discretion in interfering with the agreement arrived at between the parties. (Para 6)

J. L. D'Silva, for Petitioner; F. M. Xavier, for Respondent.

ORDER: This is a revision petition against the order of the Additional District Judge, Civil Station, Bangalore, in H. R. C. Appeal No. 331 of 51-52 confirming the order of the House Rent Controller, Civil Station, Bangalore in R. C. 720/FR/51.

(2) The tenant who is the respondent in this Court was the petitioner before the House Rent Controller. He filed a petition saying that originally he agreed to pay a rent of Rs. 125/- for the premises let out to him including a garage and a room. He went on paying this rent till 1-4-51, but later the landlord disputed that the amount paid was fixed only for the house and did not include the rent for the garage and the room. Thereon he consented to pay Rs. 130/- per month. He went on paying at the rate of Rs. 130/- till the end of December 1950. The rent was again enhanced to Rs. 140/- in January 1951 and an application was thereupon filed by him for fixation of fair rent on the 30th March 1951. The House Rent Controller has fixed the rent at Rs. 122-8-0 and this has been confirmed in appeal. The point for consideration is whether the orders of the Courts below are correct. Section 4 of the Mysore House Rent Control Order, 1948 was applicable to the case and so far as the wording of the main section is concerned there is no difference between the present House Rent Control Order and the previous one. According to S. 4:

> "The Controller may, in any case, and shall, on the application of the tenant or landlord of a house, fix the fair rent for such house after holding such enquiry as the Controller thinks fit."

It will be noticed that a distinction is made between cases where the Controller has discretion to fix a fair rent after holding an enquiry and cases where he is bound to do so as is clear by the use of the words "may" and "shall" in the Section.

(3) When an application, which is tenable, is filed before a House Rent Controller, he is bound to fix the fair rent after holding an enquiry. Such applications in cases of enhancement of rent have to be filed within a period of three months from the date of the increase of rent. In other words if an application for fixation of fair rent when any enhancement of rent is made, is filed more than three months from the date the increased rent is demanded or paid, such an application is barred by time. Under the present Act it is enacted that whether there is enhancement of rent or not, an application for fixation of fair rent must be preferred within a period of three months from the date of enhancement of rent if there is any enhancement and in other cases within three months from the date of commencement of the tenancy. The result is that when an application is filed for fixation of fair rent either on the ground that the rent is excessive or on the ground that it has been enhanced, and it is filed within time, the Court is bound to hold an enquiry and fix the fair rent. In other cases the Rent Controller is not bound to hold an enquiry and fix fair rent but he has the discretion to do so. The discretion has to be used judicially and it cannot be said that the discretion is used judicially, if he arbitrarily proceeds to fix the fair rent when no application is filed within time allowed by law. If he does so he will be defeating the very purpose for which the Act has fixed a period of limitation for obtaining such a relief.

(4) According to the section, as it stood in the House Rent Control Order, 1948, no period of limitation was fixed for filing an application for fixation of fair rent but the moment there was enhancement of rent, the tenant was bound to file an application for fixation of fair rent within three months from the date the increase of rent was demanded or paid. In this case though the original rent fixed by the parties was Rs. 125/-, the tenant had agreed to pay Rs. 130/- and went on paying rent at that rate for about nine months. Assuming that this did not amount to enhancement of rent, but that this was a case in which increased rent was paid in view of additional accommodation, it may be taken that as the Act at that time stood, he could have filed an application for fixation of fair rent at any time he liked, unless there was in the meanwhile an enhancement of rent. But in this case, as stated by the tenant, the rent was further enhanced to Rs. 140/- in January 1951. The moment this was done he could only file an application for fixation of fair rent within three months from the date the enhanced rent was demanded or paid. The application for fixation of fair rent which was filed within three months from the date this increased rent is demanded or paid must be regarded to have been filed within time to the extent that the reduction is in respect of the increase above Rs. 130/-.

(5) If, however, it is held that the rent was increased from Rs. 125/- to Rs. 130/- in April 1950, the application for fixation of fair rent below Rs. 130/- must be regarded as being barred by time since it was filed more than three months after April 1950. The case of the tenant himself is that the rent of Rs. 125/- was fixed for the entire premises including the garage, but on the pretext that the garage was not included the rent was enhanced to Rs. 130/-. If the tenant had agreed to pay Rs. 5/- more on account of increased accommodation as contended by the landlord he can have no grievance. Otherwise, taking the case of the tenant himself, there was enhancement of rent in April 1950 from Rs. 125/- to Rs. 130/- and so his application for reduction of rent on the ground that the rent was excessive is barred by time to the extent the reduction is claimed below Rs. 130/-. His application however in so far as the enhancement from Rs. 130/- to Rs. 140 is concerned, is in time and the order of the House Rent Controller as confirmed by the learned Additional District Judge is right to the extent of reduction of rent to Rs. 130/-.

(6) It is no doubt true that the House Rent Controller has powers of discretion to reduce the rent agreed upon even where no application is filed within time; but the discretion must be used judicially, and it must only be in extraordinary cases of injustice and when failure to file application in time is shown to be due to unavoidable reasons as in case in which delay is condoned under the Limitation Act, that the House Rent Controller might use his discretion in interfering with the agreement arrived at between the parties. No such case is made out. The revision petition is allowed to the extent that the order of reduction is not limited to Rs. 10/- only. The rent is fixed at Rs. 130/- per month. Parties will bear their own costs throughout.

B/G.M.J. Petition partly allowed.

A.I.R. 1954 MYSORE 133 (Vol. 41, C.N. 54)

VASUDEVAMURTHY J. (5-1-1953)

S. Ramanna and others, Appellants v. Abbas Hussain, Respondent.

Second Appeal No. 152 of 1950-51, against order of Dist. J., Shimoga, D/- 19-12-1949.

Provincial Insolvency Act (1920), Ss. 25 and 75 — Second appeal and revision against order under S. 25 — (Mysore Insolvency Act (11 of 1925), Ss. 25 and 75).

No second appeal lies against an order passed under S. 25. The High Court may, however, in certain circumstances treat the second appeal as revision and examine the order of the District Judge and determine about its legality and correctness. AIR 1936 Rang 26, AIR 1931 Mad 745 and AIR 1934 Lah 807(1), Foll. (Para 3)

Anno: Prov. Ins. Act, S. 25 N. 5; S. 75 N. 5, 6.

CASES REFERRED: Paras

(A) (V23) AIR 1936 Rang 26: 155 Ind Cas 954 2, 3

(B) (V18) AIR 1931 Mad 745: 54 Mad 989 2

(C) (V21) AIR 1934 Lah 807 (1): 150 Ind Cas 664 2

(D) ('47) 52 Mys HCR 373 4

M. P. Somasekhara Rao, for Appellants; M. Ramachandra Rao, for Respondent.

JUDGMENT: This second appeal arises out of an order in an insolvency case. The appellant who holds a decree in O. S. No. 22/37-38 on the file of the Subordinate Judge, Shimoga, against the respondent for Rs. 2855-7-0 made an application on 17-8-43 for declaring the respondent an insolvent. The respondent raised several objections which were negatived and the Subordinate Judge directed that he should be adjudicated. On appeal the District Judge of Shimoga reversed that order and dismissed the appellant's application on the ground that the respondent was able to pay his debts and he has come up in second appeal.

(2) For the respondent, Mr. M. Ramachandra Rao, his learned counsel, has raised a preliminary objection to the hearing of this second appeal. He urges that under S. 75(1) of the Mysore Insolvency Act XI of 1925 which governs this case, only certain orders passed under the Act are subject to second appeal and that the present order, which falls under S. 25 of the Act, is not liable to be appealed against to the High Court. In support of that position he has relied on — 'Wan Taik Ya v. M. S. S. Chettyar Firm', AIR 1936 Rang 26 (A); — 'Alagirisubba Naik v. Official Receiver, Tinnevelly', AIR 1931 Mad 745 (B) and — 'Ghulam Rasul v. Kidar Nath', AIR 1934 Lah 807 (1) (C). The language of S. 75(1) and those cases clearly support the objection he has taken and a second appeal, therefore, does not lie in this case.

(3) But Mr. Somasekhara Rau, learned counsel for the appellant, contends that nevertheless this Court may under S. 75(3) examine the order of the District Judge and determine about its legality and correctness, and that the present case is one in which such powers of revision ought to be exercised in favour of his client. He points out that this course has been adopted in — 'AIR 1936 Rang 26 (A)'. In view of the past history of this case, and its facts and circumstances and the clearly incorrect way in which the matter has been decided by the learned District Judge, I am inclined to adopt that procedure.

(4) The order of the District Judge cannot be sustained. He has held that there was sufficient ground in law for the appellant, a creditor of the insolvent, to base his application. Indeed he was bound to do so as this matter has been finally decided between the parties by this Court as reported in — 'Ramanna v. Syed Abbas Hussein', 52 Mys HCR 373 (D). He, however, came to the conclusion that the respondent owned sufficient properties and was in a position to discharge his debts and therefore under S. 25 of the Insolvency Act the Court would be justified in dismissing the application for insolvency. This particular ground, viz. that the respondent was able to pay off his debts was never taken in the objection statement filed before the Subordinate Judge, the ground relied on then being that the sale of the house in Bhadravati which was in execution of a decree for arrears of assessment was not an act of insolvency and did not afford a ground to the creditor for making the application. Though the appellant's application was made so far back as in August 1943, right down till December 1949 when the District Judge made his order or even till today the respondent has not been able to pay off his debt or even the smallest portion of it. This, I think, would not be an improper test to determine about the bona fides of such a claim. (After considering the evidence his Lordship proceeded:) The learned District Judge appears to have had no evidence at all before him to come to the conclusion he has done, and for that reason alone his order is liable to be set aside even in revision. Moreover, there is another observation by the learned District Judge in his judgment which clearly shows that he has not properly directed himself in the disposal of this case. In the concluding paragraph of his judgment he has observed that if the appellant cannot recover the amount due to him by proceeding against other properties of the respondent "it is yet open to him to 'press his petition' for the appellant being adjudged insolvent". He has apparently lost sight of the fact that then there would be no petition to press and it would be useless for the appellant to present another application which would be long after the alleged collusive sale in favour of the respondent's second wife and which would be of no use to him even if he showed that this alienation ought to be set aside.

(5) In the result this appeal is allowed and the order of the learned District Judge is set aside. The respondent will pay the costs of the appellant in this Court (Advocate's fee Rs. 15/-).

B/G.M.J. Appeal allowed.

A.I.R. 1954 MYSORE 134 (Vol. 41, C.N. 55)

VASUDEVAMURTHY J. (17-12-1952)

Kesave Seethamma, Plaintiff-Appellant v. Bombay Life Assurance Co. Ltd., Defendant-Respondent.

Second Appeal No. 438 of 1949-50, against decree of Dist. J., Shimoga, in R. A. No. 91 of 1948-49.

(a) Insurance Act (1938), S. 45 — Fraudulent suppression of material facts — (Contract Act (1872), S. 17).

In answer to a query in the proposal form the insured had stated that he had been insured in another company at ordinary rates without any extra premium being charged or lien or condition being imposed. The insured had made a formal declaration at the end of the proposal form that the particulars given by him in the proposal form were true and that he agreed that the said proposal and any declaration to be made before the Medical Examiner should be the basis of the contract between him and the defendant company. The statement made in

the proposal was found to be false to the knowledge of the deceased insured.

Held that there was a fraudulent suppression of material facts on the part of the insured which vitiated the contract of insurance and that S. 45 of the Insurance Act could not help the plaintiff. AIR 1936 Sind 222; (1899) 2 QB 641, Rel. on. Case law Referred. (Paras 12, 13)

Anno: Insurance Act, S. 45 N. 1; Contract Act, S. 17 N. 1, 3.

(b) Civil P. C. (1908), S. 35 — Principle that costs shall follow the event.

Contract of insurance — Defendant company not repudiating contract till after filing of suit by plaintiff even though notice of claim had been given 2 years back — Defendant company holding out hopes to plaintiff that matter was still under consideration — Even in written statement defendant stating that plaintiff's claim was still under consideration and that plaintiff had precipitated matters by rushing to court — Plaintiff's claim dismissed on one ground out of several grounds raised by defendant for first time in suit — Held that in the circumstances each party should be ordered to bear their own costs. (Para 14)

Anno: C. P. C., S. 35 N. 7.

CASES REFERRED : Paras

(A) (1908) 1908-2 KB 863: 77 LJ KB 1108 4
(B) (1925) 1925 AC 344: 94 LJ PC 60 5, 11
(C) (V24) AIR 1937 Cal 510: 172 Ind Cas 310 6
(D) (V26) AIR 1939 Cal 8: 181 Ind Cas 781 6
(E) (V26) AIR 1939 Bom 161: 182 Ind Cas 127 7
(F) (V21) AIR 1934 Mad 674: 152 Ind Cas 654 7
(G) (1879) 1879-11 Ch D 363: 48 LJ Ch 331 9
(H) (1828) 108 ER 1160: 8 B & C 586 10
(I) (1836) 150 ER 334: 1 M and W 33 10
(J) (V23) AIR 1936 Sind 222: 166 Ind Cas 16 11
(K) (V22) AIR 1935 PC 1: 13 Rang 63 (PC) 11
(L) (1899) 1899-2 QB 641: 69 LJ QB 45 12

A. R. Somanatha Iyer, for Appellant; K. Prahlad Rao, for Respondent.

JUDGMENT : The plaintiff is the widow of one K. Srinivasaiya who died on 8-9-1945 at Koppa. He had insured his life with the defendant company for Rs. 3000/- and the plaintiff sued to recover that sum after the death of the insured. The defendant company denied their liability to pay any sum under the policies on three grounds: first that the insured had suppressed certain material facts and had made some false and fraudulent statements in his proposal and personal declaration forms, which circumstance vitiated the policy; secondly, that the insured had committed suicide and as the same was within 13 months of the date of insurance the contract under the insurance policy had become void and could not be enforced: and thirdly, that the insured had speculated on his life by insuring for much larger sums than he could afford and his taking up the insurance policies of the company in those circumstances was not a 'bona fide' act on his part. The Additional Subordinate Judge, Chickmagalur, who tried the plaintiff's suit decreed it. On appeal, the District Judge of Shimoga reversed that decision and dismissed her claim. The plaintiff has now come up in second appeal.

(2) The two latter pleas, viz. that the deceased had committed suicide and that he had speculated on his life have been found against the defendant company by both the Courts below, and the same cannot and are not pressed before me. It has not been explained what exactly the company meant by the third plea and it does not seem to be by itself any proper defence to a claim on an insurance policy though it might be a piece of evidence and might probabilize other pleas such as suicide or misrepresentation.

(3) The first plea of fraudulent misrepresentation or suppression of material facts by the insured is with regard to statements recorded in columns 8 and 9 of the proposal form Ex. I. Under column 8, the insured was asked to state whether his life had ever been insured in any other company and to give particulars. He has answered that query by stating that he had done so in the Empire of India Life Insurance Co., Ltd., under four endowment policies aggregating Rs. 6000/- and that they were accepted as proposed at ordinary rates without any extra premium being charged or lien or condition imposed. The insured has made a formal declaration at the end of the proposal form that the particulars given by him in the proposal forms were true and that he agreed that the said proposal and any declaration to be made before the Medical Examiner should be the basis of the contract between him and the defendant company. These statements are 'prima facie' false. (After discussion of the evidence His Lordship proceeded :) It must therefore be held that the deceased made a false declaration in his proposal form Ex. I knowing it to be false and the point that falls for consideration is whether the same vitiates his contract of insurance with the defendant company.

(4) It is next contended by the learned counsel for the appellant that under S. 45 of the Mysore Insurance Act (22 of 1939) no policy of life insurance effected before the commencement of the Act shall, after the expiry of two years from the date of the commencement of the Act and no policy of life insurance effected after the coming into force of this Act, shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement in the proposal for insurance, or in any report of a medical officer or referee, or in any other document leading to the issue of the policy was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false. He urges that the statement of the insured regarding the details of his insurance with the Empire of India Life Insurance Co., was not on a material matter and was not fraudulently made. He has relied on a case in — 'Joel v. Law Union and Crown Insurance Co.', (1908) 2 KB 863 (A) where it has been held that the non-disclosure of certain facts in answer to questions put by the medical referee of the insurer were not, in the absence of fraud, sufficient to vitiate the contract of insurance. In that case the insured had been asked some questions in the form of declaration to the medical referee regarding the state of her health prior to the proposal. That declaration form did not state that the answers were to form a part of the basis of the contract. It was found that she had foolishly, but not fraudulently, concealed the fact that she had a ner-

vous breakdown which had necessitated her being confined in an asylum for sometime. It was held that, having regard to the nature and purpose of those questions, the truth of the answers to them was not on the true construction of the documents made part of the basis of the contract and, therefore, could not vitiate the policy. It has further been pointed out by Fletcher Moulton L. J. in that case that the contract of life insurance is one 'uberrama fidei' and that the insurer is entitled to be put in possession of all material information possessed by the insured. The opinion of the insured as to the materiality of that knowledge is of no moment; if a reasonable man would have recognized that it was material to disclose the knowledge in question, it was no excuse to say that the insured had not recognized it to be so.

(5) The next case relied on for the appellant is — 'Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.', 1925 AC 344 (B) where similarly it has been held that when statements made by an insured person in his application for a policy of life insurance are not made the basis of the contract but are to be treated as merely representations, an inaccurate statement is material so as to vitiate the policy if the matters concealed or misrepresented, had they truly been disclosed would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. It is not sufficient that they have merely caused delay in the issue of the policy while further inquiries were being made. In that case the insured, who had been in constant attendance in his office during the five years preceding the date of his policy and was never for a single day laid aside from work, had received some injections by way of tonic under medical advice. Their Lordships held, agreeing with the Judges of the Supreme Court, that those injections were not in the nature of a surgical operation which he should have disclosed and that his omitting any reference to the condition for which he received them were merely in respect of trivial ailments and the insured was not guilty of any inaccuracy in omitting to refer to them.

(6) The next case sought to be relied on for the appellant is — 'Haridasi Debi v. Manufacturers Life Assurance Co. Ltd.', AIR 1937 Cal 510 (C). But the decision in that case was reversed on appeal by a Bench in — 'Manufacturers Life Assurance Co. Ltd. v. Haridasi Debi', AIR 1939 Cal 8 (D). In that case the insured was asked by the Medical Examiner of an Insurance Company whether any members of his family had ever suffered from consumption or insanity, or whether the insured had lived in the same house or associated in any way with a case of tuberculosis. It appeared that the insured, even though he knew that the medical practitioners had diagnosed the disease that his paternal aunt was suffering from as tuberculosis and had arranged for treatment on the basis of that diagnosis, had answered the question in the negative. It was held that the answer was fraudulent since it would amount to active concealment of a fact by one having knowledge or belief of the fact within the meaning of S. 17 of of the Contract Act and that the company was therefore, entitled to repudiate the claim on the policy.

(7) 'Maneklal Kalidas v. Shivlal Dayaram', AIR 1939 Bom 161 (E) is the next case relied on for the appellant. In that case the age of the insured had been admitted and the burden of proving that such admission was procured by fraud was clearly on the Insurance Company. It was, therefore, held that the company must be held bound by their representation that they would not dispute the correctness of the age admitted by them. In — 'Indian Equitable Insurance Co., Ltd. v. Onkarappa', AIR 1934 Mad 674 (F), which is another case relied on for the appellant, in a declaration for the purpose of reviving a policy the insured had stated that he was having good health for a continuous period, but it was found that for sometime between the date of the original policy and the date of the declaration he had suffered from a mild attack of dyspepsia for which he underwent some treatment; it was held that this was not a mis-statement, much less a wiiful misrepresentation. These cases, therefore, do not help the appellant.

(8) The non-disclosure of the details regarding the previous insurance does not appear to be innocent and seems to have been deliberate and fraudulent. The insured had been examined on 11-8-1943 by an Assistant Surgeon on the Government McGan Hospital, Shimoga, holding an M.B.B.S. degree. While answering questions put by him to the insured, the insured has stated that his father had died at the age of 48 years on account of chronic malaria and anaemia and was ill for about a month before he died and that his mother died at the age of 35 years on account of secondary anaemia and that she was ill for about 3 or 4 weeks. On that, that Medical Officer reported that since the weight and measurements of the insured were below average, and his family history were not very good, he could be accepted on a load. While giving answers to the Medical Examiner of the defendant company, one Dr. K. Narasinga, an L.M.P. of the Rayapuram Medical School and a private Medical Practitioner who examined the insured on 19-8-44, the insured declared that his father had died at the age of 40, of Typhoid after being ill for 20 days and that his mother had died at the age of 35 of dysentery, having been ill for 30 days. Apparently family history is considered important. In determining the family history it is required, for instance, that if either the father or the mother had died from tuberculosis, the insured should state if the deceased ever lived in the same house as the proposer and the year in which the death occurred. This direction has been printed in red ink prominently in Col. 12 of the Medical Officer's report of the Empire of India Life Insurance Co., Ltd. showing the value attached to such family history. The insured must have known or thought that if he informed the defendant company that his proposal to the Empire of India Life Insurance Co., had not been accepted as proposed and also had been loaded, the defendant company would make independent enquiries of their own and would very easily discover about the false statements made in the family history columns.

(9) Mr. Prahlada Rao, learned counsel for the respondent, has also referred to a number of cases. In — 'Lond Assurance v. Mansel', (1879) 11 Ch D 363 (G), in the proposal in answer to a question similar to the one in the present case, the insured had stated that he had insured already in two offices at ordinary rates. It was, however, found that his life had been declined by several other insurance companies, and it was held that there had been a material concealment and that the insurance company was entitled to have the contract set aside. It was pointed out by Jessel, M. R. that in cases of insurance a party is required not only to state all matters within

his knowledge, which he believes to be material to the questions of insurance but all which are in point of fact so. If he conceals anything that he knows to be material it is a fraud. But besides that if he conceals anything that may influence the rate of premium which the underwriter may require although he does not know that it would have that effect, such concealment entirely vitiates the policy.

(10) In — 'Lindenan v. Desborough', (1828) 108 ER 1160 (H), it has been held that it is the duty of a party effecting an insurance on life or property to communicate to the under-writer all material facts within his knowledge touching the subject-matter of the insurance and it is a question for the Jury whether any particular fact was or was not material. In that case also Bayley J. remarked:

> "I think that in all cases of insurance, whether of ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured and that the proper question is whether any particular circumstance was in fact material and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often extremely be difficult to show that the party neglecting to give information thought it material."

In — 'Wainwright v. Bland', (1936) 150 ER 334 (I), the suppression or false representation of facts material to be known by the insurers was held to vitiate a policy of insurance although it was in answer to a parol enquiry and the policy was, by the articles of the insurance office, to be void on false answers being given to certain written enquiries.' Where a party gave false answers to verbal enquiries, whether she had effected similar insurances at other office it was held that the policy was thereby avoided as from the nature of the contract, the suppression of any material fact or a false answer to a material question must avoid the policy.

(11) 'Shivkumar v. North British & Mercantile Insurance Co., Ltd., AIR 1936 Sind 222 (J) was a case very similar to the present. In that case in answer to the query whether his life had in the past been proposed for assurance at any office, the insured stated that it had been insured in two companies and that his proposal had not been dropped or withdrawn or accepted by any other office at any extra premium or special terms or had been declined or deferred. It turned out that at the time when these answers were given the assured knew that his proposal of one of those companies had not matured into a policy and that that company and he had been carrying on some correspondence as the former were not prepared to accept the proposal of the insured at the rates of premium prescribed in their table for insuring a first class life and had made counter proposals and no policy had, as a matter of fact, been issued. It was held that the contracts of insurance were 'uberrima fidei' and that what facts are material is a question of fact in each case. All such facts which would influence a reasonable man either to accept or decline a risk or stipulate for a higher premium would be material. The failure by the insured to mention, the fact that his proposal to another Insurance Company had not matured into a policy and the circumstances under which it fell through, and the fact that he was twice insured with a third company were errors and omissions made wilfully or intentionally to induce the defendant company to accept his proposal and so vitiated the policy as these facts were material. In — (1925) AC 344 (B)', it has been observed by the House of Lords that it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would on a fair consideration of the evidence have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. See also — 'Dawsons Bank Ltd. v. Vulcan Insurance Co., Ltd.', AIR 1935 PC 1 (K). It is certain in any event in this case that the defendant company would not have agreed to issue a policy at normal rates, even if they did not reject the proposal, if they had been told that another responsible insurance company had done so shortly before. In that latter case they would have made counter proposals and the insured might or might not have accepted it and the contract might not have materialised at all.

(12) The representation that one company had accepted or refused to accept as normal a proposal on the life of the insured would in my opinion be clearly a circumstance which would materially affect the decision of another company and to induce the latter to either refuse or accept the proposal on similar terms, see — 'Gordan v. Street', (1899) 2 QB 641 (L).

(13) D. W. 1, the Deputy Manager of the defendant company, has stated that if at the time of the proposal it had been brought to the notice of the defendant company that the Empire of India Life Insurance Co., had accepted the insured's proposal with a load of five years, he very much doubted whether his company would have accepted it. 'Fraud' has been described in S. 17 of the Indian Contract Act as meaning and including the active concealment of a fact by one having knowledge of it with intent to deceive another party, or to induce him to enter into a contract. I think it must be held in this case that there has been such a fraud on the part of the insured as would vitiate his contract of insurance with the defendant company and that S. 45 of the Insurance Act does not help the plaintiff. The decision of the lower appellate Court is, therefore, correct.

(14) In the result this appeal fails and is dismissed. As regards costs the lower appellate Court has awarded costs to the defendant. I think this is not a case in which costs should be so awarded. The defendant company did not repudiate the contract till the plaintiff filed her present suit on 11-8-47 though they were given notice of the claim so far back as on 24-5-45. They have pleaded in their written statement that the plaintiff's claim was still under consideration and that the plaintiff had precipitated matters by rushing to Court. They also put forward other objections to the plaintiff's claim which they have not been able to make out. If they had explained to the plaintiff the grounds on which they have now contested her claim and not held out hopes to her that the matter was still under consideration, she might or might not have wasted her time and money to bring this action. I think, therefore, in the circumstances this is a proper case in which the parties should bear their own costs throughout this litigation and I order accordingly.

B/K.S. Appeal dismissed.

A.I.R. 1954 MYSORE 138 (Vol. 41, C.N. 56)

MALLAPPA J. (3-12-1952)

M. S. Srikantaiah, Appellant v. M. Hanumantha Rao and others, Respondents.

Second Appeal No. 404 of 1950-51, from decree of Addl. Dist. Judge, Mysore, in R. A. No. 168 of 1949-50.

(a) **Tort — Negligence — Collision — Suit for damages by injured person — Burden of proof.**

Generally speaking in running down cases, or as they are sometimes called collision on land cases, the plaintiff is not entitled to succeed unless he gives affirmative proof of negligence on the part of the defendant or his servant. Persons who base a claim for negligence must prove negligence. (Para 3)

In a case of this kind, presumptions on question of fact arise and may have to be rebutted. Thus it may be sufficient for the plaintiff to prove that the bus in which he was travelling took a turn and proceeded beyond the road and in turning back to go to the road, it struck against a tree which caused injury to him. Then it is for the defendant to prove that one of the bullock carts going in front turned and stood across the road and he could not avoid taking a turn. If it is proved, then the presumption raised in plaintiff's favour stands rebutted by the defendant's evidence. (Para 3)

(b) Tort — Negligence — Collision — Duty of wiser course — Limits of.

When by the negligent conduct of a vehicle or foot-passenger on the road a collision with another person or vehicle is rendered imminent, the latter will not be liable in respect of a collision if in the stress and agitation of the moment he takes unwise course in seeking to avoid it.

Good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency.

Thus even if it be possible to take a view that it would have been wiser for the driver to apply the brakes though he was quite near the bullock carts, he cannot be expected to be as wise as he or anybody else is expected to be at a cooler moment. AIR 1917 PC 173, Ref. (Para 4)

CASES REFERRED : Paras

(A) (V19) AIR 1932 PC 246: 139 Ind Cas 663 2

(B) (V20) AIR 1933 Cal 178: 141 Ind Cas 248 3

(C) (1915) 1915 SC 205 4

(D) (V4) AIR 1917 PC 173: 46 Ind Cas 319 (PC) 4

V. Krishnamurthy, for Appellant; B. T. Ramaswamy, (for Nos. 1 and 2) and H. Venkatesamurthy, (for No. 3), for Respondents.

JUDGMENT : The appellant filed a suit for damages against 1st respondent, who is the owner of a bus, and respondent 2, who is its driver, on the ground of injuries caused to his left-arm and left finger while he was travelling in their bus, and it is said the bus swerved and passed close to the side of a tree causing the aforesaid injuries to the plaintiff. The evidence of the plaintiff and his brother-in-law P. W. 4, discloses that the bus took a turn from the road in trying to pass two bullock carts which were going in front and that the accident occurred at that time. The evidence of the disinterested witness, D. W. 1, who was sitting in the front seat of the bus by the side of the driver, discloses that one of the bullock carts turned across the road leaving no space for the bus to move, with the result that the driver took a turn to a side, and finding a tree in front, he turned to the left. When he was thus taking the bus back to the road, after avoiding the cart one of the sides of the bus came so close to the tree that it was damaged and the arm of the plaintiff was injured as stated above. The learned Munsiff who gave a decree for plaintiff also thinks that it is probable that one of the bullock carts turned across the road and in consequence the bus had to take a turn to avoid a collision. But he thinks that since the driver had begun to detour at a distance of forty feet from the place of accident, he had enough time to apply the brake and stop the bus. As pointed out by the learned Additional District Judge, the evidence does not show that the bullock cart stood across the road when the driver began to detour the bus. If he did begin to detour the bus at a distance of 40 feet from the place of accident, it must be remembered, he did so to pass by the side of the bullock-carts. The disinterested testimony of D. W. 1 shows that one of the carts took a turn when the bus was almost close by and it is also clear that but for the driver taking a turn to the right, a serious accident to the drivers of the bullock-carts and to the bullocks as well as the passengers in the bus might have happened. The learned Munsiff's conclusion is that the bus was being driven at such a high speed that it was impossible for the driver to have stopped it though he saw the carts at a good distance. This is nobody's case, as the plaintiff does not allege even in the plaint that the bus was being driven at a high speed.

(2) The learned Munsiff appears to be under an impression that the burden of proof shifts on the owner and driver of the bus in a case of this kind when the injured person proves that he has been injured in a bus accident. It is, no doubt, true, that it was observed by their Lordships of the Privy Council in — 'Winnipeg Electric Co. v. Jacob Geel', AIR 1932 PC 246 (A) as follows :

"Apart from the 2nd plaintiff claiming damages for personal injury in a running down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence unless he succeeds in establishing all these matters he must fail. In virtue however of the statute he need only establish the first and the third elements, i.e., that he was injured by the defendant and the extent of his damages; as to the second, the onus is removed from his shoulders and if he established the two matters in respect of which the onus still remained on him, he may close his case because it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a patent defect, or by proof that the plaintiff was the author of his own injury; or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other."

It will first be noticed that even according to the observations of their Lordships, the initial onus rests on plaintiff. If, however, it is observed that in case he proves that he was injured and to what extent he has suffered loss or damage, the burden of proof shifts on to the defendant, it is so on account of the special provisions in S. 62 of the Manitoba Motor Vehicles Act, which was applicable to the case that was being considered by their Lordships. Even otherwise, on plaintiff proving certain facts, it may be possible to presume that unless the defendant proves the contrary, he must have been negligent. These are cases to which the principle of 'res ipsa loquitur' applies. As regards the principle of 'res ipsa loquitur', it is worthwhile giving an extract from Salmond's Law of Torts on the point :

> "The maxim 'res ipsa loquitur' applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused .... On the other hand, if the defendant produces a reasonable explanation, equally consistent with the negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff."

(3) As observed by Costello J. in — 'Baijnath v. Corporation of Calcutta', AIR 1933 Cal 178 (B) :

> "Generally speaking in running down cases or as they are now sometimes called collision on land cases the plaintiff is not entitled to succeed unless he gives affirmative proof of negligence on the part of the defendant or his servant. Persons who base a claim for negligence must prove negligence."

However, as observed by the learned Judge who was dealing with a case in which the vehicle of the defendant struck against a lamp-post :

> "....The law provides that when a vehicle is shown to be under management of the defendant or his servant and an accident occurs such as in the ordinary course of things does not happen, if he who has the management uses proper care, the onus exceptionally rests on the defendant to disprove that the accident arose from want of care."

Similarly in this case, it may have been sufficient for the plaintiff to prove that the bus in which he was travelling took a turn and proceeded beyond the road and in turning back to go to the road, it struck against the tree. If nothing else had been admitted by the plaintiff, it was for the defendant to have proved that one of the bullock carts going in front turned and stood across the road and he could not avoid taking a turn. In a case of this kind, presumptions on questions of fact arise and may have to be rebutted. It is, however, admitted that two bullock carts were going in front, and even the learned Munsiff does not disbelieve the version that one of the carts stood across the road, with the result that if there is anything in the evidence on the side of the plaintiff to raise a presumption in his favour, it stands rebutted by the evidence adduced by the defendants.

(4) Even if it be possible to take a view that it would have been wiser for the driver to apply the brakes though he was quite near the bullock carts, it must be remembered that the driver in a case of this kind cannot be expected to be as wise as he or anybody else be expected to be at a cooler moment. The law on this point as stated in Mr. Gibb's V Edition of the Law of Collisions on Land, at page 11, may be referred to :

> "When by the negligent conduct of a vehicle or foot-passenger on the road a collision with another person or vehicle is rendered imminent, the latter will not be liable in respect of a collision if in the stress and agitation of the moment he takes unwise course in seeking to avoid it."

An illustration given by the learned author on the authority of — 'Wallace v. Bergius', (1915) SC 205 (C) is as follows :

> "A was driving a motor car on the proper side of the road. B was driving in the opposite direction on the same, i.e. wrong side. A swerved at the last moment to his wrong side. B swerved simultaneously; held that A was not liable for the ensuing collision."

At page 12, the learned author again explains :

> "Where a wrong step is taken in the agony of collision it does not follow that the step was a negligent step or one caused by fault. The negligent conduct of A has put upon X a burden which is too heavy for him to discharge in the course of exercising his normal duty of care. It has created a situation calling for extraordinary skill or care, and failure to show that is not negligence or fault in a legal sense."

In the case of — 'Dwarakanath v. Rivers Steam Navigation Co. Ltd.', AIR 1917 PC 173 (D) their Lordships of the Privy Council have observed that :

> "Good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency."

What that limit should be, is stated as follows at page 178 :

> "In a moment of extreme peril and difficulty the Court is not to expect perfect presence of mind, accurate judgment and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might as he knew the circumstances, reasonably think proper he is not to be held guilty of negligence, because upon review of the facts, it can be seen that the course he had adopted was not in fact the best."

(5) In this case, it cannot be said that the 2nd defendant-respondent 2, who was the driver of the bus, was in any way careless or negligent. In my opinion, he has tried his best to avoid the danger of collision between the bus and the bullock cart, and in avoiding a greater danger, he took the alternative and a less dangerous course of taking a turn to a side and getting back into the road after passing the cart. In doing so, it is true that he could not avoid coming close to a tree which struck against the side of the bus and injured the arm of the plaintiff. It cannot be said under the circumstances that the respondents are liable for the injury caused to the plaintiff. The suit against the respondents was, therefore, rightly dismissed.

(6) As regards costs, normally speaking, one would sympathise with the plaintiff and order that both parties should bear their own costs. But, in this case, the plaintiff is aware of the fact that the second defendant was discharged in a criminal Court when he was proceeded against for offences (under Sections 279, 337 and 338, I. P. C.) of rash and negligent driving, and he should have thought twice before filing this suit, and should not have filed it unless he had good reasons to think that he had a case against the defendants. The appeal stands, therefore, dismissed with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1954 MYSORE 140 (Vol. 41, C.N. 57)

VASUDEVAMURTHY J. (17-12-1952)

S. Krishnappa, Appellant v. Kishenlal and another, Respondents.

Second Appeal No. 472 of 1951-52; against decision of 1st Addl. Sub-J.; Sm. C. Court Bangalore, in R. A. No. 36 of 1950-51.

Limitation Act (1908), S. 6 and Art. 182(5) — Applicability of S. 6 to period prescribed by Art. 182(5).

Where a decree-holder dies leaving a minor son during the pendency of his execution application and the application is subsequently dismissed, the minor son can claim the benefit of S. 6 read with Art. 182(5) in respect of a subsequent execution filed by him after attaining majority as a fresh start of limitation is given under Art. 182(5) on the dismissal of the application. 20 Cal 714; 23 Cal 374; 22 All 199 (FB); 29 All 279 and AIR 1935 Lah 144 (1), Rel. on. (Para 5)

Anno: Lim. Act, S. 6 N. 14 Pt. 8 and N. 15.

CASES REFERRED: Paras

(A) ('31) 9 Mys LJ 389 2
(B) ('12) 36 Bom 498: 15 Ind Cas 829 3
(C) ('05) 27 All 704: 2 All LJ 453 4
(D) (V5) AIR 1918 All 183 (2): 40 All 630 (FB) 4
(E) ('10) 16 Mys CCR 68 5
(F) (1900) 22 All 199: 1900 All WN 8 (FB) 5
(G) ('04) 27 All 67: 1904 All WN 163 5
(H) ('07) 29 All 279: 4 All LJ 145 5
(I) ('93) 20 Cal 714 5
(J) ('96) 23 Cal 374 5
(K) (V22) AIR 1935 Lah 144 (1) 5

D. S. Gundachar, for Appellant; Y. M. C. Sharma, for Respondents.

JUDGMENT: In this case one Sevaram Lunidaram Sait obtained a decree for money on 21-2-1938. He applied for execution in Ex. 954/39-40 on 13-5-1940 and it was dismissed on 18-9-1940. Then an uncle of the present respondents, who were then minors, filed Ex. 325/40-41 and the same was dismissed on 22-10-41. On that date it is to be noted that both the respondents were minors. The first decree-holder appears to have attained majority on 27-3-1946 and made the present application Ex. 461/48-49 on 26-3-1949. The judgment-debtor pleaded that the execution application was barred by time, the same not having been filed within three years of the dismissal of the first execution application on 18-9-1940. The Second Munsiff, Bangalore, upheld that contention and held that the execution application was barred. On appeal the First Additional Subordinate Judge, Bangalore, reversed that decision and the judgment-debtor has come up in second appeal.

(2) Mr. D. S. Gundachar, learned Counsel for the appellant, relies strongly on a case in — 'Lakkegowda v. Kempa', 9 Mys LJ 389 (A) and contends that time for executing the decree must be taken to have begun to run even during the lifetime of Lunidaram Sait and under Section 9 of the Limitation Act any subsequent disability of his minor sons could not stop such running. That case, however, is easily distinguishable. In that case the original decree-holder one Kalasegowda was alive when the execution application which he had made on 23-7-1924 was dismissed, and it was sometime after his death that his minor sons made the next execution application. Obviously the right to make a second execution application had accrued in favour of Kalasegowda as soon as the first execution application was dismissed and as time had begun to run against him the minority of his sons would not save the running of time. In the present case the fact that Sevaram Lunidaram Sait had died prior to the dismissal of the first execution application renders — '9 Mys LJ 389 (A)', inapplicable.

(3) Mr. Gundachar has next relied on a case in — 'Bhagwant Ramchandra v. Kaji Mahamad Abas', 36 Bom 498 (B). That was a case of an attempt to secure extension of time provided under Section 48 of the Code of Civil Procedure and not of an execution application. Apparently other and different considerations apply in connection with the period prescribed in S. 43 of the Code, and some of the High Courts have laid down that the disability provisions in the Limitation Act apply only to the periods of limitation prescribed under that Act and not for those prescribed under the Code of Civil Procedure; and in that decision there is no reference to Art. 182 of the Limitation Act.

(4) In 'Bhagat Biharilal v. Ram Nath', 27 All 704 (C) it was held that the person whose minority would, under S. 7 of the Indian Limitation Act, save the operation of limitation, must be a person who was entitled to bring the suit or make an application on the date from which the period of limitation for the particular suit or application was to be reckoned. In that case the person who was entitled to make an application on 21-3-1896 when an order absolute for sale was made was one Beijnath, who was not a minor, and consequently the respondent in that case could not avail himself of the benefit of S. 7. In — 'Kalika Baksh Singh v. Ram Charan', AIR 1918 All 183 (2) (FB) (D) the decree-holders were all of full age when the decree was passed. Limitation had already commenced to run and the subsequent intervention of minority was rightly held, did not entitle the legal representatives to the benefit of S. 7 of the Limitation Act.

(5) In Mysore it has been held in — 'Janamma v. T. Lakshmaiya', 16 Mys CCR 68 (E) that a minor decree-holder is entitled to claim the benefit of S. 7 of the Limitation Act even though he be one of several joint decree-holders all of whom are not under a disability. In support of that conclusion — 'Zamir Hasan v. Sundar', 22 All 199 (FB) (F); — 'Jiwan Ram v. Ram Sarup Ram', 27 All 67 (G); — 'Sri Ram v. Het Ram', 29 All 279 (H); — 'Lolit Mohun v. Janoky Nath', 20 Cal 714 (I) and — 'Norendra Nath v. Bhupendra Narain', 23 Cal 374 (J) have been referred to. In 20 Cal 714 (I) it was pointed out that Art. 179 provides several points of time from which the period of three years will begin to run and for purposes of Limitation Act the period which begins from each point is a sepa-

rate period and if the person entitled is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by the operation of S. 7. This has been approved and followed in 23 Cal 374 (J) at p. 388; 22 All 199 (FB) (F); 29 All 279 (H); and — 'Duni Chand Panna Lal v. Kuldip Singh', AIR 1935 Lah 144 (1) (K). Even a plain reading of Section 6 with Art. 182 of the Limitation Act would lead to the same conclusion. Under Art. 182, limitation prescribed for the execution of a decree is three years from the dates which are prescribed in the third column. Clause (5) of the third column states that the date of the final orders passed on an application made in a previous execution case would be the starting point for the next which may be filed within three years of that date. Section 6 of the Limitation Act prescribes that where a person entitled to make an execution application is on the date from which the period of limitation has to be reckoned a minor, he may do so within the same time after the disability has ceased. In the present case it was only after the death of Lunidaram Sait that the respondents could have made the next execution application and that they could make within three years of the dismissal of the first application which was on 18-9-40. But on that date they were minors and they could, therefore, properly claim protection under S. 6 of the Limitation Act.

(6) I see, therefore, no reason to disturb the judgment of the lower appellate Court. This appeal fails and is dismissed with costs.

B/K.S. Appeal dismissed.

A.I.R. 1954 MYSORE 141 (Vol. 41, C.N. 58)

MEDAPA C. J. AND VENKATA RAMAIYA J.
(5-1-1951)

Amco Ltd. Mysore Road, Bangalore City, Petitioner v. Registrar of Associations for Mysore, New Public Offices, Bangalore and another, Respondents.

Civil Petn. No. 8 of 1950-51.

(a) Constitution of India, Art. 226 — Writ of certiorari — Declaration by Registrar under S. 28, Mysore Labour Act (Mysore Labour Act (13 of 1942), S. 28).

To support a claim for a writ of certiorari to call for the records and quash the declaration made by the Registrar under S. 28 of the Mysore Labour Act, 1942, the petitioner has to show that the declaration constitutes a judicial or quasi-judicial act and not a ministerial one and further that it is made without or in excess of jurisdiction. (Paras 1, 3)

Held that as the declaration made by the Registrar could not be said to be without or in excess of jurisdiction and as the declaration had only a recommendatory or moral force and did not by itself create a liability or impose any penalty, no writ could be sought against it. (Para 6)

Anno: Const. of India, Art. 226 N. 161.

(b) Mysore Labour Act (13 of 1942), Ss. 22, 9 — Permanent and indefinite cessation of work with reduction of employees — Effect of Standing Order No. 16.

Where there is no means of knowing as to how long the cessation of work will continue and whether it will come to an end at all and the persons are deprived of employment without reference to the period during which they have been working and without indicating the period of unemployment, Clause (1) of Schedule II applies and the Standing Order No. 16 cannot be availed of to avoid the requirements of S. 22 of the Act. (Para 4)

CASE REFERRED Para

(A) (V37) AIR 1950 Bom 174: ILR (1950) Bom 578 6

H. S. Rajaiengar, for Petitioner; Advocate-General, (for No. 1) and V. L. Narasimhamurthy and Sm. Ratna Bai Chittur, (for No. 2), for Respondents.

ORDER: This is a petition filed under Article 226 of the Constitution of India for issue of a writ of certiorari to call for the records and quash the declaration made by the Registrar under S. 28 of the Mysore Labour Act. The declaration was to the effect that the announcement by the petitioner to close for a certain date some departments of work carried on in the Amco Factory and dispense with the services of the employees in those branches was a lock-out which for want of notice as required by S. 10(1) of the Act was illegal.

(2) The main contention urged on behalf of the petitioner is that the Standing Order No. 16 provides for temporary closure of the work in certain contingencies and since the Standing Orders including this have been registered, it is not open to the employees to complain against suspension of work or to the Registrar to question the legality of it; the Registrar having found that the notice issued by the petitioner is in conformity with the Standing Order, should have declared it to be in order.

(3) To support the claim for a writ the petitioner has to show that the declaration constitutes a judicial or quasi-judicial act and not a ministerial one and further that it is made without or in excess of jurisdiction. The existence and extent of jurisdiction for the Registrar to make the declaration have to be ascertained from the provisions of the Labour Act. Section 9 of the Act provides for Standing Orders being framed by the employer and for the employees filing objections, if any, to these within 15 days thereafter, for an examination of the same by the Commissioner and after his approval, for registration by the Registrar. On this being done, it is stated that the Standing Orders are to be determinative of the relations between the employer & the employee but these should relate only to the matters specified in Schedule I of the Act. For a change with respect to matters covered Schedule II, notice is made obligatory & a change without such notice is made illegal by Section 22 of the Act.

Admittedly no notice was given by the petitioner of the proposed closure and so the retrenchment of the staff would be illegal if it is a matter which comes under Schedule II as expressed by the Registrar. The earlier statement in the declaration that the closure is in conformity with the Standing Order cannot take away the effect of this as I think what is meant to be conveyed is, the closure no doubt is warranted by Standing Order but the Standing Order itself is ultra vires. The question therefore is whether Standing Order No. 16 relates to item 7 in Schedule I as argued for the petitioner or pertains to item 1 of Schedule II. Schedule I (1) refers to temporary stoppages of work and rights and liability of employers and employees arising therefrom. Schedule II (1) refers to reduction intended to be of permanent or semi-permanent character in the number of per-

sons employed or to be employed not due to force majeure.

Standing Order No. 16 is as follows:

"The Company may at any time or times, in the event of shortage of orders, shortage of back materials, or due to process congestion or for any other trade reason or any cause beyond the control of the Company, stop any machine or machines, department or departments, fully or partially, without notice and without compensation in lieu of notice."

Mere cessation of work for a time without affecting the number or remuneration of the employees does not present any difficulty but this cannot be expected in a business concern carried on on economic considerations; when in this case the stoppage of work is accompanied with the cessation of employment of persons, a doubt arises as to its being beyond the pale of Schedule II. The period of time implied by the word "Temporary" and "semi-temporary" is left uncertain. It is possible that suspension of work and reduction of employees though styled temporary may virtually amount to both being permanent if it be prolonged and indefinite. The notice declared illegal states:

"That there is a shortage of orders coupled with shortage of back material and process congestion compelling the stoppage ..... indefinitely."

There is no means of knowing as to how long the cessation will continue and whether it will come to an end at all. If persons are deprived of employment without reference to the period during which they have been working and without indicating the period of unemployment, it is difficult to hold that clause (1) of Schedule II does not apply. The Standing Order cannot therefore be availed of to avoid the requirements of S. 22 of the Act.

(5) The Registrar has further stated that with the materials the petitioner has, the work can be carried on. From this it may be inferred that there is no force majeure required in No. 1 of Schedule II and the circumstances necessary for resorting to Standing Order No. 16 do not exist. As the notice issued by petitioner is capable of being considered as relating to matters provided for in Schedule II, the requirements of Section 22 are not satisfied and even otherwise the conditions necessary for action under Standing Order No. 16 are not shown to exist, the declaration made by the Registrar cannot be said to be without or in excess of jurisdiction.

(6) Sri Raja Iyengar, learned Counsel for petitioner cited — 'Digambar Ramchandra v. Khandesh Spinning & Weaving Mills. Co. Ltd', AIR 1950 Bom. 174 (A) to show that the standing orders once registered are binding on the parties and must prevail over other considerations. That was a case in which rights of parties had to be determined in arbitration proceedings and not one for a writ. It is not therefore of help in this case. The discussion so far has proceeded on the assumption that the declaration is not a ministerial act. The question whether it is so or not need not be decided since the petition has to fail on the ground that the declaration is not shown to have been made without or in excess of jurisdiction. It may however be mentioned that the argument of the learned Advocate General in regard to the declaration not being a judicial or quasi-judicial act has much force. The formalities associated with a judicial or quasi-judicial proceeding such as notice to parties concerned, opportunity for representation, reasons for the declaration, are not required to be observed. The Registrar is enjoined to make the declaration within three days after an application is filed by the employer or employee irrespective of the difficulty felt in any case to form an opinion in such a short time & the facts necessary for it being available and either party furnishing these. The only consequence following the declaration is that the party contravening it is made liable for prosecution but the Act does not render the declaration conclusive but expressly provides for its being impeached by the accused as illegal. In effect therefore it is nothing more than a 'brutum fulmen'. The acquittal of the petitioner in a case filed by the respondent for alleged contravention of the provisions of the Act supports this. Perhaps because of this consideration, the provision for the Registrar's declaration is not found in the Act of the Indian Parliament. The declaration has therefore but a recommendatory or moral force and does not by itself create a liability or impose any penalty. The declaration is discretionary and when no conditions are prescribed for its exercise and the party against whom it is exercised is allowed to challenge it, how the petitioner can seek a writ — if he deems it necessary at all — alleging the declaration to be a judicial or quasi-judicial act cannot be easily understood.

(7) It seems to me that this is not a case for issue of a writ of certiorari. The petition is, therefore, dismissed and the ad interim order vacated.

A/ D.R.R. Petition dismissed.

A.I.R. 1954 MYSORE 142 (Vol. 41, C.N. 59)

MALLAPPA J. (26-11-1952)

Shivapadegowda and another, Defendants-Appellants v. Anniahchar, Plaintiff-Respondent.

Second Appeal No. 465 of 1949-1950, against decree of Sub.-J., Mysore, in R. A. No. 23 of 1947-48.

(a) **Civil P. C. (1908), O. 21, R. 54 — Absence of attachment and irregular and invalid attachment.**

A judgment-debtor has no right to question an auction sale on the ground of want of attachment or because the attachment was effected in an irregular manner; and a person who purports to purchase the property long after 30 days from the auction sale can have no better right than that of his predecessor. **(Para 2)**

Anno: Civil P. C., O. 21, R. 54 N. 12 Pts. 2 to 4.

(b) **Civil P. C. (1908), O. 21, R. 63 — Claim dismissed for default.**

Where a claim petition is dismissed for default without investigation nothing comes in the way of the claimant or any person under him laying claim to the property or contending that the claimant continued to be the owner of the property till the time of his death in spite of the claimant's failure to get the order in the claim case set aside. (Para 3)

Anno: Civil P. C., O. 21, R. 63 N. 4 and 16.

(c) **Transfer of Property Act (1882), S. 43 — Principle of section does not apply to cases of involuntary sales.** **(Para 4)**

Anno: T. P. Act, S. 43 N. 12 Pt. 3.

(d) **Will — Construction — Mere fact that document calls itself will does not necessarily make it will.** **(Para 6)**

CASES REFERRED: Paras

(A) ('42) 47 Mys HCR 372 2
(B) ('44) 49 Mys HCR 275 3
(C) (V39) AIR 1952 Mys 25: ILR (1952) Mys 113 3
(D) (V25) AIR 1938 Lah 360: 177 Ind Cas 746 4
(E) (V8) AIR 1921 PC 89: 58 Ind Cas 228 (PC) 6
(F) ('47) 52 Mys HCR 187 6

M. Lakshminarayana Rao and C. N. Ramaswamy Sastry, for Appellants; K. R. Gopivallabha Iyengar, for Respondent.

JUDGMENT: The property in respect of which disputes between the parties in this case arose belonged to one Chick Bommiah. He executed on 7-7-41 the original of Ext. G in favour of defendant 2 Chikmalliah concerning his properties, which I may here mention had been hypothecated by him to one Shivaram Singh sometime before the execution of this document. In pursuance of this document Chickmalliah executed the sale deeds exts. L, BBB, MM and MMM dated 28-8-41, 28-10-41, 4-11-41 and 3-9-42 respectively in order to discharge debts due by Chick Bommiah, as mentioned in Ext. G. To all these documents Chick Bommiah's attestation as evidence of his consent has been taken.

In execution of a decree obtained by defendants 4 and 5 against the second defendant, all the properties of Chick Bommiah mentioned in Ext. G were attached and the suit property which is a dry garden land was purchased by the decree-holders as per sale certificate Ext. F. Plaintiff-respondent has purchased the suit property from Defendants 4 and 5. Meanwhile Chick Bommiah filed a claim petition contending that Ext. G did not convey his interest in the properties to Chick Malliah and that he continued to be the owner of the properties. But the claim petition was dismissed for default. Subsequently the suit filed by him for setting aside this order was withdrawn with permission to file a fresh suit. But no such suit has since been shown to have been filed. The plaintiff-respondent is the purchaser of the suit property from defendants 4 and 5.

After the claim case filed by Chick Bommiah was dismissed on 2-9-42, the second defendant Chick Malliah executed on 3-9-42 the sale deed Ext. 8 conveying the suit property to the first defendant, and it is the first defendant who is the first appellant in this case. Defendant 6 has purchased the properties mentioned in Ext. G other than the suit property from the second defendant's son the 3rd defendant in whose favour Chick Bommiah had executed Ext. I on 8-5-43 and the 6th defendant claims to have discharged the debts due by Chick Bommiah under the hypothecation deed executed by him in favour of Shivaram Singh.

(2) The first contention raised by the first defendant who claims the property as having purchased it from the defendant is that the attachment of the suit property was not effective as a copy of the attachment warrant was not affixed on it and a copy of the warrant was not affixed to the Court notice board as required under O. 21, R. 54, Civil P. C. On the other hand, it is contended that as a copy was affixed on one of the properties that were attached and all the properties including the suit property are in the same village, the requirements of the rule are satisfied. There is no evidence whether a copy of the warrant was affixed to the Court notice board, except for the fact that the Amin's report about it is silent. But these two defects, if they are defects, do not arise for consideration in this case as after the attachment and prior to the sale in favour of defendants 4 and 5, the suit property had not been conveyed by the judgment-debtor the second defendant in this case, to either the first defendant or any one else.

By the time the second defendant executed the sale deed Ext. 8 on 3-9-42, the suit property had been sold away in execution of the decree and purchased by defendants 4 and 5 as per the sale certificate Ext. F on 28-7-42. It is no doubt true that the sale was confirmed after the date of the sale deed. But this by itself cannot help the first defendant as the sale was held actually prior to the date of Ext. 8. When the second defendant sold the property to the first defendant, long after 30 days had elapsed from the date of the Court sale, he had ceased to have any interest in the property. In fact, so far as he was concerned he had no right, at the time he sold the property, to question the sale on the ground that the attachment was defective and even if there was no attachment the sale is valid as against the judgment-debtor. I may here refer to the decision reported in — '47 Mys HCR 372 (A)' in which it has been held that

> "An auction-sale held in execution of a decree is not invalid for want of attachment, or because the attachment was effected in an irregular manner."

If the second defendant, the judgment-debtor, had no right to question the sale, a person like the first defendant who purports to purchase the property from him can have no better right than that of his predecessor. The contention of the appellants that the attachment was not valid therefore fails.

(3) The main contention of the appellant is that the property continued to belong to Chikka Bommiah even after he executed Ext. G which purports to be a will in favour of Chikkamalliah and the latter who was the judgment-debtor of defendants 4 and 5 had no title to the suit property when it was sold in execution of the decree against him. The objection of the respondent is that the appellant is not entitled to rely on the title of Chikka Bommiah to the suit property as Chick Bommiah had filed a claim petition & it was dismissed for default. The suit filed by Chick Bommiah within one year from that suit was subsequently withdrawn with permission to file a fresh suit and it is no doubt true that no fresh suit is shown to have been filed since then, and it may be taken that the dismissal of the claim petition has not been set aside in any subsequent suit.

On the other hand, it is contended that as the claim petition was dismissed without investigation, nothing comes in the way of Chick Bommiah or any person under him laying claim to the property or contending that Chick Bommiah continued to be the owner of the property till the time of his death. This contention is not without substance. It was held in — '49 Mys HCR 275 (B)' that where a claim was dismissed for default the order of dismissal was not made as one after investigation and therefore O. 21, 63, Civil P. C., would not apply to the order and there would be no obligation on the part of the claimant to have that order set aside. That decision is fully applicable to the facts of this case.

Therefore, since the claim petition was dismissed for default, it cannot be said that anything comes in the way of Chick Bommiah's title being raised, in spite of his failure to get the order in the claim case set aside. It is no doubt true that the observations made in this case as regards suits filed under O. 21, R. 103 read with Art. 11(a) have not been followed, in the decision reported in —

'Ramchandra Rao v. Subba Rao', AIR 1952 Mys 25 (C), but the actual decision in respect of O. 21, R. 63 which is the point under consideration is binding on this Court. It may be added, that it has been made clear in — 'AIR 1952 Mys 25 (C)' that unless the words 'after investigation' in O. 21, R. 63 are deleted the intention of the Legislature in amending Art. 11 by dropping the words 'after investigation' in it may not be said to have been achieved without doubt.

When reference to the intention of the Legislature for amending Art. 11 is referred to in that decision, it is done, in order to point out that the Legislature's attempt to avoid the distinction that arises by the presence of these words in Art. 11 and the absence of the same in Art. 11(a) shows that the absence of these words in Art. 11(a) is significant. Similarly so long as these words are retained in O. 21, R. 63 which bars a subsequent suit, it must be held that the bar in it only applies to cases in which the Court passes an order in claim cases after investigation. It is therefore open to appellant to contend that Ext. G executed by Chick Bommiah is a will and Chikkamalliah had no interest in the property till the latter died.

(4) Before coming to the consideration of the document, the original of Ext. G, another objection to the appellant contending that the property did not belong to Chikmalliah, but belonged to Chick Bommiah may be disposed of. It might here be stated that it is no doubt true that the rights of both the plaintiff and the first appellant are based on the right of Chikmalliah to the suit property. It is no doubt true that if Chickmalliah had no right in the suit property the first defendant's title to the suit property is as shaky as that of the plaintiff himself. But as it is the plaintiff who has come to Court it is open to the first defendant-appellant to contend that he cannot succeed as he has not derived any title to the suit property since Chickmalliah, his predecessor-in-title, had no right to it.

Then again it is no doubt true that if Chikmalliah had voluntarily sold the suit property to defendants 4 and 5 the predecessors-in-title of plaintiff, he was estopped under S. 43 of the Transfer of Property Act from pleading that it did not belong to him, when at any rate he became the owner of it after Chick Bommiah's death. This principle however does not apply to cases of involuntary sales, such as Court sales in which the interest of Chikmalliah was purchased by defendants 4 and 5, predecessors-in-title of plaintiff. I may here refer to the decision reported in — 'Nanak Chand v. Gandu Ram', AIR 1938 Lah 360 (D) that:

> "Where certain share of a person is sold by a Court sale though in fact he was not entitled to any such share at the time of sale but subsequent to the sale has become entitled to such share, such person in equity would not be compelled to make good from the share which he subsequently acquires the title conveyed to vendee at the court sale because there can be no question of equities in the case of a Court sale."

(5) Having thus found no good reason coming in the way of examining the title of Chickmalliah on the date of the Court sale, it is now necessary to examine the nature of Exhibit G executed by Chick Bommiah on 7-7-41, that is long before the Court sale. The document of which Ext. G is a copy calls itself a will. It states that the properties have been put in possession of Chickmalliah and there is a direction that Chickmalliah should discharge the debts due by him and that he should maintain him and perform his obsequies. It is also stated that he and his progeny might enjoy the properties for ever and concludes by saying that no one else has any interest in the properties conveyed.

(6) Two strong circumstances relied on by the appellant for construing the document as a will are, first, that the document calls itself a will and secondly that the executant states that no one has any interest in the property other than himself. It might be stated here that the mere fact that the document calls itself a will does not necessarily make it a will. I may here refer to the decision reported in — 'Tirugnanpal v. Ponnammal Nadathi', AIR 1921 PC 89 (E) in which it has been held that

> "The mere fact that a document in some places styles itself a Will does not make it a Will."

As regards the second contention, all that is stated at the end of the document is that no one other than the executant of the document had any interest in the properties mentioned in the document. This does not mean that he intended to continue to have any right in the property after the execution of the document. The fact that the properties were delivered to Chikmalliah in whose favour the document was executed so that he and his progeny might enjoy the properties, clearly indicates that the document was executed in order to convey immediate transfer of interest in the properties. I may here refer to a decision of this Court, as it is almost on all fours with this case, and that decision is — 'Konamma v. Kalamma', 52 Mys HCR 187 (F). In that case it was held:

> "On a construction of the deed, that though the document is described as a settlement deed, the description at the head of the document is not the controlling factor to construe its legal effect. It is the substance and not the form which is to be looked into; and the deed of settlement in this case was a gift, what was transferred under the document being possession and enjoyment of properties and the transfer being immediate."

If there is any doubt about the intention of Chick Bommiah in his having executed the original of Ext. G in favour of Chikmalliah, it is made clear that he intended to convey immediately the title to the latter by his having consented to Chickmalliah selling away some of the properties under Exts. L, BBB, MM and MMM referred to above. It is also significant that the document has been executed on a stamp paper of Rs. 37-8-0 which in the case of a will was not necessary. On the whole I feel no doubt that Chikmalliah was the owner of the property at the time of the attachment and sale of the suit property in execution of the decree against him, and that the plaintiff has become the full owner of the property after purchasing it from defendants 4 and 5, who had purchased it in the Court sale.

(7) The next point for consideration is the contention of the 6th defendant—the second appellant that he has discharged the debt due by Chick Bommiah. If he has done so, it will be noticed that he did so as he had purchased other properties of Chick Bommiah. In fact, it has not been proved in this case that any such debt has been discharged though it is mentioned in the sale deed in favour of the 6th defendant that part of the consideration has to be utilised for that purpose.

There is, however, nothing to show that he has paid anything more than the amount for which he bought the properties other than the suit property and he cannot lay claim to get from the

plaintiff any amount said to have been paid by him in order to discharge the hypothecation debt. Similarly, the claim for improvements has not been made out. In the result, I hold that the learned Subordinate Judge was right in decreeing the plaintiff's suit. This appeal stands dismissed with costs and the judgment and decree of the learned Subordinate Judge are confirmed.

V.R.B. Appeal dismissed.

A.I.R. 1954 MYSORE 145 (Vol. 41, C. N. 60)

MEDAPA C. J. AND VASUDEVAMURTHY J.

(28-7-1953)

B. Himantharaju Setty, Plaintiff-Appellant v. Corporation of the City of Bangalore, Defendant-Respondent.

Regular Appeal No. 129 of 1951-52, against decree of Sub-J., Civil Station Bangalore, in O. S. No. 38 of 1950-51.

(a) Transfer of Property Act (1882), S. 55(1)(d) — Execution of indemnity bond — Condition for executing sale-deed.

If the seller insists on the purchaser to execute a meaningless indemnity bond, which in law he cannot do, and makes that a condition for executing the sale-deed which he is bound to execute, the mere fact that he does so by way of abundant caution cannot justify his action in law or save him from the consequences of such unreasonable conduct. (Para 6)

Anno: T. P. Act, S. 55 N. 5.

(b) Transfer of Property Act (1882), S. 55(1)(d) — Sale-deed in favour of purchaser's nominee.

The obligation under S. 55(1)(d) is merely to execute a proper conveyance, the section being silent as to the person in whose favour the conveyance is to be executed. The seller is therefore bound to execute a proper conveyance to the purchaser's nominee. AIR 1935 Bom 340, Foll. (Para 7)

Anno: T. P. Act, S. 55 N. 5 Pt. 13.

CASES REFERRED: Paras

(A) (V22) AIR 1935 Bom 340: 59 Bom 582 7

(B) (1877) 6 Ch D 469: 46 LJ Ch 356 7

V. Krishnamurthy, for Appellant; W. Ekambaram, for Respondent.

JUDGMENT: The plaintiff brought a suit in the Court of the Subordinate Judge, Civil Station, Bangalore, for the recovery of Rs. 6750/-. His suit was dismissed and he has come up in appeal.

(2) The facts of the case which are not in dispute are as follows: At a public auction held by the defendant Corporation in respect of certain building sites, one H. V. Sriranga Setty was the highest bidder for one of the sites, his bid being Rs. 15,200/-. Before the commencement of the auction, he had deposited a sum of Rs. 100/- as required by one of the conditions of sale. Immediately after the auction he paid a further sum of Rs. 4000/- to cover 25 per cent. of the purchase money, through a cheque issued by the plaintiff. He had to pay the balance of the purchase money within 15 days from the date of confirmation of the sale. On 30-7-1946, even before the sale was formally confirmed, Sriranga Setty wrote Ex. C wherein he stated that as he was a permanent resident of Saklespur it was not possible for him to manage the property at Bangalore and that as such the sale-deed of the site may be executed in favour of the plaintiff after receiving from the latter the balance of Rs. 11,100/-.

He also stated in that letter that the earnest money of Rs. 4000/- had in fact been paid by the plaintiff on his behalf. The defendants then wrote to the plaintiff as per Ext. M, dated 5-8-46, in which they enclosed a copy of Sriranga Setty's letter (Ext. C) and asked him to deposit the balance of Rs. 11,100/- if he was agreeable to the arrangement proposed in Ext. C. The plaintiff accordingly deposited Rs. 11,100/- on 20-8-1946. On 11-11-1946 the defendants forwarded a copy of a draft sale-deed which they were willing to execute and asked the plaintiff to pay an additional sum of Rs. 485/- towards cost of stamp paper, drafting and typing fees. They subsequently wrote a reminder Ex. S on 26-3-1947 asking the plaintiff to pay the said amount immediately after which they would arrange for the execution and registration of the sale-deed in his favour. The plaintiff paid this amount also on 9-4-47. He however did not hear anything further from the defendants about the execution of the sale-deed and he therefore wrote Ex. W on 19-6-47 asking them to expedite the matter.

At this stage, on 17-7-47, the defendants wrote Ex. Y to the plaintiff informing him that the Standing Committee was objecting to execute the sale-deed in his favour and inquiring if it could be drafted in favour of Sriranga Setty to which the plaintiff replied on 19-11-47 as per Ext. Z drawing their attention to the previous correspondence and pointing out that the Municipal Commission (as the defendants were then called) could not raise such objection then as they had accepted from him Rs. 4000/- towards earnest money and Rs. 11,100/- being the balance of purchase money as also the cost of stamp paper, etc., amounting to Rs. 485/-. He further stated that Sriranga Setty was his nephew and not a third party and that the arrangement between them was only a transfer and insisted that the sale-deed should be executed in his favour.

He was then informed by a reply dated 25-11-47 (as per Ex. AA) that the Standing Committee of the Municipal Commission had decided against him and as such the sale-deed could only be executed in the name of Sriranga Setty. The stamp paper, which in the meanwhile had been purchased out of plaintiff's money, was returned to him with that letter. The plaintiff then issued a notice, Ext. BB, dated 12-1-48, as required by S. 38 of the Bangalore Municipal Law and demanded the return of purchase money with interest, etc., aggregating Rs. 16559-9-0. The Commission did not reply to this notice but simply sent him a copy of letter Ext. CC, dated 23-3-48, addressed by them to Sriranga Setty in which they had enquired whether he would indemnify the Municipal Commission by executing the necessary bond in their favour. The plaintiff wrote back to say that he was standing by his statutory notice. Sriranga Setty also refused to execute an indemnity bond as required by them.

The defendants again wrote as per Ex. EE on 8-7-48 to the plaintiff's counsel forwarding a resolution of the Municipal Commission dated 24-6-48 to the effect that the sale-deed may be executed in favour of the plaintiff on his executing an indemnity bond as a safeguard against any possible claims by Sriranga Setty or his heirs. This evoked a reply from the plaintiff as per Ext. VIII that he stood by his demand notice issued through his advocate on 12-1-1948. Thereupon the Municipal Commission wrote to Sriranga Setty on 4-9-1948 as per Ext. GG asking him to pay the balance of Rs. 11,100/- as the plaintiff had refused to buy the site. Sriranga Setty refused to do so. He wrote as per Ex. K and asked the defendants to refund the entire sum to the plaintiff. The plaintiff however subsequently complained to the Gov-

ernment whereupon the defendants returned a sum of Rs. 11,149-1-0 by cheque on 2-6-1949 and refused to pay the earnest money of Rs. 4100/- and other charges and hence his present suit.

(3) The contention on behalf of the Corporation was that all along they were agreeable to execute the sale-deed in favour of the plaintiff provided they were safeguarded against any claim from the highest bidder, Sriranga Setty, and that the plaintiff and Sriranga Setty had unreasonably refused to give such an indemnity. They further contended that there was no privity of contract between the plaintiff and the defendants and that as such the plaintiff was not entitled to claim the suit amount.

(4) Sriranga Setty has been examined in the case as P. W. 1. He has unequivocally declared that his maternal uncle, the plaintiff, had advanced Rs. 4000/- towards earnest money by means of a cheque issued by him in favour of the defendants on 19-6-1946. He has also admitted that he wrote Ext. C wherein he has not indicated any objection to the refund of Rs. 4000/- to the plaintiff.

(5) We think the judgment of the lower Court is clearly wrong and cannot be supported. Mr. W. Ekambaram, learned counsel for the respondents, urged before us that there was no privity of contract between the plaintiff and the defendants. Such a plea is unintelligible as the defendants in this case have chosen to accept the arrangement by which the amount paid by Sriranga Setty was to be treated as having been paid by the plaintiff and to execute a sale-deed in his favour. They have also called for and received the necessary expenses for stamp and registration and sent to him a draft sale-deed.

Sriranga Setty has told them definitely in Ext. C and Ex. K that the sum of Rs. 4000/- paid towards earnest money really belongs to the plaintiff, his close relation, and he has not at any time subsequent thereto objected to the refund of the same to the plaintiff or to the execution of the sale-deed in his favour. The plaintiff accepted the offer made by the defendants as per Ext. M and in fact paid the balance of the purchase money as also stamp and registration charges, etc. There is therefore no substance in the contention relating to privity of contract.

(6) It was next urged by Mr. Ekambaram that the plaintiff or Sriranga Setty might easily have executed the indemnity bond demanded of them when the defendants would have executed a sale-deed in favour of the plaintiff without any difficulty and that as the indemnity bond was asked for with a view to safeguarding the interest of the Corporation, the demand for it was 'bona fide'. As Sriranga Setty had himself written the letters Ext. C and Ex. K there was no possibility of any claim being made by him against the Corporation and as such there was no question of his giving an indemnity bond in the matter. Nor can the plaintiff be required to give such a bond. If the defendants insisted on such a meaningless bond, which in law they could not do, and made that a condition for executing a sale-deed which they were bound to do, the mere fact that they did so by way of abundant caution cannot justify their action, in law, or save them from the consequences of such unreasonable conduct.

(7) Mr. Ekambaram further contended that the acceptance of the arrangement with the plaintiff has been by the Secretary and not by the President of the Municipal Commission and that the Secretary had no power to commit the Municipal Commission by such an acceptance. Here again the defendants are on slippery ground. Mr. T. S. Desikachar who was the Manager of the Municipal Commission has admitted in his evidence that the

> "President sees every 'tappal'. At times the Secretary used to act according to the instructions of the President..... Ex. M was not brought to the notice of the President. Ext. M is a routine paper. On routine papers the Secretary had power to act."

That is clearly an understandable position. By writing Ext. M to the plaintiff the Secretary was not imposing any additional or new burden or responsibility on the Municipal Commission. He was not making any new contract with the plaintiff. The Municipal Commission had merely to execute the sale-deed in favour of the plaintiff instead of the original bidder, Sriranga Setty, according to the latter's instructions. One of the duties cast on the vendor by S. 55 (1) (d) of the Transfer of Property Act is, on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place. The obligation under the sub-section is merely to execute a proper conveyance, the section being silent as to the person in whose favour the conveyance is to be executed.

In a case decided by Beaumont C. J. and Rangnekar J. and reported in — 'Rahimtulla v. Official Assignee', AIR 1935 Bom 340 (A), it has been pointed out that unless there is anything express in the contract to convey, entitling the vendor to insist that he is not bound to execute any conveyance except in the name of the purchaser, the vendor is bound to execute a proper conveyance to the purchaser 'or his nominee'. The party to a contract may dispose of the benefit of the same in favour of any other person. Such a disposition may be made either by way of assignment or by a sale or in any other way. In England the law appears to be quite clear that a purchaser can always demand a conveyance from the vendor not only in his own favour, but in favour of any person as he would direct and the vendor cannot refuse to execute a conveyance in favour of the nominee of the purchaser. See — 'Earl of Egmont v. Smith', (1877) 6 Ch D 469 at p. 474 (B), where Jessel, M. R., has pointed out that

> "an ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct."

It is observed in Halsbury's Laws of England, Vol. 29, Hailsham Edn., 1938, at p. 411—

> "Para 558. As a rule the conveyance is made to the purchaser, but, provided the vendor is not prejudiced, the purchaser can direct it to be made to a nominee, for such estate and interest, not exceeding the interest purchased, as he pleases. Where the grantee is to enter into covenants with the vendor, the purchaser cannot substitute a new covenantor for himself without the vendor's consent, and in such a case the nominee must not be a person under disability."

> "Para 559. When the purchaser has disposed of the land before the completion of the contract, it is usual, for the purpose of saving the expense of the second conveyance and double stamp duty, to take the assurance direct to the second purchaser. The disposition may be either by assignment of the contract or resale of the land. Upon an assignment of the contract the

original purchaser is not usually a necessary party to the conveyance, nor is he a necessary party where there is a resale without increase of price."

In such a course there is no additional burden cast on the vendor as he receives full consideration and goes out of the scene. It is not urged in this case that the purchaser had to perform any other obligation or that any personal qualification of the purchaser was a material element of the contract of sale, or that there was any special contract which would override the general rights of the parties.

(8) In the result, we think that the judgment and decree of the learned Subordinate Judge must be set aside and the suit allowed.

(9) As regards the amount for which a decree has to be passed in favour of the plaintiff, it is contended by Mr. Ekambaram that the plaintiff cannot claim interest on Rs. 4100/- from 19-6-46 and on Rs. 11,100/- from 5-8-46 as he has done. By virtue of S. 55 (6) (b) of the T. P. Act, a purchaser is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property for the purchase money paid by him in anticipation of the delivery and also for interest thereon and if the sale falls through for no fault of his and he properly declines to accept the delivery, also for earnest money.

The defendants adopted a curious and vacillating attitude and their refusal to refund the amount even when demanded through a lawyer's notice, Exhibit BB, which expressly claimed interest from dates of deposit clearly entitles the plaintiff to claim it by way of damages. The defendants had the use of a large sum of money of the plaintiff and the latter who is described as a merchant was deprived of the use of it and is entitled to be compensated for the same. The interest claimed at 6 per cent. per annum is not unreasonable or excessive. The plaintiff cannot however claim such interest either from 19-6-46 the date of the sale or 5-8-46 but can only do so from 20-8-46 by which time the cheques issued by the plaintiff had been realised and the entire purchase money was made up.

(10) We therefore allow this appeal and there will be a decree in favour of the plaintiff as prayed for but with interest only from 20-8-1946 up to date of payment. The plaintiff will have his costs from the defendants both here and in the Court below.

V.R.B. Appeal allowed.

A.I.R. 1954 MYSORE 147 (Vol. 41, C.N. 61)

MALLAPPA J. (11-3-1953)

Puttappa, Petitioner v. Maligamma and others, Respondents.

Civil Revn. Petn. No. 389 of 1952-53, against order of Sub. J., Hassan, D/- 11-8-1952.

Civil P. C. (1908), O. 47, R. 7 and S. 115 — Revision.

Maintainability of appeal against order in review not objected to before appellate Court — Order of appellate Court, setting aside order in review, just, while order in review unjust: Held that in the absence of objection to maintainability of appeal it was to be taken that the opposite party conceded that the error which occasioned the review fell within Cl. (a), (b) or (c) of O. 47, R. 7 (1): Held further that the appellate order in such a case will not be interfered with in revision merely on the ground that the Court of appeal had no jurisdiction: Case law referred to. (Para 4)

Anno: C.P.C., S. 115 N. 27; O. 47, R. 7 N. 16.

CASES REFERRED: Paras

(A) ('26) 4 Mys LJ 53 4
(B) (V16) AIR 1929 Rang 198: 120 Ind Cas 693 4
(C) (V8) AIR 1921 Lah 265: 67 Ind Cas 278 4
(D) ('31) 9 Mys LJ 433 4

E. Kanakasabhapathy, for Petitioner; R. V. Srinivasaiya, for Respondent.

ORDER: This is a revision petition against the decision in Misc. Appeal No. 7/51-52 on the file of the Subordinate Judge, Hassan, setting aside the order of review in Mis. 142 of 49-50 on the file of the Munsiff, Hassan, granting review of the decree in O. S. No. 351 of 48-49.

(2) The property in dispute was purchased by Puttappa, the present petitioner, from one Mahadeviah and his son Renukaradhya. Bramarambha, their minor daughter, filed a suit claiming the property as belonging to her deceased mother and after her death Malligamma respondent 1 in this case was brought on record, as the L. R. of Bramarambha. The ultimate decision of the High Court in that case is that Malligamma was entitled to ¼th share of the property while Puttappa the present petitioner was entitled to ¾th share. When Malligamma was executing the decree in her favour, the three younger brothers of Puttappa, the petitioner in this case, filed a suit for declaration of their title to the property in dispute and for an injunction restraining Malligamma from executing the decree in her favour. Puttappa, the present petitioner, was also made a defendant, but he remained 'ex parte'. Thereafter there was a compromise between the petitioner's brothers and Malligamma, the latter being allowed to take ¼th share, ¾th share being allowed to be taken by the three brothers. There was a decree in accordance with this compromise. But Puttappa, the present petitioner, filed a review petition saying that he was not aware of the compromise and that he should get the entire ¼th share that had fallen to the share of Malligamma or at least ¾th of her share. The review was granted by the learned Munsiff.

(3) It will be noticed that the learned Munsiff was wrong in allowing the review petition and giving the petitioner ¾th of the ¼th share that had fallen to the share of Malligamma. The petitioner knew full well that he who had purchased the property got only ¾th's share and if at all his brothers had any claim to it as members of an undivided family, they could only get ¾th of the ¾th's share, which according to the High Court decision he was entitled to in the property. He should have, therefore, sought for getting ¼th share in the ¾th share to which he and his brothers were entitled to. But this he did not apply for, as evidently he and his brothers intended to deprive Malligamma of her ¼th share in the said property. The learned Subordinate Judge was therefore right in setting aside the order passed in review.

(4) It is contended that whatever might be the merits of the case, the learned Subordinate Judge was wrong in interfering with the order in review in an appeal filed against it. As has been held in — '4 Mys LJ 53 (A)':

"If a Court has erroneously granted a review, unless the error falls under cls. (a), (b) or (c) of sub-r. (1) of R. 7 of O. 47, the order granting the review cannot be objected to either by way of appeal or in revision."

Unfortunately for the petitioner in this case no objection was taken in the Court of appeal, about

the maintainability of the appeal, and in the absence of any such objection it must be taken that it was conceded that the error which occasioned the review fell under cls. (a), (b) or (c) of sub-r. (1) of R. 7 of O. 47. Moreover, in this case it has been shown that the order of the appellate Court is just, while the order passed by the learned Munsiff in review is unjust. In such cases the Court of revision is not bound to interfere merely on the ground that the Court of appeal had no jurisdiction to sit in appeal over the order and it is so particularly when the question of lack of jurisdiction was not raised in the Court of appeal. As has been observed in — 'M. T. T. K. M. M. N. Chettyar Firm v. V. K. P. A. N. M. Firm', AIR 1929 Rang 198 (B) that:

"Where the appellate Court has decided correctly but has decided without jurisdiction by holding that appeal lay where appeal did not lie, High Court will not interfere in revision."

I may here refer to the decision in — 'Ganda Ram v. Sundar Lal', AIR 1921 Lah 265 (C) that:

"The High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect."

It has also been observed in — 'Doddamallappa Setty v. Khanderaya Setty', 9 Mys LJ 433 (D) that:

".....the revisional jurisdiction is exercised in the ends of justice, and not in furtherance of purely technical grounds, especially at the instance of a party who had the assistance of counsel and who himself was responsible for the course adopted by the opponent and the lower Court."

(5) No case is, therefore, made out for interference in revision in this case. The revision petition stands dismissed. The parties will bear their own costs.

M.K.S. Petition dismissed.

A.I.R. 1954 MYSORE 148 (Vol. 41, C.N. 62)

BALAKRISHNAIYA J. (5-3-1953)

A. V. Krishnappa Reddy, plaintiff-Petitioner v. Venkatappareddy and others, Defendants-Respondents.

Civil Revn. Petn. No. 340 of 1952-53, against order of Principal Dist. J., Bangalore, D/- 29-7-1952.

(a) Civil P. C. (1908), O. 33, R. 1 — Suit filed in ordinary way can be continued at later stage as pauper suit provided circumstances justify it. **(Para 3)**

Anno: Civil P. C., O. 33, R. 1 N. 2 Pt. 1.

(b) Civil P. C. (1908), O. 7, R. 11 and O. 33, R. 1 — Deficit court-fee not paid but leave to continue suit as pauper asked for.

Order 7, R. 11 does not apply to applications to sue in forma pauperis. When the plaintiff is given time to make up the deficiency in the court-fee and within the time so allowed, he applies for permission to continue the suit as a pauper, the application should be considered on merits and the plaint should not be rejected for failure to pay the deficient court-fee. AIR 1936 Cal 221, Relied on. (Para 3)

Anno: Civil P. C., O. 7, R. 11 N. 5; O. 33 R. 1 N. 2.

(c) Civil P. C. (1908), O. 33, R. 2 — Leave asked for, at later stage of suit — Procedure.

The procedure in Rr. 2-8 is essentially meant for applications instituted in forma pauperis at the inception. When a suit has already been registered in the ordinary way, and leave is asked for at later stage, it is obviously unnecessary to include a plaint as required under R. 2. The Court in the exercise of its inherent power should dispose of the application on merits after notice to the opposite side. (Para 4)

Anno: Civil P. C., O. 33, R. 2 N. 1.

CASES REFERRED: Paras

(A) (V23) AIR 1936 Cal 221: 162 Ind Cas 689 3
(B) (V20) AIR 1933 Cal 238: 141 Ind Cas 135 3
(C) (V16) AIR 1929 Mad 828: 53 Mad 43 4
(D) (V38) AIR 1951 Mad 841: 1951-1 Mad LJ 446 4

N. V. Ramachandra Rao, for Petitioner; B. V. Rama Rao, for Respondents.

ORDER: This revision petition is directed against the order of the District Judge, Bangalore, rejecting I. A. No. 3 filed by the plaintiff in O. S. No. 81 of 1951-52.

(2) The said original suit was filed by the plaintiff for partition and possession of his 1/4th share in the family properties, alleging that he was in joint possession, on payment of a fixed court-fee of Rs. 50/-. Later, an amendment of the plaint to include a prayer for cancellation of a release deed was sought for and granted by the Court. In consequence of the amendment granted, the plaintiff was required to pay an additional court-fee of Rs. 975/-. Pleading his inability to meet the heavy demand, he filed an application (I A. No. 3) under O. 33, R. 1, Civil P. C., through his counsel for permission to continue the suit as a pauper. The trial Court held that such an application in pending proceedings is not maintainable.

(3) Mr. Rama Rao, the learned Advocate for the respondent, frankly admitted that he is unable to support the order of the trial Court on the grounds mentioned therein, but contended that the application is liable to be rejected on other grounds. I am unable to agree with the learned District Judge that the suit filed in the ordinary way could not be continued at a later stage as a pauper suit. It is a recognised principle that the Court which has the power to permit, on certain grounds, the institution of a suit in forma pauperis, be deemed to possess power to continue the suit on similar grounds at a later stage provided the then circumstances justify such a course.

In — 'Mahomed Fateh Nasib v. Saradindu Mukerjee', AIR 1936 Cal 221 (A), where a suit had been registered as an ordinary suit and the plaintiff did not pay the deficient court-fee but applied for permission to continue the suit as a pauper, it was held that the application should not be rejected on the ground that the suit had already been registered as an ordinary suit.

It was contended by the respondent that the plaintiff, not having paid the requisite court-fee as directed, the suit should have been dismissed under O. 7, R. 11, Civil P. C. Order 7, R. 11, does not apply to applications to sue in forma pauperis. When the plaintiff is given time to make up the deficiency in the court-fee and within the time so allowed, he applies for permission to continue the suit as a pauper, the application should be considered on merits and the plaint should not be rejected for failure to pay the deficient court-fee (Vide — 'Surendra Chandra v. Showdamini Roy', AIR 1933 Cal 238 (B)). The same High Court has laid down in — 'AIR 1936 Cal 221 (A)' that

"the mandatory provisions contained in O. 7, R. 11, are intended for cases when no other complications intervene and the Court has sufficient inherent power to depart from the normal

procedure to suit the exigencies of the situation." Order 33 prescribes a special procedure to aid a person not having sufficient means to pay the court-fee to institute a suit as a pauper provided he fulfils the conditions laid down in the said Order and there is no prohibition to extend the benefit of the said provision at any stage of the suit or to withdraw the concession and dispauper the suitor if circumstances justify such a procedure.

(4) It is next argued that the application is liable to be rejected on the ground that it was not presented in person as required by R. 3 of O. 33. Rule 1 of O. 33 enables the filing of suits in forma pauperis. Rule 2 prescribes the contents of the petition to include a plaint in detail and under R. 3, the application has to be presented in person or by a duly authorised agent. Rule 8 provides for registration of the application, when admitted, as a regular suit. This procedure is essentially meant for applications instituted in forma pauperis at the inception. When a suit has already been registered in the ordinary way, it is obviously unnecessary to include a plaint as required under R. 2. In a similar case — 'Subba Rao v. Venkataratnam', AIR 1929 Mad 828 (C), the Madras High Court held that an application should not be dismissed because it was not in accordance with Rr. 2 to 8 of O. 33, Civil P. C., but the Court in the exercise of its inherent power should dispose of the application on merits after notice to the opposite side. The respondent relied upon a recent decision reported in — 'Parvathi Ammal v. Meenakshi Ammal', AIR 1951 Mad 841 (D) in support of the proposition that an application presented not in person by the applicant but through the counsel was held to have been not validly presented under O. 33. That case is distinguishable from the facts of the present petition, as in that case it was held to be a fresh suit and not an application in pending proceedings to continue the suit as a pauper. In that case, the original plaint was returned as not being within the jurisdiction of the Court, and the case ended. It was re-presented after making an amendment suo motu to bring it within the jurisdiction of the same Court. It was therefore held that being a fresh suit the petitioner had not complied with the provision that it should have been presented in person.

In the circumstances of the present case, there is no doubt that an application to continue the suit as a pauper is maintainable and should have been enquired into and disposed of on merits. I, therefore, set aside the order of the trial Court and remit the application back for disposal on merits. The costs of this petition will be costs in the cause and will abide the final result; Advocate's fee is Rs. 15/-.

R.G.D. Case remanded.

A.I.R. 1954 MYSORE 149 (Vol. 41, C.N. 63)

VENKATARAMAIYA AND MALLAPPA JJ.

(5-3-1953)

Papiahachary, Decree-holder-Petitioner v. Gurusamappa and others, Judgment-debtors-Respondents.

Civil Revn. Petn. No. 69 of 1952-53, against order of Sm. C. C. J., Bangalore, D/- 20-3-1952.

(a) Limitation Act (1908), Art. 182 — Revival and continuation.

First execution application for sale of certain movables filed within limitation — Claim by third person and stay of sale of movables — Execution dismissed on 21-12-1943 for satistical purposes as there was no other prayer — Second execution for sale of same movables dismissed on 6-3-1945 — Claim allowed on compromise and attachment of movables raised — Third execution filed on 23-12-1948 praying for arrest of judgment-debtor and for attachment of other movables: Held that the third execution could not be treated as a continuation of the previous applications as the prayers for relief were not the same as in the previous applications and as such it was barred under Art. 182(5). (Para 4)

Anno: Lim. Act, Art. 182 N. 143 Pt. 20.

(b) Limitation Act (1908), S. 20 — Duly authorised agent.

A claimant of attached property cannot be said to be the agent of the judgment-debtor within the meaning of S. 20. In fact their interests are adverse to each other. (Para 5)

Anno: Lim. Act, S. 20 N. 18.

CASE REFERRED: Para

(A) ('41) 19 Mys LJ 82 2

Y. Adinarayan Rao, for Petitioner; H. Nanjunda Sastry, for Respondents Nos. 1 to 3.

ORDER: The short point for consideration in this revision petition is whether Execution Application No. 889 of 48-49 on the file of the Court of Small Causes, Bangalore, filed on 23-12-1948 is in time or whether it is barred by time. The decree which is sought to be executed was passed on 10-6-1940. In Execution Case No. 976 of 41-42 certain moveables and immoveables were attached but the execution application was dismissed as being old and the attachment was ordered to subsist. In Execution No. 84 of 43-44 the moveables attached in the previous execution case were sought to be sold. But a third person one Venkatachalam, who is not the judgment-debtor, filed a suit in O. S. No. 224 of 43-44 claiming that the moveables attached are his and got an order to stay sale of the moveables sought to be sold in that execution case. The result was that the execution application was dismissed as there was no prayer in that execution application for proceeding against the judgment-debtor in respect of any other property or by his arrest. Thereafter O. S. No. 224 of 43-44 was dismissed for default on 30-11-1944.

Then the decree-holder filed Execution Case No. 459 of 44-45 for proceeding with the sale of the moveables already referred to but this was dismissed on 6-3-1945 on account of default of the decree-holder to pay process fee and to file a copy of the attachment list. The original suit was, however, restored to file on 20-12-1946 and ended in a compromise decree on 17-2-1948. According to the compromise the claimant paid Rs. 140/- with the result that the attachment of the moveables is raised and his claim to the same is allowed. The decree-holder then filed Execution 889 of 48-49 on 23-12-48 for arrest of the judgment-debtor and for attachment of other moveables. It will be noticed that this execution application is not only beyond three years from 21-12-1943 on which Execution Case No. 84 of 43-44 was dismissed but also more than 3 years from 6-3-1945 on which Execution No. 459 of 44-45 was dismissed. The Execution Application No. 889 of 48-49 is on the face of it barred by time.

(2) It has however to be observed that it has been established by a long series of cases in our High Court that where an execution application is dismissed for satistical purposes on the ground that execution has been stayed or dismissed for no fault of decree-holder the first execution application after the bar is removed in case it had been stayed, must be treated as an application for a

revival of the previous execution case dismissed for satistical purposes and not as a fresh execution application for purposes of Arts. 181 and 182, Limitation Act. We need refer only to — 'Venkate Gowda v. Mudli Setty', 19 Mys LJ 82 (A) and the case law referred to in it.

(3) It is contended that since Execution No. 84 of 43-44 was stayed pending decision in O. S. No. 224 of 43-44, and that case must be deemed to be pending till it was disposed of by compromise on 17-2-1948, the period between the stay and the compromise must be excluded. What was stayed however is sale of moveables sought to be sold in Execution No. 84 of 43-44 and the decree-holder was not prevented by any stay order from proceedings against the other properties of the judgment-debtor or by his arrest. As such, while a fresh execution application after the stay order ceased to be operative, for proceeding with execution of the decree to the extent the stay order had come in the way of execution of the decree may be taken as a revival of the old execution case, it cannot be said that an execution application for execution of the decree to the extent the stay order did not come in the way of its execution, is a revival of the old case and that it is not governed by Arts. 181 and 182 if it is filed beyond time as provided in those articles.

(4) When an execution application is dismissed for statistical purposes as, for instance, on the ground that it is one year old, though the decree-holder is diligent, it is contended that it is open to him to file a fresh execution application to continue the previous execution application dismissed for no fault of his. The new application filed to revive the old proceedings is not barred though it is filed more than 12 years after the decree but this contention is correct only to the extent that the new application seeks relief claimed in the previous execution application dismissed for statistical purposes. If there is a fresh prayer, the new application must be treated as a fresh application to that extent. In this case the contention would have been held good in case the prayer in Execution 459 of 44-45 was the same as the prayer in Execution No. 889 of 48-49 as in such cases it may have to be taken that the disposal in the previous case is for statistical purposes and the later execution application in which the same prayer is made is a continuation of the previous execution application dismissed for statistical purposes. In this case, however, attachment of the moveables for the sale of which Execution No. 84 of 43-44 was filed is not sought. In fact the attachment of those moveables has been raised. What is sought is the attachment of other moveables of the judgment-debtor, i.e., the prayers in the two execution applications are not the same though they are similar. It cannot therefore be said in any sense that Execution No. 889 of 48-49 can be taken as a continuation of Execution No. 84 of 43-44 even if it is deemed that the disposal of that execution case is merely for statistical purposes. Then again there is now a prayer for arrest of the judgment-debtor and in respect of this prayer it cannot be said that it is even similar to the prayer made in Execution No. 84 of 43-44. It was also contended that Execution No. 975 of 41-42 was disposed of for statistical purposes. It is admitted that the prayer in that case was for attachment of certain immoveables and for attachment and sale of moveables already referred to. As such, the present execution application, i.e., Execution No. 889 of 48-49 on the file of the Court of Small Causes, Bangalore, in which the relief sought is attachment and sale of other moveables and arrest of judgment-debtor can, under no circumstances, be deemed to be a continuation of Execution No. 975 of 41-42 in which no such prayer had been made. As the prayer in the present execution application is totally different from the previous execution applications, the contention of the decree-holder that the present execution application must be deemed to be a continuation of either Execution No. 84 of 43-44 or of 975 of 41-42 fails.

(5) There is only one other contention raised on behalf of the decree-holder for the purpose of showing that the execution application under consideration is in time. It is contended that a sum of Rs. 140/- has been paid by the plaintiff in O. S. No. 224 of 43-44 and that payment must be deemed to be the payment on behalf of the judgment-debtor for purposes of S. 20, Limitation Act. In the first place this point has not been relied upon in the execution application and in the second place it cannot be said under any circumstances that the claimant is an agent of the judgment-debtor and in fact their interests are adverse to each other. Moreover, no allegation is made and no attempt is made to prove that payment is either towards the interest or towards the principal and that the payment has been evidenced by an acknowledgment in the hand-writing of, or in a writing signed by, the person making the payment.

(6) On the whole there is no substance in any of the contentions raised by the decree-holder. The lower Court was right in holding that the execution application is time barred. This revision petition is therefore dismissed with costs.

K.S.B. Revision dismissed.

A.I.R. 1954 MYSORE 150 (Vol. 41, C.N. 64)

VENKATARAMAIYA J. (18-2-1954)

M. Seshagiri Rao, Petitioner v. The State of Mysore, Complainant-Respondent.

Criminal Revn. Petn. No. 300 of 1953, against conviction and sentence passed by Special First Class Magistrate, Ramanagaram, in C. C. No. 949 of 1953.

(a) Mysore Police Act (5 of 1908), S. 56(o) — Scope.

For the purpose of Cl. (o) of S. 56, it is enough that in a public street indecent language is indulged in with or without particular reference to an individual and so the non-examination of any one cannot have the significance which it may otherwise have, provided there is proof of the alleged utterance. (Para 1)

(b) Criminal P. C. (1898), S. 263 — Contents of judgment.

The judgment in a summary trial should be such as to enable a higher Court to know from a perusal of the same, the nature of the case, substance of the evidence and the raesons for the conclusion arrived at. The accused is under a handicap in challenging the conviction in a summary trial but this should not lead to his being dealt with arbitrarily. (Para 2)

Anno: Cr. P. C., S. 263 N. 2.

(c) Criminal P. C. (1898), Ss. 265 and 537 — Failure to sign judgment — Effect.

The omission of the Magistrate to put his signature on the judgment by writing his name instead of the initials is a mere irregularity not affecting the legality of the conviction. It is desirable, however, that Magistrates should avoid this and not give room for criticism on

the score of the provisions of the Code not being duly complied with. AIR 1954 SC 194; AIR 1925 All 299, Rel. on. (Para 3)

Anno: Cr. P. C., S. 265 N. 3; S. 537 N. 12.

CASES REFERRED: Paras

(A) (V17) AIR 1930 Mad 867: 32 Cri LJ 430 2
(B) (V17) AIR 1930 Mad 187: 31 Cri LJ 715 2
(C) (V12) AIR 1925 All 299: 26 Cri LJ 688 2
(D) (V41) AIR 1954 SC 194: 1954 Cri LJ 475 (SC) 2

S. K. Venkataranga Iyengar, for Petitioner; Advocate-General, for the State.

ORDER: The petitioner has been convicted under cl. (o) of S. 56, Mysore Police Act, for having uttered abusive words in indecent language in a public street and sentenced to pay a fine of four annas. The case was tried summarily and in view of S. 263, Criminal P. C., the correctness of the conviction has to be mainly determined from the judgment in the case. Sri S. K. Venkataranga Iyengar, learned counsel for the petitioner, contended that according to the report made by the police, the offence alleged is one falling under cl. (r) of S. 56 which requires that the words uttered should not only be abusive and in a street but also intended or likely to cause breach of the peace, that since there is no finding that the words were intended or likely to cause it, the conviction is erroneous. Under cl. (o) mere use of indecent language is punishable. The word 'indecent' is not found in cl. (r). That the words attributed to the accused are indecent admits of no doubt.

The accused was asked whether he gave expression to these and if it is proved that he uttered the words the conviction under cl. (o) cannot be said to be wrong whatever may have been alleged by the police. It was next urged that the person with reference to whom the words were uttered has not been examined and that the case is concocted. For the purpose of cl. (o) it is enough that in a public street indecent language is indulged in with or without particular reference to an individual and so the non-examination of any one cannot have the significance which it may otherwise have, provided there is proof of the alleged utterance. The accused in his statement mentions ill-will on the part of the Sub-Inspector who is not a witness but does not impute any motive for the witnesses who have been examined to implicate him unnecessarily. Their version cannot therefore be discarded as false. If this is believed, as has been done by the lower Court, the conviction is justified.

(2) The objection strenuously put forward to the conviction is that the judgment is defective inasmuch as the names of witnesses and the particulars of the evidence of each are not set forth in sufficient detail and that it does not bear the signature of the Magistrate. It is true that in a case of this kind the requirements of S. 263 should be satisfied as the judgment is almost the sole record to be looked into and the reasons for the decision are to be gathered from it. As pointed out in many cases the judgment should be such as to enable a higher Court to know from a perusal of the same the nature of the case, substance of the evidence and the reasons for the conclusion arrived at. The accused is under a handicap in challenging the conviction in a summary trial but this should not lead to his being dealt with arbitrarily. The evidence may well have been referred to in some detail and the requirements for constituting the offence noticed in the judgment but I do not think that these are serious flaws.

For the contention that the judgment is invalid as it does not bear the signature of the Magistrate the decision of — Sundaram Chetty J. in — 'Brahmaiah v. Emperor', AIR 1930 Mad 867 (A) was cited. In that case which was tried summarily by a Bench of Magistrates the judgment was signed by two of them and initialled by one. The learned Judge considering the words of S. 265 of the Code "a judgment shall be signed by each member of the Bench....." and the meaning attached to the word signing' in cases relating to will and risk note, and warrant of arrest, held that the

> "requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the mandatory provisions of the section."

But a Division Bench of the same Court held in — 'T. M. A. Nathan v. Emperor', AIR 1930 Mad 187 (B), that a judgment of a Bench of Magistrates signed only by the Chairman of the Bench does not affect the conviction though S. 265 of the Code required that by whomsoever the judgment and record may have been written these shall be signed by all the members present and that the omission as to the signing was an irregularity which occasioned no failure of justice and curable under S. 537 of the Code, since all the members had signed the register in which the sentence was embodied.

In — 'Ram Sukh v. Emperor', AIR 1925 All 299 (C) Mukerji J. expressed that the omission of a Magistrate to sign the judgment is an irregularity covered by S. 537 of the Code and added

> "It will be deplorable if after a trial the judgment has to be set aside and a retrial has to be ordered simply because the learned Magistrate forgot to sign the judgment and date it. The irregularity does not affect the merits of the case and therefore this point fails."

As to what is essential for consideration about a judgment in a criminal case, Bose J. in the course of the judgment of the Supreme Court — 'Surendra Singh v. State of Uttar Pradesh', AIR 1954 SC 194 (D) at p. 196 states

> "Small irregularities in the matter of pronouncement or the mode of delivery do not matter but the substance of the thing must be there; that can neither be blurred or left to inference and conjecture nor can it be vague. All the rest—the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter can be cured—If a judgment happens not to be signed and is inadvertently acted on and executed the proceedings consequent on it would be valid....."

(3) The omission of the Magistrate to put his signature by writing his name instead of the initials is in the circumstances a mere irregularity not affecting the legality of the conviction. It is desirable that the Magistrate should avoid this in future and not give room for criticism on the score of the provisions of the Code not being duly complied with.

(4) There are no good grounds for interference. The petition is hence dismissed.

K.S.B. Petition dismissed.

A.I.R. 1954 MYSORE 152 (Vol. 41, C.N. 65)

MEDAPA C. J. AND VASUDEVAMURTHY J.
(4-2-1954)

Abdul Shakoor and another, Appellants v. Custodian of Evacuee Property in Bangalore, Respondent.

Regular Appeals Nos. 5 and 6 of 1953 connected with Writ Petns. Nos. 67 & 68 of 1953, against the order of Revenue Commissioner & Custodian of Evacuee Property, Mysore, D/- 2-12-1952.

(a) Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949), S. 30 — Right of appeal — Act repealed subsequently — Effect of repeal on right — (Civil P. C. (1908), S. 96).

Ordinarily the law in force at the time the action started must govern the decision of such action at all stages. The right of appeal which is a matter of substantive right, and not one relating merely to procedure, becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court. Such a vested right cannot be taken away except by express enactment or necessary intendment. The right of appeal, which had been expressly granted under S. 30 of the Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949) in respect of proceedings initiated under S. 5 of that Act, was not taken away either expressly or by necessary intendment by the subsequent Acts, namely, the Mysore Administration of Evacuee Property Second (Emergency) Act (74 of 1949) or the Administration of Evacuee Property Act (31 of 1950). AIR 1953 SC 221, Foll. (Paras 3, 4, 6)

Anno: C. P. C., S. 96, N. 2.

(b) Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949), S. 2(c) — "Leaves or has left" — Temporary leaving.

The words "leaves or has left "imply some amount of permanent stay or residence outside India, though not to the extent of completely abandoning the Indian domicile. It could never have been the object of the Legislature when they enacted the Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949) to declare people who had gone out of Mysore for a short time and had returned to Mysore even long before that Act was contemplated, i.e., between 1-3-47 and 7-7-49, as evacuees or to declare their properties as evacuee properties and to render them homeless paupers even if they chose to continue to reside in Mysore or drive them out of India unless their cases fell under sub-cls. (ii) and (iii) of S. 2(c). AIR 1953 Pat 112, Rel. on. (Para 16)

(c) Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949), S. 2(c) — Remittance of funds to members of family in Pakistan or for trade purpose — (Administration of Evacuee Property Act (1950), S. 2(d)).

The definition of "evacuee" in S. 2(c) applies to the person who is to be found to be an evacuee. Merely because some members of his family have migrated to Pakistan and he has sent some monies to them the person cannot be treated as an evacuee and his property in India as evacuee property. If the persons have transferred some funds for legitimate purposes of either their trade or for providing maintenance to the members of their family who might have left for Pakistan on account of disturbances, it will not necessarily make such persons evacuees. (Para 18)

(d) Mysore Administration of Evacuee Property (Emergency) Act (47 of 1949), S. 2(c) — Evacuee — Members of family in Pakistan — (Administration of Evacuee Property Act (1950), S. 2(d)).

There is nothing in the definition of evacuee which will justify holding that if some members of a family of a person are in Pakistan or have migrated to Pakistan on account of the disturbances or are living there, the person in India is an evacuee. (Para 19)

(e) Constitution of India, Art. 7 — "Migrated".

The expression "migrated from the territory of India to the territory now included in Pakistan" as used in Art. 7 can only mean departure from the territory of India to Pakistan with the intention of residence or settlement in that country. (Para 21)

Anno: Const. of India, Art. 7 N. 2.

(f) Constitution of India, Art. 7 — Temporary visit to another country.

A temporary visit to another country on business or otherwise cannot amount to migration. Whether a person has migrated from one country to another or has gone there on a temporary visit is primarily a question of fact which will have to be decided on the circumstances of each case. AIR 1952 All 257, Foll. (Para 21)

Anno: Const. of India, Art. 7 N. 2.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 221: 1953 SCR 987 (SC) 6
(B) (1905) 1905 AC 369: 74 LJPC 77 6
(C) ('08) 32 Bom 337: 10 Bom LR 330 6, 7, 8
(D) (V14) AIR 1927 PC 242: 9 Lah 284 (PC) 6, 7, 9
(E) (V15) AIR 1928 Lah 627: 10 Lah 165 (FB) 6
(F) (V15) AIR 1928 Cal 640: 56 Cal 512 (FB) 6
(G) (V31) AIR 1944 Bom 252: 46 Cri LJ 328 6
(H) (V16) AIR 1929 Mad 381: 52 Mad 361 (SB) 6
(I) (V15) AIR 1928 All 437: 50 All 965 (FB) 6
(J) (V37) AIR 1950 Nag 177: ILR (1950) Nag 532 (FB) 6
(K) (V39) AIR 1952 Punj 103: ILR (1951) Punj 395 (FB) 6
(L) (V18) AIR 1931 Cal 100: 129 Ind Cas 849 6
(M) V38) AIR 1951 SC 124: 52 Cri LJ 391 (SC) 6
(N) (V39) AIR 1952 SC 409: ILR (1953) Patiala 9 (SC) 6
(O) (V39) AIR 1952 Pat 380 6
(P) (V30) AIR 1943 Mad 208 (1): 1942-2 Mad LJ 667 7
(Q) (V31) AIR 1944 Mad 148: 215 Ind Cas 65 7
(R) ('47) 52 Mys HCR 455 9
(S) (V41) AIR 1954 Mad 103: 1953-2 Mad LJ 340 (FB) 11
(T) (V37) AIR 1950 Pat 318: 29 Pat 318 11
(U) (V38) AIR 1951 SC 230: 1951 SCJ 334 (SC) 11
(V) (V40) AIR 1953 Pat 112: 32 Pat 131 16
(W) (V40) AIR 1953 SC 298: 1953 SCR 691 (SC) 17
(X) (V39) AIR 1952 All 257: 1952 Cri LJ 553 21

K. Rajah Iyer and Mahomed Haneef, for Appellants; Nittoor Srinivasa Rao, Advocate-General, for Respondent.

VASUDEVAMURTHY J.:

The above two appeals are by two brothers Khan Saheb Abdul Ghani and Khan Saheb Abdul Shacoor against a common order dated 2-12-1952 passed by the Revenue Commissioner and Custodian of Evacuee Property in Mysore in Evacuee Property Case No. 12/51-52. The two writ petitions are by the same parties and are made under Art. 226 of the Constitution of India and therein they have prayed that the same order of the Custodian may be quashed by a suitable writ.

(2) This case has had a chequered history to which it is necessary briefly to refer. Shortly after

the partition between what is now known as the territory of India and Pakistan, the then Government of His Highness the Maharaja of Mysore being satisfied that circumstances existed which rendered it necessary to take immediate action to provide for the administration of evacuee property in Mysore and in exercise of the powers conferred by sub-s. (1) of S. 31 of the Government of Mysore Act of 1940 enacted Act No. 47 of 1949—The Mysore Administration of Evacuee Property (Emergency) Act of 1949. Thereafter the Custodian of evacuee property in Mysore, by virtue of his powers under S. 6 of that Act, notified in the Mysore Gazette dated 21-9-1949 the properties of the appellants as evacuee properties which had vested in him under the Act.

The appellants then applied to him under S. 8 objecting to their properties being so treated and their applications were transferred for enquiry to the Deputy Commissioner and Deputy Custodian of Bangalore District. He overruled their objections and declared their properties as evacuee properties by an order dated 17-4-1950. Against that order the appellants appealed to the Custodian and that officer passed a long and considered order on 22-8-1950. He found that there was not sufficient evidence to treat the appellants as evacuees as defined in S. 2 (c) (i), (ii) and (iii) of the first (Emergency) Act and that consequently the properties in question belonging to the appellants could not be treated as evacuee properties. He, therefore, set aside the order of the Deputy Custodian and allowed the appeals.

He made a reference to the first (Emergency) Act apparently because by that time in Mysore a second Act had been passed by the Government of His Highness the Maharaja of Mysore—Act 74 of 1949—The Mysore Administration of Evacuee Property Second (Emergency) Act. Subsequent to that order the Custodian General issued notice to the appellants on 3-10-1950 calling upon them to show cause why the order of the Custodian should not be revised. That notice purported to be under S. 27 of Act 31 of 1950 which was an Act enacted by Parliament on 17-4-1950 called the Administration of Evacuee Property Act of 1950. The Custodian General, who was not the Custodian General who issued notice, then heard arguments and made an order on 13-9-52 setting aside the order passed by the Custodian and he sent the case back to him with a direction that he should proceed to dispose of the case in the light of the evidence already recorded before his predecessor and such other evidence as may be produced by the appellants.

On receipt of the records the then Custodian made an interim order on 7-4-52 noting down certain points on which he thought evidence should be recorded. He also noted the names of certain witnesses who might be examined in addition to those who may be produced by the appellants and referred the matter to the Deputy Custodian of Bangalore for recording such evidence and re-submitting the file to himself for disposal. The Deputy Custodian accordingly recorded evidence and returned the records to the Custodian. The Custodian issued another notice on 10-7-52 calling upon the appellants to show cause why an order should not be passed declaring them as evacuees or in the alternative as intending evacuees and their properties as evacuee property under the provisions of Act 31 of 1950.

The appellants objected to this notice by an application dated 4-8-52. They represented that the proceedings against them were started under S. 8 of the Mysore Act 47 of 1949 and their claims were filed under S. 8 of the same Act. The Deputy Custodian had passed orders dismissing their claim; but on appeal it had been decided by the Custodian that though meanwhile other Acts had come into force both in Mysore and in India relating to evacuee property, their case was governed by Act 47 of 1949 which was the law in force when the proceedings were taken, and he had found that there was not enough evidence to treat the appellants as evacuees as defined in S. 2 (c) (i), (ii) and (iii) of Act 47 of 1949. He had therefore set aside the order of the Deputy Custodian, Bangalore, and allowed the appeal.

The Custodian General while remanding the case to the Custodian had observed that the Custodian himself should dispose of the matter as that would give a chance to the appellants to appeal against any adverse decision and that having regard to the scope of the order of remand by the Custodian General the enquiry should be confined only to the narrow question as to whether the appellants were not evacuees within the meaning of S. 2 (c) of Act 47 of 1949; and they wanted the Commissioner to withdraw and cancel the notice issued to them.

On this application the Custodian made a considered order on 6-9-1952. He held that while in law there could be no objection for proceedings being taken in terms of the notice issued to the appellants, yet having due regard to the representations made by them that they would thereby be deprived of the right of appeal they would have had if such proceedings were to be started by the Deputy Custodian instead of the Custodian he was inclined on grounds of equity to concede the point with regard to the present proceedings before him and to confine the enquiry to the issue as to whether the appellants were evacuees or not within the meaning of S. 2 (c) (i). That order, he observed, should not however be taken as a bar to any action that may be taken against the appellants independently under S. 19 of the Evacuee Property Act of 1950 at a later stage if necessary. The Custodian, who was not the Custodian who passed the first order, then made a final order on 2-12-1952 holding that the appellants were to be treated as evacuees and their properties as evacuee properties; and it is against that order that the appellants have come up in appeal to this Court.

(3) The appeals are made under S. 30 of Act 47 of 1949 under which any person aggrieved by an order made under S. 8 may prefer an appeal to the High Court whether the original order has been passed by the Custodian, the Additional Custodian or the authorized Deputy Custodian. A preliminary objection has been taken on behalf of the respondent to the maintainability of the appeals and it is urged that by the time the Custodian passed the first order of August 1950, Act 47 of 1949 had been repealed and superseded by S. 53 of Act 74 of 1949 and later by S. 58 of Act 31 of 1950 which provided for no appeal to the High Court but only for revision by the Custodian General under S. 27 against an order like the one with which we are concerned in this case.

Reference has been made to the saving clause contained in those sections which provide that anything done or any action taken in exercise of any power conferred by the said Act 47 of 1949 shall be deemed to have been done or taken in the exercise of the powers conferred by these later Acts, and it is argued that the same means that the remedies open to a person aggrieved by an order of the Custodian can only be under S. 27 of Act 31 of 1950. It is also urged that the appellants have acquiesced in and submitted them-

selves to the jurisdiction of the Custodian General and cannot now challenge the revisional jurisdiction he has exercised in this case.

In answer Mr. Rajah Iyer, learned Counsel for the appellants, has urged that the right of appeal which had been expressly granted under S. 30 of Act 47 of 1949 in respect of proceedings initiated under S. 5 of that Act was in the nature of a substantive right and not one which related merely to procedure. that such a right to which the appellants had become entitled could not and had not been taken away except expressly by the subsequent Act, that the first order of the Custodian of August 1950 became final and was not subject to any revision by any other higher authority and that the action taken and order made by the Custodian General revising that order was 'ultra vires' and without jurisdiction and not in accordance with law. He represents that his clients have all along been contending before the Custodian and Custodian General that the proceedings in these cases which were initiated under Act 47 of 1949 were to be conducted and are governed by that Act alone notwithstanding the changes made in the succeeding statutes.

He further represents that even before the Custodian General this aspect was raised in the course of the arguments and an application was also made to that effect to the Custodian on 4-8-1952, which we have already noticed above. He has also relied on the terms of a notice dated 10-10-1952 issued by the Custodian which refers to the 'status quo ante' as having been restored as a result of the order of the Custodian General and the properties again vesting in the Custodian during the pendency of the case. He also urges that there can be neither acquiescence nor submission to a jurisdiction which did not exist and, that notwithstanding their objection, the Custodian General exercised his revisional powers, that in any event he has made no final order against the appellants but has merely directed a further enquiry by the Custodian, that even the Custodian in Mysore has in his first order conceded and recognised that the proceedings were to be governed by the old Act and that everyone concerned in this case has understood the proceedings as being governed by that Act alone.

(4) There is considerable force in the contentions of the appellants. Even the Custodian in the course of his order dated 2-12-1952 has conceded in para. 3 that the contention of the appellants that the proceedings before him could only be under S. 2 (c) of the Mysore Act 47 of 1949 and not under the later Act of 1949 as the same could not have retrospective effect. He has held that ordinarily the law in force at the time the action started must govern the decision of such action at all stages and has referred to Case No. 46 decided by the Custodian General in support of that conclusion.

(5) For the respondent reference has been made to an interim order dated 7-4-52 framing certain issues, notices dated 10-7-52 and 12-8-52 purporting to issue under Ss. 22 (b) and 10 (3) of Act 31 of 1950 by the Custodian. But in view of the circumstance that the appellants' objections filed on 4-8-52 pointing out that the proceedings against them were started under S. 5 of the Mysore Act 47 of 1949 and that their claim was based on S. 5 of the same Act, and the order passed thereon on 6-9-52 allowing that application and confining the enquiry to the issue as to whether they were evacuees or not within the meaning of S. 2 (c) (i), and the finding in the last order of the Custodian, these notices cannot have much significance. They are indicative of the uncertainty which prevailed in the mind of the Custodian with regard to the application of the two Acts.

(6) In — 'Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh', AIR 1953 SC 221 (A), Mahajan and S. R. Das JJ. have held:

"A right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

In that case the question arose whether the appellant's appeal was governed by the Central Provinces and Berar Sales Tax Act when the assessment proceedings were started or by a later amended proviso to S. 22 (1) of the Act. The Board of Revenue had taken the view that as the order of assessment was made after the amendment of the section and the appeal was filed thereafter, such appeal must be governed by the provisions of law as it existed at the time the appeal was actually filed and the law as it existed before the filing of the appeal could not apply to the case. The assessee then moved the High Court of Madhya Pradesh under Arts. 226 and 227 of the Constitution of India for an appropriate writ directing the Sales Tax Commissioner to admit and hear the appeal without demanding payment of the amount of sales tax assessed by the Assistant Commissioner of Sales Tax as required by the later amendment.

The High Court dismissed his application and the assessee thereupon applied for and obtained special leave to appeal to the Supreme Court. While allowing the appeal, their Lordships of the Supreme Court referred to — 'Colonial Sugar Refining Co. v. Irving', 1905 AC 369 (B), where Lord Macnaghten, who delivered the judgment of the Privy Council, said

"that the only question before the Board was, was the appeal to His Majesty in Council a right vested in the appellant on the date of the passing of the Act or was it merely a matter of procedure. It seemed to their Lordships that the question did not admit of any doubt. "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

In the course of their judgment they have referred to — 'Nana Aba v. Sheku Andu', 32 Bom 337 (C); — 'Delhi Cloth and General Mills Co. v. Income-tax Commr., Delhi', AIR 1927 PC 242 (D); — 'Kirpa Singh v. Rasalldar Ajaipal Singh', AIR 1928 Lah 627 (FB) (E); — 'Sadar Ali v. Doliluddin Ostagar', AIR 1928 Cal 640 (FB) (F); — 'Hasan Abdul Karim v. Emperor', AIR 1944 Bom 252 (G); — 'In re, Vasudeva Samiar', AIR 1929 Mad 381 (SB) (H); — 'Ram Singha v. Shankar Dayal', AIR 1928 All 437 (FB) (I); —

'Radhakisan v. Sridhar', AIR 1950 Nag 177 (FB) (J); — 'Gordhandas Baldevdas v. Governor-General in Council', AIR 1952 Punj 103 (FB) (K); — 'Nagendra Nath v. Mon Mohan Singha', AIR 1931 Cal 100 (L); — 'Janardhan Reddy v. State', AIR 1951 SC 124 (M) and — 'Ganpat Rai Hiralal v. Agarwal Chamber of Commerce', AIR 1952 SC 409 (N), in which the principle of the above decision has been accepted. See also — 'Kailash Singh v. Sheopujan Singh', AIR 1952 Pat 380 (O).

(7) Mr. Rajah Iyer has also urged that the Custodian General had no authority to revise the order of the Custodian as such power was not found in Act 47 of 1949. He urges that the order of the Custodian of 25-8-1950 became final and was subject only to an appeal by the appellants if the same had gone against them and that that order had therefore become final and could not be set aside by the Custodian in the exercise of revisional powers given to him under the later Act. He has referred in this connection to cases reported in — 'AIR 1927 PC 242 (D)'; — 'Examiner of Local Fund Accounts v. Subramania Mudaliar', AIR 1943 Mad 208 (1) (P); — 'Surayya v. Inspector Municipal Councils and Local Board, Madras', AIR 1944 Mad 148 (Q) and — '32 Bom 337 (C)'. In — 'AIR 1943 Mad 208 (1) (P)', their Lordships pointed out that there is no logical distinction between a right of appeal, and the right of a final judgment without an appeal. Both are vested rights and cannot be deemed to be affected by later enactments or rules retrospectively unless such an enactment or rule is given retrospective operation either expressly or by necessary intendment.

(8) In — '32 Bom 337 (C)' the plaintiff filed a suit on 24-2-1906 in the Mamlatdar Court under Bombay Act 3 of 1876. In October the later Mamlatdar Courts Act 2 of 1906 came into force and by S. 2 of that Act the earlier Act was repealed. In 1907 the plaintiff whose suit was dismissed by the Mamlatdar presented an application for revision of his order under S. 23 of the later Act of 1906. Under the earlier Act of 1876 the Collector had no power of revision. It was held by Sir Lawrence Jenkins, C. J. and Batchelor, J. that having regard to the words of the Bombay General Clauses Act the Collector had no jurisdiction; to hold otherwise would be to affect a legal proceeding in respect of a right which had accrued under the old Act and that to disturb an existing right of appeal was not a mere alteration in procedure.

(9) In Mysore also in — 'Gururajachar v. Rangiah', 52 Mys HCR 455 at p. 484 (R), that principle had been accepted. In that case the Revenue Commissioner made an order in April 1945 under the House Rent Control Order as it then stood. Subsequently in August 1945 an amendment was made providing for revision by Government of such an order by the Revenue Commissioner and the tenant applied for a revision of the order in September 1945. Venkataramana Rao, C. J. and Venkata Ramaiya, J. held that the order of the Revenue Commissioner became final when it was passed in April 1945 and there was no remedy by way of revision under the House Rent Control Order as it then stood. The plaintiff had acquired a vested right to a final judgment and as observed in — 'AIR 1927 PC 242 (D)', the provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

(10) Mr. Rajah Iyer has also referred to certain rulings of the Custodian General in Cases Nos. 34, 42, 46 and 60 which arose before him and which are found in Vol. 1, Rulings of the Custodian General, published by the Federal Law Depot, Delhi. These rulings may not be binding on the Civil Courts, but they show that even the Custodian General has recognised the above principle and lend great support to the stand taken by the appellants in connection with the writ petitions that their remedy is not clear and that as the Custodian General himself has conceded in such cases that an appeal lies to the High Court it would not be reasonable to ask them to apply to him in appeal or revision under the later Act and await his decision when by that time their right to appeal to the High Court would have become barred by time.

It is not necessary to refer to those cases in detail. But it might be noticed that in Case No. 46 the Custodian General has laid down that a right of appeal to the particular forum which existed at the time the action was started is not taken away or otherwise affected by any change in the law taking place during the pendency of the action unless such change has either expressly or by necessary intendment been given a retrospective operation, that proceedings commenced by the appellant under S. 8 of the Ordinance No. 12 of 1949 did not fall within ambit of S. 55 (3) of Ordinance No. 27 of 1949 and that the appeal from the order of Authorised Deputy Custodian under the Ordinance No. 27 of 1949 declaring certain properties as evacuee properties lay to the High Court and not to the Custodian General.

(11) For the appellants reliance has also been placed on — 'Madhava Rao v. Surya Rao', AIR 1954 Mad 103 (FB) (S) and — 'Raghuraj Prasad Singh v. Basudeo Singh', AIR 1950 Pat 318 (T), where it was held that where there is no inherent jurisdiction neither acquiescence nor request nor any application on the part of a party can give such jurisdiction. In the first of these cases the petitioners applied under Art. 226 of the Constitution of India for the issue of a writ to quash an order of a Deputy Registrar of Co-operative Societies in the matter of some election dispute. They had not objected before that officer to his jurisdiction to pass such an order and had also carried his order in revision to the Registrar of Co-operative Societies. It was held that this fact did not preclude them from questioning the jurisdiction of the Deputy Registrar before the High Court. In — 'United Commercial Bank Ltd. v. Their Workmen', AIR 1951 SC 230 at pp. 236, 237 (U), the Supreme Court has observed that no amount of consent will cure the initial want of jurisdiction.

(12) In this connection there is another circumstance which would vitiate or at least seriously raise a doubt regarding the validity of the Custodian General's exercising of powers of revision in this case. The Mysore Act 47 of 1949 was repealed by Act 74 of 1949 which came into force on 29-11-1949. Act 31 of 1950 became law in Mysore also only on 17-4-1950 and by S. 58, Cl. (i) of that Act, only the Administration of Evacuee Property Ordinance 1949 (27 of 1949) was repealed with no reference to any Mysore State laws with a saving clause 2 that the previous operation of that Ordinance was not affected by the repeal and subject thereto anything done or action taken under that Ordinance should be deemed to have been done under Act 31 of 1950.

This S. 58 was later on repealed and substituted by Act 66 of 1950. Sub-clauses (2) and (3) of that section came into force on 7-12-1950. The first order of the Custodian was passed on 22-8-

1950. On that date there was no provision similar to sub-cl. (3) of S. 58 of Act 66 of 1950 declaring that proceedings taken under any corresponding law in any State was to be deemed to have been taken under Act 31 of 1950, thereby attracting the operation of S. 27 of that Act, viz., powers of revision of the Custodian General. The Mysore Act 74 of 1949 no doubt provided for a revision of the Custodian's order by the Custodian General. But that was also an emergency Act passed under S. 31 of the Government of Mysore Act and it automatically expired and ceased to exist after six months, i.e., on 29-5-1950.

The Custodian General has not, apparently therefore and for reasons which are not clear or explained, acted under any provision of that Act but has purported to act expressly under S. 27 of Act 31 of 1950. Until by Act 66 of 1950, S. 58, Cls. (2) and (3) were amended the case could not be brought under Act 31 of 1950 or the powers of revision provided in it by S. 27 applied even if the same could otherwise have been exercised in the present case.

(13) Mr. Rajah Iyer has also urged that the proceeding under Ss. 5, 6 and 8 of Act 47 of 1949 have no corresponding parallel in Act 74 of 1949 or Act 31 of 1950 and that the provisions of the later two Acts are quite different from those in the first Act. He represents that on the date of the commencement of proceedings under Act 47 of 1949 there was no Custodian General in existence and hence the order of the Custodian dated 22-8-50 became final under S. 30 (6) of the Mysore Act. The revisional powers of the Custodian General which came into existence later could not therefore be exercised by him so as to take away from the finality attached to that order, which was in the nature of a vested right, and that right could not and had not been infringed by Act 31 of 1950.

He therefore contends that the saving clause contained in S. 58 of Act 31 of 1950 cannot be invoked for the purpose of enabling the Custodian General to exercise his powers of revision in the present case, that the scheme of the later Acts is quite different from that of the earlier, that the later Acts introduced new and radical changes in the method by which the property of a person should be declared evacuee property and he, as an evacuee or intending evacuee and that the later Acts provided for a different procedure for enquiry and determination of those questions and prescribed quite different and new forms of appeal and revision. While the orders under Act 47 of 1949 were open to be examined by the High Court the later Acts took away that very valuable right and gave other overriding powers to the Custodian General. This could not be merely a matter of procedure.

Neither the Mysore Act 74 of 1949 nor Act 31 of 1950 expressly or even impliedly refers to this right of appeal to the High Court which the parties had come to possess by reason of the well recognized principles of law discussed above. The saving clauses in S. 53 of Act 74 of 1949 or S. 58 of Act 31 of 1950 could under the circumstances only refer to the procedure to be adopted, the effect to be given and the implementations to be made in respect of prior orders and pending orders and not to already acquired vested rights of appeals.

In a case like the present when through executive orders rights to valuable property and status of an Indian citizen are sought to be decided finally, without recourse to judicial process one would not be too ready to accept the argument that by the saving clauses which are contained in S. 53 of Act 74 of 1949 and S. 58 of Act 31 of 1950 it is to be implied that the already vested valuable right in pending proceedings of recourse to the highest Court in the land should be taken away by a 'side wind'. In any event one would also hesitate to deny now to the High Court power and jurisdiction to examine such orders which they undoubtedly possess under Art. 226 of the Constitution to correct palpable errors affecting the rights and liberty of subject guaranteed under Chapter III of the Constitution if they find that any orders have been made without jurisdiction and are not justified by the definition of evacuee and evacuee property in Act 47 of 1949.

(14) In the light of the above discussion we think that the appeals to this Court are competent.

(15) We have been taken through the documentary and oral evidence. Mr. Rajah Iyer has contended that the same do not justify the finding that the appellants are evacuees, that the first order of the Custodian was correct, that the subsequent order of the Custodian, which is appealed against, is based not on evidence but on mere suspicion and that the Custodian has not kept in view the difference between an Evacuee and an intending Evacuee. The learned Advocate-General also has argued in support of the order.

'Evacuee' has been defined in S. 2, Cl. (c) of Act 47 of 1949 as follows:

> " 'Evacuee' means any person (i) who, on account of setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st of March 1947, left any place in Mysore for any place outside the territories now forming part of India; or
>
> (ii) who is resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in Mysore, or whose property in Mysore has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorised person; or
>
> (iii) who has, after the 1st of March 1947, acquired in any manner whatsoever any right to, interest in or benefit from, any property which is treated as evacuee property under any law for the time being in force in Pakistan."

The Custodian has rightly found that the appellants' case does not fall under sub-cls. (ii) and (iii) of that definition and that the only question is whether it falls under sub-cl. (i).

(16) As the appellants have not left Mysore to any place outside India, in the sense that they were on the date when the proceedings were started and are still residing in Mysore, their case has to be considered only with reference to the words "leaves (or has), on or after the first day of March 1947, (left) any place in Mysore." The word 'leaves' in that context prima facie applies to a person leaving Mysore after the coming into force of Act 47 of 1949 in contradistinction to a person who has already left on or after 1-3-1947. It cannot apply in any case to short temporary visits made to a place outside Mysore on some legitimate business followed by a return to India. It cannot also include a person who might merely have had some remote or passing inclination to make a choice of his future domicile outside India and who has returned to Mysore before the passing of the first (Emergency) Act on 7-7-1949.

As pointed out in — 'S. M. Zaki v. State of Bihar', AIR 1953 Pat 112 (V), the words "leaves or has left" imply some amount of permanent stay or residence outside India, though not to the extent of completely abandoning the Indian domicile. It could never have been the object of the Legislature when they enacted that Act to declare people who had gone out of Mysore for a short time and had returned to Mysore even long before that Act was contemplated, i.e., between 1-3-47 and 7-7-49, as evacuees or to declare their properties as evacuee properties and to render them homeless paupers even if they choose to continue to reside in Mysore or drive them out of India unless their cases fell under sub-cls. (ii) and (iii) of S. 2 (c).

It must be remembered that in Act 47 of 1949 there was no definition or reference to an intending evacuee and that the same came in only in the Second (Emergency) Act 74 of 1949. That would have been a very unreasonable way of dealing with Indian Nationals who had returned before the passing of Act 47 of 1949 having made up their mind to remain as citizens of this country particularly where, as in this case, both the going and returning was under proper and valid temporary permits or no objection certificates. It has not been shown that the appellants who had ample scope and funds at their disposal when they visited Karachi had acquired any properties there or effected any exchange of their own properties in India with any properties situated in Pakistan. This would have been a relevant and even a strong indication of their intention or object of their visit.

(17) The Custodian has not also paid sufficient attention to the words "evacuee means any 'person' who (leaves or has left), 'on account of' the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances" in that sub-clause. He has not expressly found that the appellants who were living and carrying on business and owned considerable properties in South India had gone to Karachi (Sind) in Pakistan for any of those reasons. The evidence in the case merely shows that they had gone there with the perfectly lawful object of meeting the members of their family and not with a view to make arrangements for leaving this country after realizing their assets.

The first Emergency Act as well as the later Acts were designed for the State to seize, preserve and manage the property of evacuees or 'persons' who had chosen to leave India for specified reasons some time before or even after the first Act was passed. This was to be done for the benefit of displaced persons and to prevent such properties from being left uncared for or frittered away or wrongfully taken up by others or transferred or taken away outside India. The Act was not meant to punish people or impose the penalty of depriving them of all their properties or to drive them out of this country or render them homeless paupers merely because they were for a short while panicky or foolish and of two minds as to where they should settle down here or elsewhere — and who had done nothing else with their properties which would bring them within the definition of evacuees or intending evacuees.

As pointed out by the Supreme Court in — 'Ebrahim Aboobaker v. Tek Chand', AIR 1953 SC 298 at p. 303 (W), the provisions of the Administration of Evacuee Property Act

> "far from suggesting that the person declared an evacuee suffers a civil death and remains an evacuee for all time show on the other hand that the person may cease to be an evacuee under certain circumstances that he is reinstated to his original position and his property restored to him subject to certain conditions and without prejudice to the rights if any in respect of the property which any other person may be entitled to enforce against him. These provisions also establish that the fact of a property being evacuee property is not a permanent attribute of such property and that it may cease to be so under given conditions. The property does not suffer from any inherent infirmity but becomes evacuee because of the disability attached to the owner. Once that disability ceases, the property is rid of that disability and becomes liable to be restored to the owner."

(18) The Custodian has also not borne in mind that the definition must apply to the 'person' who is to be found to be an evacuee. Merely because some members of his family have migrated to Pakistan and he has sent some monies to them the person cannot be treated as an evacuee and his property in India as evacuee property. This is clear even from the definition of "intending evacuee" and the proviso to S. 2 (c) (i) and the definition of the words "members of the family" as meaning any member of the family of any person who is wholly dependent upon the earnings of such person for the ordinary necessaries of life or who shares with such evacuee in the ordinary expenses of the household to which they jointly belong or who owns property or carries on business jointly with such evacuee.

If, therefore, as found in this case the appellants have transferred some funds for legitimate purposes of either their trade or for providing maintenance to the members of their family who might have left for Pakistan on account of disturbances, it would not necessarily make the appellants evacuees. It is well-known that on account of the disturbances the families who were living near the border of the two countries became separated and that has been one of the tragedies of the partition. The persons who are living in India at the time of the partition would have had also relations in Pakistan who are dependent on them for support — like aged parents, or wife and children who happen to be living separately at the time and who might not even be agreeable to come back — and if funds were legitimately sent to them, such sending of the funds to them would be specifically saved from being inferred as intention to migrate from India.

(19) The Custodian has found that the wife and children of one of the appellants Abdul Shacoor are still in Pakistan and that one wife and her children and two of his children by the first wife have all along been here. He has also found that their return had not been secured though some years have now elapsed and that that is an indication of the appellants being evacuees. The appellants have stated that they have applied to the authorities for permission to bring them down to India from Pakistan. This has not been refuted by the Custodian. These proceedings have been pending from 1948 and the properties of the appellants had become vested in the Custodian. They have been kept sufficiently uncertain, busy and worried about their own affairs here while the means for getting down the members of their family from Pakistan were greatly diminished.

Such permission for people to migrate from Pakistan to India is not shown to be either so

easy or so readily obtainable, and we see nothing in the definition of evacuee which would justify holding that if some members of a family of a person are in Pakistan or have migrated to Pakistan on account of the disturbances or are living there, the person in India is an evacuee. In Case No. 52 decided by the Custodian General he has recognized that neither a mere expression of an intention of going to Pakistan nor the mere circumstance of one's son having migrated to Pakistan can make a person an evacuee.

(20) (His Lordship then considered the evidence relating to certain alleged transactions of the appellants and reached the conclusion, namely). On the facts and circumstances disclosed in this case we have no hesitation in holding that the appellants are entitled to succeed and that these appeals should be allowed. We accordingly allow the appeals and set aside the order of the Custodian dated 2-12-1952. The respondents will pay the costs of the appeals, Advocate's fee Rs. 250/- in each appeal.

(21) When the preliminary objection was taken regarding the maintainability of the appeals, the appellants have filed two writ applications and have prayed that the order of the Custodian may be quashed. We have found in the course of our judgment in the appeals that the Custodian General had no jurisdiction to interfere in revision and set aside the first order of the Custodian. In addition to the ground that the Custodian-General had no such revisional jurisdiction we think that the appellants can reasonbly complain that their fundamental rights under the Constitution of India are being infringed by the order of the Custodian General and that they are entitled to relief at the hands of this Court on that ground also.

It is undisputed that the appellants were citizens of India within the meaning of Art. 5 of the Constitution. They were born in the territory of India; their parents were also born in the territory of India and they have been residents in the territory of India for long over five years preceding the commencement of the Constitution. Article 7 provides that notwithstanding anything in Arts. 5 and 6 a person who has, after the 1st day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India; but even that is subject to the proviso that nothing in that article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return.

The expression "migrated from the territory of India to the territory now included in Pakistan" used in Art. 7 can only mean departure from the territory of India to Pakistan with the intention of residence or settlement in that country. As pointed out in — 'Shabbir Husain v. State of U. P.', AIR 1952 All 257 (X), a temporary visit to another country on business or otherwise cannot amount to migration. Whether a person has migrated from one country to another or has gone there on a temporary visit is primarily a question of fact which will have to be decided on the circumstances of each case. In that case the applicant who was an Indian subject and was born and brought up in the District of Bijanur in Uttar Pradesh was carrying on cloth business. He sent some of his goods to Lahore and in order to dispose of them he went to Lahore for two months. Before his departure from Bombay to Pakistan and within the period of his temporary visit to Pakistan he expressed his intention that he would be going there on a temporary visit and would return home after finishing his business.

After finishing his business he did return to India. It was held that in the circumstances it was not possible to hold that a temporary visit of the kind undertaken by the applicant amounted to migration from India to Pakistan and that the applicant could not be deemed to have lost the citizenship of India and could not be ordered to be removed from India though he had come into India under a temporary permit. The present is a stronger case as the appellants have gone to Pakistan & returned on temporary 'no objection' certificates.

Under Art. 19 (1) as citizens of India the appellants have a right to reside and settle in any part of the territory of India and to acquire, hold and dispose of property in India subject of course to the exceptions mentioned in sub-cl. (v) of that Article, and they would of course be liable to lose that right if the appellants were declared evacuees or intending evacuees. If they are not evacuees and their fundamental rights are sought to be infringed by an order which is bad for want of jurisdiction or other similar grounds, this Court has undoubtedly power under Art. 226 of the Constitution to grant them relief and to quash the proceedings. No doubt ordinarily the remedy of persons like the appellants against whom the provisions of the Evacuee Property Act are enforced and who feel aggrieved is to seek relief under that Act by proceedings prescribed in that Act. But where, as in this case, it is not quite clear that the appellants have no right to appeal to this Court and it is not also clear under what particular Act the proceedings before the Custodian have been taken and the order passed and where the appellants have good ground to contend that the Custodian General had no jurisdiction in revision to re-open the earlier proceedings and pass an order of remand which has now resulted in the present order of the Custodian, we think that this Court ought not to refuse relief to the appellants under Art. 226 of the Constitution on the ground that they may have any other equally certain, clear or effective remedy.

(22) In this view, we allow the applications and direct a 'writ' quashing the order of the Custodian dated 5-12-1952 to issue. There will be no separate order as to costs in these petitions.

V.S.B. Appeals and applications allowed.

A.I.R. 1954 MYSORE 158 (Vol. 41, C.N. 66)

MEDAPA C. J. AND VASUDEVAMURTHY J.

(15-7-1954)

M. Thiruvengadam, Petitioner v. The Indian Institute of Science, Bangalore and others, Respondents.

Writ Petn. No. 5 of 1954.

Constitution of India, Art. 226 — Termination of service — Petition for writ against employer — Maintainability — Proper remedy — (Master and servant — Resignation of servant — Acceptance of, if necessary for termination of service).

The petitioner was confirmed in his appointment as an Electrical Supervisor in the Indian Institute of Science, Bangalore, with effect from 2-5-1950 and was to hold the appointment till the age of 60. Under the terms of employment the services could be terminated on either side with six months' notice. The petitioner wrote a letter dated 11-5-1953 in which he tendered his resignation on account of certain charges made

against him. On 17-6-1953 he however wrote another letter by which he purported to withdraw his offer to resign. The Institute authorities however refused to allow him to withdraw his resignation and treated his employment as terminated at the end of six months from the date of letter of resignation. The petitioner thereupon filed a petition under Art. 226 for a writ to the Institute authorities declaring that he was still in service and requiring them to admit him to the post and let him work without let or hindrance:

Held (i) that the contention of the petitioner that his letter of resignation dated 11-5-1953 conveying notice of six months did not amount to unconditional resignation or that it required acceptance before the offer to withdraw was made, could not be accepted. From the terms of the letter of 11-5-1953 it was clear that no acceptance of its terms was ever contemplated or required and that it was in the nature of a notice by which the petitioner said he had resigned or renounced his job and would cease to work from a date six months later. Nothing more was therefore necessary to be done either by him or by the employers in pursuance of the notice which had put an end to the contract of service in a manner stipulated between the parties themselves. (Paras 4, 6)

(ii) that it was not a proper case in which a writ ought to be issued. The terms and conditions of service between the Institute and the petitioner were not governed by any statute or rules having the force of law the obedience to which could be enforced through a writ. Nor did the case raise any question of any judicial enquiry or quasi-judicial enquiry by any authority which could be corrected by a writ of certiorari. AIR 1953 Cal 581, Ref. to. (Para 5)

(iii) that the remedy, if any, of an employee in such a case where it was alleged that a breach of a contract of service had taken place would obviously be by a suit and not through an application for a writ. AIR 1952 Cal 610, Rel. on. (Para 5)

CASES REFERRED: Paras

(A) (V40) AIR 1953 Cal 581 5
(B) (V39) AIR 1952 Cal 610: 56 Cal WN 264 5
(C) (V38) AIR 1951 Mad 882: 1951-1 Mad LJ 709 5
(D) (V39) AIR 1952 Mad 150: 1951-2 Mad LJ 561 5
(E) (V11) AIR 1924 Mad 396: 45 Mad LJ 798 6
(F) (1900) 2 Bom LR 790 7
(G) (V41) AIR 1954 Assam 65: 58 Cal WN 54 8

H. S. Raja Aiyangar, for Petitioner; Nittoor Srinivasa Rao and K. R. Gopivallabha Iyengar, for Respondents.

VASUDEVAMURTHY J.:

The petitioner has made an application under Art. 226 of the Constitution of India and prayed for the issue of a proper direction, order or writ to the respondents declaring that his appointment by respondent 2 to the post of Electrical Supervisor in the Department of Power Engineering of respondent 1 never ceased, that he is still an occupant of the post entitled to hold and function in the same without any obstruction from the respondents, and requiring respondents 2 and 3 to restore and admit him to the post and let him work therein without any let or hindrance. Respondent 1 is the Indian Institute of Science, Bangalore, respondent 2 the Council of the Indian Institute of Science, respondent 3 the Director and respondent 4 the Registrar of that Institute.

(2) The facts relevant to this case are practically undisputed and are set out in para 8 of the petition. On 7-5-1953, it appears that the then Director in charge while checking a statement presented by the petitioner called him a liar and charged him with incompetence. The petitioner took exception to his conduct and wrote a letter dated 11-5-1953 addressed to the Director. Therein he tendered his resignation. On second thought he wrote another letter on 17-6-1953 to the Registrar by which he purported to withdraw his offer to resign. The Institute authorities however refused to allow him to withdraw his resignation and treated his employment as terminated at the end of six months from the date of the letter of resignation.

(3) It is contended by Mr. H. S. Raja Iyengar, learned Counsel for the petitioner, that the letter of resignation required acceptance by the Director, and that till it was so accepted it could not have any legal effect. To appreciate this contention it is necessary to refer to the circumstances under which the petitioner was appointed. By a resolution of the Council of the Institute he was appointed on probation for one year and joined duty on 2-5-1949. The probation period was extended by one more year and thereafter by a resolution passed on 6-10-1952 the petitioner was confirmed in his appointment as Electrical Supervisor with effect from 2-5-1950. He was to hold the appointment till the age of 60. After the passing of this resolution the Registrar sent a draft of his service agreement and asked the petitioner to sign it. One of the clauses of that agreement provided

> "that the employee may likewise terminate the contract of service by giving the Director as the Chief Executive six months' notice in writing of his intention of doing so".

It is common ground that under the original terms of the employment itself the services of the employee were liable to be terminated by the Council either on medical grounds with three months' notice or on grounds of retrenchment or economy with six months' notice as part of the conditions of the service.

(4) It is contended for the petitioner (1) that he could not have been asked to enter into any fresh additional term providing for termination of service by six months' notice by the employee, (2) that the petitioner's letter dated 11-5-1953 did not amount to an unconditional resignation and (3) that as the resignation was not accepted before its withdrawal it could not have the legal effect of terminating his service. This additional clause in the agreement was one entirely in favour of the petitioner and conferred a right on him. Without such a clause he could not have resigned even if he got very lucrative or more advantageous job elsewhere. He could not apparently also resign on any personal ground, other than ill-health, say for disagreement with his employer or on account of any other adverse conditions of service in the Institute.

Surely if the petitioner had secured a better job after sending a notice like the present and the Institute had refused to accept it and relieve him after six months, the petitioner would not have tolerated such a position. This additional provision as to notice by the employee did not, as a matter of fact, provide for any acceptance. An acceptance of a resignation in such circumstances is not always necessary or required in law. Unless the appointment was for a fixed term on a contract basis and the resignation of an employee suddenly

in the midst of his work was likely to cause serious harm or prejudice to the employer, ordinarily a service like the present ought to be capable of being put an end to both by the employer and employee on sufficient notice in the absence of any other special contract. What was required was six months' notice by the employee terminating his service.

The petitioner's letter of 11-5-1953 did not also ask for any such acceptance. Therein the petitioner said that he felt that in view of the charge against him he could not do true justice to his work and that he was most reluctantly compelled to apply for his resignation. He had to give six months' notice and his letter was to be treated as six months' notice with effect from 15-5-1953. Indeed by his letter dated 17-6-1953 the petitioner said he would be grateful if he was permitted to withdraw his earlier letter and that he wished to apologise for his hasty action in sending it. In the meantime on 29-5-1953 he had been told that no leave which he had asked for in the letter of May was admissible to him and that before the period of notice, viz., six months, elapsed he had to give some explanations and render some accounts and make some reports about his work in the Institute.

In this connection we may refer to the ordinary and familiar case of notice issued by a landlord or a tenant in cases where the lease is terminable at will or by agreed notice. Nobody in such a case could ever contend that it requires acceptance by the other party. The present contention of the petitioner that his letter of resignation conveying notice of six months was not a resignation or that it required acceptance has, therefore, no substance.

(5) We do not think that this is a proper case in which a writ ought to be issued. The terms and conditions of service between the Institute and the petitioner are not governed by any statute or rules having the force of law the obedience to which could be enforced through a writ. Nor does the case raise any question of any judicial enquiry or quasi-judicial enquiry by any authority which could be corrected by a writ of certiorari. See — 'Bibhuti Bhusan v. Damodar Valley Corporation,' AIR 1953 Cal 581 (A) for a similar case where it has been pointed out that in order that a writ of certiorari may issue for quashing the departmental proceedings and the order of dismissal which follows as a result of such proceeding it must be shown that an obligation or duty has been imposed by statute upon the employer to act judicially or quasi-judicially in relation to such inquiry.

That was a case of an Engineer employed under the Damodar Valley Corporation who brought a writ complaining against the termination of his services. The dispute is really in the nature of one between a private employer and employee though it may be that the Council of the Institute is functioning and its affairs are being administered under a scheme made or approved by the Government of India. There is no case of any refusal of natural justice to the petitioner. He voluntarily chose to send his letter of resignation or notice of termination of his services and cannot complain if the same has been given effect to according to the express terms of his contract with the Institute. Neither party has told us what exactly was the reason for disagreement between the then Director and the petitioner or the irregularities he was charged with. We have therefore no material before us to express any opinion on anything other than the purely legal aspect of the matter. The remedy, if any, of an employee in a case like the present where it is alleged that a breach of a contract of service has taken place would obviously be by a suit and not through an application for a writ as pointed out in — 'D. Parraju v. General Manager, B. N. Rly.', AIR 1952 Cal 610 (B) where it has been observed that

> "A person aggrieved by an order of removal from service has a more convenient, effective, complete and adequate remedy by way of a suit for a declaration that the order dismissing him was void."

See also in this connection 'AIR 1953 Cal 581 (A)' — 'Dr. M. Krishnamoorthy v. State of Madras', AIR 1951 Mad 882 (C) and — 'Purushotham v. Venkatappa', AIR 1952 Mad 150 (D).

(6) Mr. Raja Iyengar has referred to some cases in support of his petition. In — 'Sudarsana Rao, v. Christian Pillai', AIR 1924 Mad 396 (E) Ramesam J. held that an Honorary Magistrate does not cease to hold his office on his resignation but only when the resignation is accepted. He however observes at p. 396:

> "It may be that the need for acceptance does not apply to honorary appointments and it is a question of fact in each case whether the resignation amounted to a renunciation without acceptance and may depend to a certain extent on the contents of the letter of resignation which is not filed in this case. But it is unnecessary to pursue this line of argument further as the petitioner never contended in the Court below that he resigned on the 21st September".

In the present case from the terms of the letter of 11-5-1953 it is clear that no acceptance of its terms was ever contemplated or required and that it was in the nature of a notice by which the petitioner said he had resigned or renounced his job and would cease to work from a date six months later. Nothing more was therefore necessary to be done either by him or by the employers in pursuance of the notice which had put an end to the contract of service in a manner stipulated between the parties themselves.

(7) — 'Ganesh Ramchandra v. G. I. P. Rly. Co.', 2 Bom LR 790 (F) was a case of a suit and not of a writ brought against a Railway Company. The plaintiff, a Station Master, had written a letter of resignation with 24 hours' notice and stopped away from work thereafter. He was later on dismissed by the Company. It was urged for him that as he had ceased to be in the Company's employment by resignation he could not be visited with the consequences of a dismissal. The Railway Company contended that they had not accepted his resignation. The terms of service between the plaintiff and the defendant are not disclosed in the report. The facts and terms of contract in the present case are clear and are covered by the observation of Sir Lawrence Jenkins C. J. at page 792 of the report.

> "Mere resignation obviously is not enough unless it be assented to, or unless it complies with those terms which the law implies or 'the prior agreement of the parties may permit.'"

(8) — 'Himendra Chandra v. Gauhati University', AIR 1954 Assam 65 (G) was a case of a writ of a candidate for an examination against the Assam University to compel the performance of certain statutory duties required of them by the Gauhati University Act and has no application to the present case.

(9) In the result this petition is dismissed. In the circumstances there will be no order as to costs.

K.S.B. Petition dismissed.

A.I.R. 1954 MYSORE 161 (Vol. 41, C.N. 67)

MEDAPA C. J. AND VASUDEVAMURTHY J.
(9-7-1954)

A. S. Ramaiya and another, Petitioners v. State of Mysore by the Chief Secretary, Respondent.

Writ Petn. No. 49 of 1954.

(a) Constitution of India, Art. 226 — Who can apply.

Only a person aggrieved can move the Court by a writ. No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law. AIR 1951 SC 41, AIR 1951 Mys 14, AIR 1953 Hyd 227 and AIR 1951 All 1 (FB), Rel. on. (Para 1)

Anno: Const. of India, Arts. 32 and 226 N. 22.

† (b) Mysore Court-fees (Amendment) Act (9 of 1954) — Constitutionality of — Constitution of India, Art. 13 (2) and Part III.

The raising of court-fees from Rs. 2/- to Rs. 20/- on writ petitions by the Mysore Court-fees (Amendment) Act, 1954, is not unconstitutional on ground that it takes away or abridges the rights conferred by Part III. The enhancement is neither so unreasonable nor the proposed court-fee of Rs. 20/- so heavy that it can operate in that way. Moreover, admittedly the proposal to enhance the court-fee is to bring it in line with the charges which are being collected in the neighbouring province and "the pith and substance" of that legislation is therefore not to abridge or discourage such applications. (Para 2)

† (c) Constitution of India, Art. 246, Sch. 7, List 2, Items 3 and 66 — Mysore Court-fees (Amendment) Act (9 of 1954) — Validity — (Interpretation of Statutes).

The Mysore Legislature was fully competent under List 2, Item 3 of Sch. 7 to pass the Mysore Court-fees (Amendment) Act, 1954, by which it raised court-fees in respect of certain matters including a petition for a writ. (Para 3)

Item 66, List 2, Sch. 7 cannot be construed as taking away the right given in Item 3 of the same List. Such a construction is obviously unreasonable as Item 66 would then have to be treated as destructive of Item 3 and such construction leading to "absurdity" is not permissible and is opposed to the well-recognized principles of interpretation of statutes. (Para 3)

'Fees' in Item 66 could only mean fees other than court-fees as the latter has already been expressly provided for in Item 3. (Para 3)

CASES REFERRED: Paras

(A) (V38) AIR 1951 Mys 14: 31 Mys LJ 171 1
(B) (V38) AIR 1951 SC 41: 1950 SCR 869 (SC) 1
(C) (1914) 235 US 151: 59 Law Ed 169 1
(D) (V40) AIR 1953 Hyd 227: ILR (1953) Hyd 336 1
(E) (V38) AIR 1951 All 1: 1950 All LJ 767 (FB) 1
(F) (V29) AIR 1942 All 156: 43 Cri LJ 674 2, 3

S. K. Venkataranga Iyengar, for Petitioners.

VASUDEVAMURTHY J.:

This is an application under Art. 226 of the Constitution of India by which the petitioners have prayed that the action of the Legislature in Mysore in enhancing the court-fees on writ petitions under the Mysore Court-fees (Amendment) Act, from Rs. 2/- to Rs. 20/- is void as being opposed to the fundamental rights guaranteed under the Constitution. The petitioners do not claim any other relief nor do they complain in their petition that any particular fundamental rights of their own have been at present infringed and that the enhanced court-fee is standing in their way of approaching this Court under Art. 226 on account of their own poverty. We have held in this Court that only a person aggrieved can move the Court by a writ: vide — 'Bangalore Dist. Hotel Owners' Association v. District Magistrate, Bangalore', AIR 1951 Mys 14 (A).

The Supreme Court have also expressed the same view in — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 (B), where Fazl Ali, Das and Mukherjea JJ. have pointed out that no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law and they have referred to a passage in — 'McCabe v. Atchison', (1914) 235 US 151 (C). That case arose out of a suit filed by five Negroes against five railway companies for restraining them from making any distinction in service on account of race pursuant to a State Act known as "The Separate Coach Law." Upholding the dismissal of the suit Hughes J. observed:

> "It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it and the absence of an adequate remedy at law must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial interference."

The same view has been taken in — 'Veerasham v. Vajrama', AIR 1953 Hyd 227 (D) and — 'Indian Sugar Mills Association v. Secy. to Govt., Uttar Pradesh Labour Department', AIR 1951 All 1 (FB) (E). It is, however, urged for the petitioners that they may be deemed to also have personal interest in the matter as citizens of India as their right to approach this Court is proposed to be curtailed or affected by the raising of the court-fee. We are, therefore, not disposing of their application only on that ground though we are disposed to think that it can be dismissed on that short ground.

(2) It is contended for the petitioners that this legislation goes counter to Art. 13 (2) of the Constitution. It is represented that formerly writ petitions were being charged court-fees of Rs. 2/- only under Art. 1 of the Mysore Court-fees Act as on an application or petition to the High Court for which no other provision was made and that by attempting to raise it the State is really making a law which takes away or abridges the rights conferred by Part III and consequently that any such law is void.

In the affidavit annexed to the application it is represented that the reason given for the enhancement was to bring about uniformity in the rate of court-fees leviable in this State and the rates levied in the Bellary District which has recently been added on to Mysore and on the principle that justice must not be sold but should be administered freely the rates in Bellary ought to have been reduced to bring it in line with the court-fees in Mysore. We do not think that the raising of court-fees from Rs. 2/- to Rs. 20/-, which we may observe has been done in Madras also, in any way takes away or abridges the rights conferred by Part III. The enhancement is neither so unreasonable nor the proposed court-fee of Rs. 20/-

so heavy that it can operate in that way. Moreover admittedly the proposal to enhance the court-fee is to bring it in line with the charges which are being collected in the neighbouring province and "the pith and substance" of that legislation is therefore not to abridge or discourage such applications. It may be that some persons wishing to make groundless, speculative and frivolous applications merely for the purpose of sensation or harassing others may be somewhat discouraged or deterred from filing such applications by reason of the small increase but it is not likely to act as an obstruction to 'bona fide' applications by persons who have a real grievance.

In this connection reference may be made to a case reported in — 'Emperor v. Munna Lal', AIR 1942 All 156 (F). In that case the U. P. Sugar Factories Control Act (1 of 1938) was impugned as unconstitutional on the ground that the Act tended to restrict entry into or export of sugarcane from the province which the Provincial Legislature could not do under S. 297 (1) of the Government of India Act (1935). That construction was negatived. It pointed out:

> "Now the Sugar Factories Act does not expressly or directly prohibit or restrict export or import of sugar or sugarcane from or into the province. It is not a law on the subject of export but it is a law on the subject of agriculture, industries and factories. And in so far as it directs the sugarcane in a reserved area to be sold by some sort of statutory compulsion at a price not below a minimum, it has adopted a necessary measure in the interest of and in order to preserve and develop sugarcane cultivation at a stage when the sugarcane was not and was not likely to be in future, with the doubtful exception in some border districts, subject of inter-province trade. And any remote or indirect interference which may result to export or import by these measures is not open to objection under S. 297 (1), Constitution Act."

(3) It is next urged that the State Legislature was not competent to legislate in this matter. List II, State List, Sch. VII, Item 3 permits legislation with regard to the fees taken in all Courts except the Supreme Court. But it is argued that Item 66 which permits legislation in this matter "of fees in respect of any of the matters in that List but not including the fees taken in any Court" takes away the right given in Item 3 of the same List. Such a construction is obviously unreasonable as Item 66 would then have to be treated as destructive of Item 3 and such construction leading to "absurdity" is not permissible and is opposed to the well-recognized principles of interpretation of Statutes; see Maxwell on Interpretation of Statutes, 9th Edn., p. 5. Fees in the later Item 66 could only mean fees other than court-fees as the latter has already been expressly provided for in Item 3. It refers to fees or cesses leviable in respect of the various matters or items enumerated in that List. By this entry the State Legislature can levy fees or cesses in all matters which are within their legislative ambit by being included in the said List II; see — 'AIR 1942 All 156 (F)'. The Mysore Legislature was therefore, in our opinion, fully competent to pass the Mysore Court-fees (Amendment) Act, 1954, by which it raised court-fees in respect of certain matters including a petition for a writ.

(4) This petition is therefore dismissed.

K.S.B. Petition dismissed.

A.I.R. 1954 MYSORE 162 (Vol. 41, C.N. 68)

MEDAPA C. J. AND VASUDEVAMURTHY J.
(21-6-1954)

J. Kishenlal Phoolchand, Plaintiff-Appellant v. A. Rathan Singh, Defendant-Respondent.

Misc. Appeal No. 80 of 1953, against order of Dist. J., Civil Station, Bangalore, D/- 16-6-1953.

Civil P. C. (1908), O. 40, R. 1 — Receiver, if and when may be appointed in mortgage suits.

In a suit on a simple mortgage a Receiver can be appointed under O. 40, R. 1 at the instance of the simple mortgagee. 12 Mys LJ 495, Foll.; Case law referred. (Paras 6, 10)

In a suit on a simple mortgage the mortgagee plaintiff applied for appointment of a Receiver nearly two years after the institution of the suit when he came to know that a prior mortgagee had obtained a decree and was proceeding against the mortgaged property. This prior encumbrance was suppressed by the mortgagor from the knowledge of the mortgagee. No interest was paid on the mortgage since the date of its execution. The property was not fetching a fair amount due to improper management of the mortgagor and the security had been rendered insufficient due to the prior mortgage:

Held, that in the circumstances it was thoroughly just, reasonable and convenient to appoint a Receiver in the suit. The circumstance that the plaintiff had made an application for the appointment of a Receiver some time after the suit was filed and not immediately but after the prior mortgagee had obtained decree and started to proceed against the mortgaged property was indicative of bona fides and an anxiety to safeguard his own interest rather than otherwise. (Para 5)

Anno: Civil P. C., O. 40, R. 1 N. 4, 14.

CASES REFERRED: Paras

(A) ('34) 12 Mys LJ 495 6
(B) (V16) AIR 1929 Mad 138: 52 Mad 979 6, 7
(C) (V12) AIR 1925 Lah 590: 85 Ind Cas 737 6
(D) (V14) AIR 1927 Sind 230: 102 Ind Cas 353 6
(E) (V13) AIR 1926 Cal 978: 95 Ind Cas 6 6
(F) (V13) AIR 1926 Cal 1006: 95 Ind Cas 632 6
(G) (V23) AIR 1936 Rang 296: 14 Rang 308 (SB) 6
(H) (V7) AIR 1920 Cal 545: 47 Cal 418 6, 8, 10
(I) (V20) AIR 1933 Mad 570: 65 Mad LJ 222 (FB) 7, 10
(J) (V23) AIR 1936 All 495: 58 All 949 (FB) 9
(K) (V30) AIR 1943 All 1: 204 Ind Cas 210 (FB) 9
(L) (V34) AIR 1947 All 157: ILR (1947) All 456 9
(M) ('90) 14 Bom 431 10

A. R. Somanatha Iyer and M. V. Srinivasa Iyengar, for Appellant; N. K. Gopala Iyengar, for Respondent.

VASUDEVAMURTHY J.:

The appellant, who is the plaintiff in the Court below, has filed a suit to recover, Rs. 1,15,000/- principal plus Rs. 4,662-8-0 interest on the foot of a deed of simple mortgage admittedly executed by the defendant on 8-1-1951. It bears the endorsement of the Sub-Registrar that the amount was paid in his presence. The defendant has pleaded that he has not received full consideration for the document and has asked for a re-opening of some previous transactions between himself and others which, according to him, have a bearing on the consideration for the suit document.

(2) In March 1953 the plaintiff made an application for the appointment of a Receiver for managing and protecting the mortgaged properties and for the collection of rents and profits. In the affidavit annexed to the application, he represented that nearly Rs. 1,41,000/- were due to him by that date including costs, that though in the mortgaged deed the respondent had expressly covenanted with the plaintiff that the mortgaged properties were all free from encumbrances except those set out in it he had recently come to know that some of the items had been already mortgaged to one Ambaram Fakirbhai in July 1942, that the latter had filed two suits O. S. Nos. 56 and 57 of 51-52, obtained decrees for sale and had been executing the said decrees and that a sum of Rs. 22,000/- was stated to be due to him under those decrees and that though the respondent had agreed to pay interest at one per cent. per mensem regularly he had not paid any amount towards interest from the date of mortgage though he was realizing a sum of Rs. 920/- for rent.

In the meantime the value of the mortgaged properties was falling and in the event of a decree there was no chance of his realizing the full amount due to himself as some of the plaint items were now to be subject to the prior encumbrance in favour of Ambaram Fakirbhai. He estimated the present value of the properties at Rs. 1,33,500/- after deducting the amount due under the previous mortgage in favour of Ambaram Fakirbhai.

(3) In the counter affidavit the defendant pleaded that the plaintiff was aware about the encumbrances and that one Khanmull Ganeshmull who was acting for the plaintiff had applied or promised to apply for an encumbrance certificate and had collected the necessary charges from himself. The suit mortgage deed was got drawn up by Ganeshmull who for some reason did not incorporate therein the two mortgages in favour of Ambaram. The value of the properties mortgaged was according to him Rs. 4,11,000/- and they were fetching rent of Rs. 680 and not Rs. 920/- as alleged. He characterized the plaintiff's application as 'mala fide'.

(4) The learned District Judge who heard the application refused to appoint a Receiver. He was inclined to believe that the value of the immovable properties had fallen; but he thought that, as ordinarily money-lenders advance loans only up to 40 per cent. of the value of the properties, the mortgaged properties were of sufficient value and continued to be good security for the plaintiff's loan. He said:

> "I am not just now in a position to know the real or probable market value of properties. However it is significant that the fact of a prior mortgage was not embodied in the suit mortgage deed, and at this stage, it may be inferred that the defendant did not have it embodied. But the application was filed about 8 months after the suit and ordinarily a simple mortgagor has a right to remain in possession and appropriate the profits of the mortgaged property till the sale has actually taken place."

He thought that though the amount was heavy it could not be said that the arrears had fallen due for a long period of time. The plaintiff has come up in appeal against that order.

(5) It is difficult to support the learned District Judge's order. That some considerable amount is due to the plaintiff is not denied by the defendant. It is also not denied that no interest at all has been paid to the plaintiff though more than four years have now elapsed since the date of the mortgage. It is not clear how the learned District Judge considers that a creditor advances only 40 per cent. of the value of the property. Section 66, Transfer of Property Act, provides that a security is sufficient only if—in the case of mortgaged buildings—they are at least twice the value of the debt. It cannot be believed that the value of the properties is Rs. 4 lakhs and odd as represented by the defendant if the rent which he is realizing from them is only Rs. 680/- per month. If the rent is capitalized as 16 2/3 x 10 months' rent it would amount to Rs. 1 lakh and odd. Admittedly there are two prior mortgages for which decrees have been obtained and execution has been sought in respect of some of the items mortgaged.

It is represented for the respondent that he has not chosen to raise the rent of the buildings and that the tenants have continued to pay the same rent from a long time. This would indicate either that the respondent is unable to manage his affairs properly, if he is not sufficiently interested in realizing the proper rents especially when he is so heavily indebted, or that the premises are not kept in proper repair and management. It appears to be therefore thoroughly just, reasonable and convenient to appoint a Receiver in the present case. The respondent can certainly be not said to be justified in asking that he should be collecting all the rents and utilising them himself without paying a single pie even towards his admitted and just debts for which decrees have been obtained and which would vitally affect the plaintiff's security. The circumstance that the plaintiff has made an application for the appointment of a Receiver some time after the suit was filed and not immediately and probably after Ambaram obtained decrees and started to proceed against the mortgaged property is indicative of bona fides and an anxiety to safeguard his own interest rather than otherwise.

(6) 'Abdul Basid Sab v. Sahukar Sardarmul Multan Mull', 12 Mys LJ 495 (A) is a clear authority for the position that a Receiver can be appointed at the instance of a simple mortgagee. The learned District Judge has tried to distinguish that case on the ground that there was an allegation of waste of the mortgaged property made in it. But it has been laid down in that case that apart from the allegation of waste there was a distinct allegation that nearly Rs. 8000/- interest had not been paid and that circumstance was a sufficient ground to justify the order of appointment of a Receiver in a suit on a simple mortgage. The cases in — 'Ethirajalu Chetty v. Rajagopalachari', AIR 1929 Mad 138 (B), — 'Paras Ram v. Puran Mal-Ditta Mal', AIR 1925 Lah 590 (C); — 'Punjab National Bank Ltd. v. Moosaji Jafferji', AIR 1927 Sind 230 (D); — 'Abdul Khairat Mahommad v. Hrishikesh Das', AIR 1926 Cal 978 (E) and — 'Manindra Chandra v. Suniti Bala Debi', AIR 1926 Cal 1006 (F), are referred to therein in support of that position; see also — 'Venkenna v. Mangammal', AIR 1936 Rang 296 (SB) (G) and — 'Rameswar Singh v. Chuni Lal', AIR 1920 Cal 545 (H), which are to the same effect.

(7) In — 'AIR 1929 Mad 138 (B)' it is pointed out that

> "It is impossible to lay down a hard and fast rule laying down under what circumstances the Court will appoint a Receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow

possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a Receiver."

This case has been referred to and followed in — 'Paramasivan Pillai v. Ramasami Chettiar', AIR 1933 Mad 570 (FB) (I).

(8) In — 'AIR 1920 Cal 545 at p. 547 (H)' when dealing with the contention that a Receiver could not be appointed at the instance of a simple mortgagee their Lordships observed that the same was not based on principle and that there was no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a Receiver; whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession.

(9) The learned District Judge has referred to — 'Anandi Lal v. Ram Sarup', AIR 1936 All 495 (FB) (J) which lays down the contrary. That decision was based on the interpretation of the words "any person" in O. 40, R. 1 as meaning even parties to the suit, and held that as a simple mortgagee has no present right to remove the opposite party from possession and custody he cannot get a Receiver appointed to the property mortgaged to him. That decision was later on considered by a Full Bench in — 'Mt. Tulsha Devi v. Shah Chironju Lal', AIR 1943 All 1 (K) and Iqbal Ahmed C. J. observed that the Division Bench which heard the appeal had entertained considerable doubt about the accuracy of that decision and that the answer to the question whether cl. (ii) of R. 1 of O. 40 has application only to properties in the possession of third parties or is also applicable to the properties in the possession of one of the parties to the litigation is beset with considerable difficulty and there is considerable divergence of judicial opinion on the point. The Full Bench considered advisable that, in order to set the doubt at rest so far as their Courts were concerned, the rule should be so amended as not to leave any doubt as to the true interpretation of cl. (ii) of R. 1 of O. 40. They themselves left the question open as they felt it unnecessary to decide it in the case before them. Subsequently the rule was amended in Allahabad as referred to in — 'Bireshwar Banerji v. Sudhansu Shekhar Singh', AIR 1947 All 157 (L). By that amendment the words "not being a party to the suit" were inserted after the word "person" in sub-r. (ii).

(10) It must be observed that the wording of O. 40, R. 2 in the Code of Civil Procedure as in force in Mysore is the same as in Madras and Calcutta; and nevertheless those Courts have not considered the same as any bar to the appointment of a Receiver in suits on a simple mortgage. They seem to be based on the principle that by appointing a Receiver in such a case the mortgagee is not really seeking to deprive the possession by the mortgagor of the mortgaged property or to obtain possession for himself but is ensuring that the same is managed for the benefit of the mortgagor and on his behalf so that its income and profits which may be said to be accretions to the mortgaged property may be made available and applied towards the discharge of the mortgage debt and that the Court by such appointment is merely ensuring the payment of interest to the mortgagee as agreed to by the mortgagor and that the appointment of a Receiver is only a mode of realizing the security even in the case of a simple mortgage; see — 'AIR 1933 Mad 570 at pp. 574, 581 and 582 (FB) (I)'. They also base their decisions on principles of English law in such matters; see — 'AIR 1920 Cal 545 (H)'; — 'Jaikissondas Gangadas v. Zenabai', 14 Bom 431 (M). In any event we are bound by the decision of this Court which appears to us, if we may say so with respect, to be in consonance with justice and equity.

(11) We, therefore, allow this appeal and set aside the order of the Court below. The District Judge is directed to appoint a proper person as Receiver with powers to manage the properties, collect the rents and deposit the same in Court. There will be no order as to costs in this appeal.

(12) During the course of the arguments in the appeal before us it was agreed for the appellant that a sum not exceeding Rs. 200/- per month may be paid out of the rents so collected to the defendant till the disposal of the suit for his current expenses. The learned District Judge will give effect to the same.

(13) The suit was filed more than two years ago. The matter involved appears to be simple, and it is surprising that the suit has not been disposed of till now. It is hoped that the learned District Judge will do so expeditiously.

K.S.B. Appeal allowed.

A.I.R. 1954 MYSORE 164 (Vol. 41, C.N. 69)

BALAKRISHNAYYA AND MALLAPPA JJ.

(4-2-1954)

M. Ramamurthy, Accused-Petitioner v. State of Mysore.

Criminal Revn. Petn. No. 242 of 1953, against decision of Principal Sessions J., Bangalore, in Cr. A. No. 75 of 1953.

(a) Penal Code (1860), S. 292 — Obscene publication — What is —Test.

The test of obscenity is, whether the tendency of the matter charged as obscene is to deprive and corrupt those whose minds are open to immoral influences and in whose hands a publication of this sort may fall. The publication must be regarded as obscene if it is calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. (1868) 3 QB 360, Rel. on. (Para 4)

Works of art are never considered as obscene. (Para 6)

It is the effect of the publication on the mind of an ordinary young person that has to be considered in deciding whether it is obscene or not. AIR 1952 Cal 214, Rel. on. (Para 6)

Whether the book is obscene is a matter in which the Court is entitled to rely on its own judgment as well as the evidence of witnesses in support of this finding of fact. AIR 1932 Cal 651, Rel. on. (Para 9)

Where a man publishes a work manifestly obscene he must be taken to have intended the inevitable consequences. The object which the writer has in view is immaterial. If the publication is an obscene publication it would be no defence to say that the law was broken for some wholesome and salutary purpose. (Para 9)

Held on a consideration of the publication 'Kama Kala' as a whole that it was obscene within the meaning of S. 292, Penal Code. (Para 8)

Anno: Penal Code, S. 292 N. 1.

(b) Criminal P. C. (1898), Ss. 242 and 537 — Effect of non-compliance of S. 242.

Under S. 242, Cr. P. C., a Magistrate trying a summons case is required at the very outset to state to the accused the particulars of the offence and to ask him to show cause why he should not be convicted. The particulars must be stated in such detail as to give the accused full information regarding the case which he has to meet. 16 Mys CCR 231, Rel. on. (Para 10)

Where the omission to comply with S. 242 has prejudiced the accused in his defence the conviction cannot be sustained. (Para 10)

Anno: Cr. P. C., S. 242 N. 8.

CASES REFERRED: Paras

(A) (1868) 3 QB 360: 37 LJMC 39 4, 9
(B) (V34) AIR 1947 Lah 383: 48 Cri LJ 910 5
(C) (V39) AIR 1952 Cal 214: 1952 Cri LJ 575 6
(D) (V19) AIR 1932 Cal 651: 56 Cal LJ 123: 33 Cri LJ 771 7, 9
(E) (V7) AIR 1920 Bom 402: 22 Bom LR 166: 22 Cri LJ 513 8
(F) (1814) 3 M and S 11: 105 ER 516 9
(G) ('11) 16 Mys CCR 231 10
(H) ('24) 2 Mys LJ 223 10
(I) ('29) 7 Mys LJ 144 10

C. B. Srinivasa Rao, for Petitioner; The Advocate General, for the State.

ORDER: This is a revision petition against the judgment of the Principal Sessions Judge, Bangalore, in Criminal Appeal No. 75 of 1953 confirming the conviction under S. 292, I. P. C., but modifying the sentence passed by the Additional First Class Magistrate, Bangalore, in C. C. No. 10 of 1952-53.

(2) The petitioner-accused is the editor of a monthly journal known as 'Kama Kala'. The prosecution case is that the accused-petitioner is distributing and has put into circulation this monthly journal which contains obscene writings and pictures. Eleven copies of the journal of different months have been exhibited in the case and three witnesses were examined for the prosecution and according to them the journal contains obscene writings harmful to youngmen and women. On the other hand, the accused has examined two witnesses of whom one is Dr. Puttanna, a retired Surgeon and who was the Principal of the Medical College and the other gentleman is the well-known author Sri Devadu Narasimha Sastry. The Doctor is of opinion that there is nothing obscene in the pamphlets and that it is fit to be prescribed as a text book in Medical Colleges and Schools. Sri Devadu Narasimha Sastry is of opinion that he has no hesitation in placing these pamphlets in the hands of children of sufficient age.

(3) We have been taken through some portions of the pamphlets and before considering the question whether they are obscene it may be useful to state that what has to be considered as obscene or indecent has changed from time to time and may not exactly be the same in different countries. What is tolerated in one country may be considered as bordering on obscenity in another country. It may also be stated that there has been a difference of opinion as to whether young men and women have to be educated on questions of sex and if so, to what extent. Though the tendency in recent times is to consider that young men and women should know something of sex, the orthodox view is still that such a knowledge is dangerous. The intention however of Legislature is not to prohibit knowledge of sex being spread on scientific lines. What however is objectionable according to law is that a person should not take advantage of the curiosity of young men and women to know something of sex and make money out of publications that will have the effect of depraving their minds.

(4) The Indian Penal Code has not defined what is meant by "obscene". In "Manual of Law terms and phrases" by K. J. Aiyar "obscene" is defined as follows:

> "This term is intended in law to denote what is an offence to public moral and decency. The offences against public moral and decency are (1) selling, distributing, importing, or printing for sale, or hire, or publicly exhibiting any obscene book, pamphlet, paper, drawing, painting, representation or figure; (2) Having in possession any obscene book for sale or exhibition; Sections 292 and 293, I. P. C."

The test of obscenity according to what has been laid down by Cockburn C. J. in — 'R. v. Hicklin', (1868) 3 QB 360 (A), which is invariably relied on in most of the later authorities on the point is,

> "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences and in whose hands a publication of this sort may fall."

He also observed that the publication must be regarded as obscene if it is

> "calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come."

(5) As observed in — 'Emperor v. Harnam Das', AIR 1947 Lah 383 (B):

> "Where the book in question was a serious work intended to give advice to married people, and particularly husbands, on how to regulate the sexual side of their lives to the best advantage, that is to say, with a view to promoting their health and mutual happiness.
>
> Held: Such books when properly written serve a useful purpose. Such books are published on a large scale and widely circulated in all civilised countries including Britain and the United States of America. If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood, and, it cannot be said that the publication of such books should be banned altogether because of the danger, against which it is undoubtedly very difficult to provide effective safeguards, that they may fall into the wrong hands."

(6) It may be added that works of art are never considered as obscene. Then again as observed in — 'Sukanta Halder v. The State', AIR 1952 Cal 214 (C):

> "The Courts have, more often, restricted the use of the term obscenity to sexual immorality only. Such matters as would tend to stir in persons, into whose hands such matter is ordinarily expected to reach, sex impulse which lead to sexually impure and lustful thoughts, are declared as obscene, attracting the jurisdiction of the Court to ban out such publications. The true test is not to find out what depraves the morals in any way whatsoever but what leads to deprave only in one way, viz., by exciting sexual desires and lascivious thoughts."

Another point that may arise for consideration is whether a book can be called obscene if it pro-

duces depraved thoughts on any young person. It may be that a young person may be so sensuous in nature that his feelings will be roused by a look at the diagram of sex organs in a medical book. There may be persons whose feelings are not roused under any circumstances. It is not the effect of the publication on such persons the Courts have to take note of. It is the effect of the publication on the mind of an ordinary young person that has to be considered in deciding whether it is obscene or not. As observed in the above authority:

> "The effect produced on an ordinary member of the society or a particular class of readers for which a particular publication may be meant has to be ascertained. It is neither a man of wide culture or rare character nor a person of a depraved mentality should be thought of as being the readers of such literature. The standard of readers is neither one of exceptional sensibility nor one without any sensibility whatsoever."

(7) As regards appreciation of evidence in cases of this kind,

> "whether the book is obscene is a matter in which the Court is entitled to rely on its own judgment as well as the evidence of witnesses in support of this finding of fact,"

as observed by Jack J. in — 'Kailash Chandra v. Emperor', AIR 1932 Cal 651 (D).

(8) In this case some oral evidence has been adduced and the Courts below have rightly applied their mind and found that the journal contains material that would corrupt and deprave the minds of young persons. It would but be fair to say that the journal contains some useful matter to young men and women, but on the whole there are a good number of passages that would have an undesirable effect on the minds of young men and women. What the author clearly refuses to answer to imaginary or real questions put to him, he publishes in the form of questions stated to have been put to him in letters. Pictures of naked men and women are printed to attract youngsters. No better purpose than this could be thought of for the introduction of a large number of such portraits exhibiting different postures of naked persons. Taken as a whole it is difficult to differ from the findings of the Courts below. It is true that some passages contain useful matter that may be read by young men but as observed by Hayward J. in—'Rahimatalli v. Emperor', AIR 1920 Bom 402 (E):

> "It is necessary of course, to take into consideration the whole pamphlet and not merely to look to passing references which might give no real indication of its true intention. But on the other hand it is equally necessary not to be misled by the length of perfectly unexceptional and proper passages into missing the sting, however short and pungent, lurking in the pamphlet."

(9) It is contended that the intention of the accused is to instruct the young and not to deprave their minds. But Blackburn J. in — '(1868) 3 QB 360 (A), took the rule of law to be, as stated by Lord Ellenborough in — 'Rex v. Dixon', (1814) 3 M & S 11 (F) in the shortest and clearest manner

> "it is a universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious the intention is an inference of law resulting from the doing of the act."

As observed in — 'AIR 1932 Cal 651 (D)':

> "Where a man publishes a work manifestly obscene he must be taken to have intended the inevitable consequences;"

and as observed by Mitter J. in the above case:

> "The object which the writer has in view is immaterial. If the publication is an obscene publication it would be no defence to say that the law was broken for some wholesome and salutary purpose."

(10) The oral evidence of the Doctor, Puttanna, and Sri Devadu is no doubt in favour of the accused but it is unfortunate that the prosecution has not concentrated on the above portions of the pamphlets and questioned the witnesses as to their view on these portions. Even the P. Ws. have not not been questioned with reference to these portions of the publication. It is this weakness in the evidence that leads us to ascertain what definite case the accused has been asked to meet. It is found that no question under S. 242, Cr. P. C., has been put at all. Even after the P. Ws. were examined he had not been questioned particularly with reference to the objectionable passages and we are of opinion that this has prejudiced the accused to a considerable extent. The question for consideration is whether the conviction under these circumstances has to be upheld.

As was pointed out in — '16 Mys CCR 231 (G)' under S. 242, Cr. P. C., a Magistrate trying a summons case is required at the very outset to state to the accused the particulars of the offence and to ask him to show cause why he should not be convicted. The particulars must be stated in such detail as to give the accused full information regarding the case which he has to meet. It may here be stated that this is a decision of a Bench. It is no doubt true that this case has been distinguished in — '2 Mys LJ 223 (H)'. That is a case decided by a Single Judge. The omission was regarded as a mere irregularity and in view of certain points referred to in that decision it was considered that the accused was not prejudiced and the conviction was upheld.

In a later decision it is pointed out that the omission amounts to an illegality. That is a decision of a Bench of two Judges and it has been held in that decision, — '7 Mys LJ 144 (I)', that in a summons case, the procedure prescribed in S. 242, Cr. P. C., is mandatory. The Court should bring to the notice of the accused persons, the particulars of the offence they were accused of, and their plea should be recorded under Ss. 242 & 243, Cr. P. C. Mere examination of the accused under S. 342, Cr. P. C., after prosecution witnesses had been examined, will not cure the initial illegality in the omission to follow the provisions of S. 242 whch renders the trial void. The weakness of the oral evidence as it stands and the inadequacy of questions put under Ss. 242 and 342, Cr. P. C., make us feel that the conviction cannot be upheld on this count.

(11) The petitioner appears to be young man of some intelligence. He has faced the trial. This case has been hanging on from 10-6-52 when the charge sheet was filed. He had filed an appeal and has come up to this Court in revision. We have been assured that the publication of 'Kama Kala' was stopped from the date on which the charge sheet was placed. It may be added that it has been brought to our notice that this is the first case launched in Mysore under S. 292, I. P. C. Considering all the circumstances of the case, we do not think that it is necessary to remand the case and order a re-trial. The revi-

sion petition is therefore allowed and the conviction and sentence are set aside.

K.S.B. Conviction & sentence set aside.

A.I.R. 1954 MYSORE 167 (Vol. 41, C.N. 70)

BALAKRISHNAYYA J. (9-2-1953)

Hutcheeregowda, since deceased by L. Rs. and others, Plaintiffs-Appellants v. Sanjeevagowda and others, Defendants-Respondents.

Second Appeal No. 14 of 1952-53, against decree of First Addl. Sub.-J., (Court of Sm. C.), Bangalore in R. A. No. 72 of 1949-50.

Civil P. C. (1908), O. 3, R. 4 — Pleaders — Power to compromise.

A pleader has no authority to enter into a compromise on his own responsibility unless the vakalatnama in his favour confers such authority on him and a compromise decree effected by the pleader without the necessary authority is not binding on the client. Even in the case of express authority in writing, the general power to conduct the case cannot imply a specific power authorising the Advocate to agree to compromise on his own responsibility. 4 Mys LJ 94, Rel. on; Case law referred:

Held that as the Advocate in the case had made it amply clear in his deposition that he had compromised the suit on behalf of all the parties as he had power to do so and the assertion was fully supported by the express authority to compromise contained in the vakalatnama, the compromise was binding on the parties. AIR 1950 Pat 253, Distinguished. (Paras 4, 5)

Anno: Civil P. C., O. 3, R. 4 N. 7.

CASES REFERRED: Paras

(A) (V17) AIR 1930 PC 158: 57 Ind App 133 (PC) 4
(B) (V22) AIR 1935 PC 119: 14 Pat 545 (PC) 4
(C) (V10) AIR 1923 PC 98: 84 Ind Cas 721 (PC) 4
(D) ('98) 21 Mad 274: 8 Mad LJ 40 4
(E) ('26) 4 Mys LJ 94 4
(F) (V5) AIR 1918 Mad 656: 41 Mad 233 4
(G) (V37) AIR 1950 Pat 253 5

G. Dayananda, for Appellants.

JUDGMENT: The suit from which this appeal arises was filed to repel the terms of a compromise entered in O. S. 338/46-47 and to declare the decree passed therein as null and void. The trial Court dismissed the suit and the said decision was confirmed in the first appeal.

(2) O. S. 338/46-47 was filed by defendants 1 to 3 of this suit, against the plaintiff and defendant 4 (pro forma) for declaration that the alienation of the properties made by their father was not binding on their interests. During the progress of the suit, a compromise was entered into under the terms of which the defendants obtained certain portions of the properties involved in that suit. The compromise petition was signed by defendant 4 who was present in Court and the lawyer (Mr. H. Narayana Rao) who was appearing for all the defendants in that suit signed on their behalf. The ground upon which the suit is filed is that the compromise was entered into without the knowledge of the plaintiffs and that it was the result of fraud on the part of the lawyer in collusion with defendant 4. It has been found by the Courts below that there was no proof of either collusion or fraud on the part of the lawyer and that the compromise entered into was bona fide and in pursuance of the authorisation contained in the vakalatnama (the kannada version translated) to the effect that "we have hereby given full powers to agree to compromise on our behalf in the case." The appellants are thus concluded by the concurrent findings of fact and no interference is called for.

(3) A point touching the validity of, and impeaching the power of the Advocate to enter into, the compromise, is raised. It is argued for the appellants that the general power stipulated in the vakalatnama was insufficient to enable the Advocate to act on his own responsibility so as to bind the appellants for the acts of the counsel, and that in addition it was incumbent on the part of the Advocate to have taken special authority before the compromise was agreed upon. I am unable to appreciate the contention, especially in view of the express authority contained in the vakalatnama.

(4) The relation of a party with that of the Advocate appointed to conduct the suit on his behalf is regulated by the agreement, express or implied, between them. In the English Courts, the authority of an Advocate to compromise on behalf of a client in a suit is said to be derived from the known existence of the implied authority attributable to his appointment as counsel. If the authority is derived from an express agreement in writing, no question of implied authority arises, but the extent of the power is governed by the specific terms of the authority. In a general authorisation to conduct a case, the authority to compromise is not implied; and the Advocate in such cases cannot, without reference to his client, compromise a suit on his behalf. But the Advocate can always compromise if the express authority is contained in the vakalatnama. Following the practice obtained in the English Courts, Lord Atkin delivering the judgment of the Judicial Committee of the Privy Council observed in an appeal from Bengal — 'Sourendra Nath v. Tarubala Dasi', AIR 1930 PC 158 at p. 161 (A) that

> "their Lordships regard the power to compromise a suit as inherent in the position of an Advocate in India. The considerations that have led to the implied power being established in the Advocates of England, Scotland and Ireland, apply in equal measure in India."

This decision was followed in a later case — 'Sheonandan Prasad Singh v. Abdul Fateh Mohammad', AIR 1935 PC 119 (B), where it was laid down that

> "Counsel in India have the same implied authority to compromise an action as have counsel in English Courts..... It may, however, be withdrawn or limited by the client; in such a case the actual authority is destroyed or restricted."

These are cases in which implied authority was the question for consideration, without an express authority in writing. In the former case, the learned Lord (Lord Atkin) proceeds to state at page 162 that

> "When a legal representative in Court of a client, derives his authority from an express written authority, such as a vakalatnama, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of any kind under discussion."

Where the compromise was supported, not on implied authority but depended upon an express

written authority, the opinion of their Lordships has been expressed in — 'Sourindra Nath v. Heramba Nath', AIR 1923 PC 98 (C) thus:

> "A pleader who does not hold or has not filed in the suit before the Court his clients' general power of attorney authorising him generally to compromise a suit on behalf of clients cannot be recognised by a Court as having any authority to compromise the suit, unless he has filed in the suit his clients' vakalatnama giving him authority to compromise the suit before the Court."

When the party has retained a pleader and signed the vakalat which made no reference to the power to compromise, the Madras High Court held in — 'Jagapati Mudaliar v. Ekambara Mudaliar', 21 Mad 274 (D) that

> "it is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so."

This Court has, on a consideration of — '21 Mad 274 (D)' and — 'AIR 1923 PC 98 (C)', laid down in — 'Naranaiyengar v. Naranachar', 4 Mys LJ 94 (E) that

> "A pleader has no authority to enter into a compromise on his own responsibility unless the vakalatnama in his favour confers such authority on him and a compromise decree effected by the pleader without the necessary authority is not binding on the client."

Even in the case of express authority in writing, the general power to conduct the case cannot imply a specific power authorising the Advocate to agree to compromise on his own responsibility. A provision in the vakalat "to present, if necessary, petitions of rajinama for withdrawal and for referring to arbitration and to sign the rajinama, etc.", was held to be insufficient to give authority to the Vakil to enter into compromise without reference to his client (vide — 'Thenal Ammal v. Sokkammal', AIR 1918 Mad 656 (F)).

(5) It was further argued that the mere signature of the Vakil to the petition without indicating that it was so signed in pursuance of authority vested in him under the vakalat, does not bind the client. Reliance was placed for this proposition on — 'Shital Prasad Singh v. Surendra Nath', AIR 1950 Pat 253 (G). In that case, the express authority in writing claimed by the Vakil to compound the case was not proved by the production of the vakalat and in consequence, it was observed that the power, even if available, could not be recognised as there was not even an endorsement indicating that signature was appended in pursuance of the express power vested in him. The case is thus distinguishable and does not help the appellants. In the present case, the Advocate has made it amply clear in his deposition that "I have compromised the suit on behalf of all the parties as I had power to do so" and this assertion is fully supported by the express authority to compromise, contained in Exhibit XIV the vakalatnama. There is thus no reason to interfere with the concurrent decisions of the Courts below.

(6) In the result, the appeal is dismissed without notice.

D R.R. Appeal dismissed.

A.I.R. 1954 MYSORE 168 (Vol. 41, C.N. 71)

VENKATA RAMAIYA AND MALLAPPA JJ.
(2-12-1953)

Bank of Mysore Ltd., Avenue Road, Bangalore City by its Manager, B. V. Narayana Reddy, Appellant v. B. D. Naidu, Respondent.

Regular Appeal No. 75 of 1950-51, against decree of Dist. J., Bangalore in O. S. No. 27 of 1945-46.

Contract Act (1872), S. 38 — Valid tender — Essentials.

A tender to be effective must be, as required by S. 38, Contract Act, unconditional and of the full amount due. A tender clogged with the term that the money is to be taken as a settlement is not good. (1847) 11 QB 130 and (1833) 172 ER 1223, Rel. on. (Para 3)

Thus, a cheque for an amount which is short of what is actually payable for a complete discharge with a condition that it should operate as extinction of the entire liability is not a valid tender. There is no principle of law which authorises the acceptance by the creditor of a cheque for a sum smaller than what is due without prejudice to his rights, when the cheque describes the payment to be in full discharge of the liability. (Para 3)

Further, when a cheque is meant to discharge two debts as a whole without specifying the portion of the amount to be applied to either debt, the creditor has no option or obligation to receive the amount and distribute it between the debts in a manner which the debtor considers to be helpful to him. (1848) 136 ER 1091, Rel. on. (Para 3)

Anno: Contr. Act, S. 34 N. 2, 3, 4.

CASES REFERRED: Paras

(A) (1847) 11 QB 130: 116 ER 425 3
(B) (1833) 172 ER 1223: 6 Car and P 237 3
(C) (1848) 136 ER 1091: 5 CB 793 3

K. Raja Iyer, D. H. Chandrasekharaiya and C. K. Narayana Rao, for Appellant; D. Narasarajulu and K. P. Muddappa, for Respondent.

VENKATA RAMAIYA J.:

Respondent sued the appellant which is the Bank of Mysore, Ltd., for return of the Shares left as security for a loan, alleging that the Bank unreasonably failed to accept the tender of monies due and caused loss to the respondent estimated at Rs. 11,000/- and this sum together with dividends payble with respect to the shares are more than sufficient to wipe off the debt. The tender and discharge of the debt were both denied by the Bank and a lien on the shares was claimed for payment of the loan referred to in the plaint as well as another for recovery of which a decree has been obtained in the Court of the Sub Judge. The question as to what was the amount due to the Bank was raised in Issue No. 4, that of tender in Issue No. 1 and of damages in Issue No. 3. Without recording any evidence the learned District Judge dismissed the suit holding that it was not maintainable. The dismissal was set aside by this Court and the case remanded for disposal after taking evidence and allowing amendment of the plaint.

Subsequently, an account of monies due to the Bank and of damages due to plaintiff was asked for and an additional issue about the Bank's right to retain the shares till payment of the amount due under the decree of the Sub Court was framed. Besides the correspondence and extracts of

accounts relating to the transactions exhibited in the case, the only persons examined in the case are plaintiff and the Superintendent of the Loan section of the defendant Bank. The lower Court has on a consideration of these decreed the suit as prayed for awarding Rs. 11,000/- as damages. On behalf of the Bank it is contended that the decision is not warranted either by the facts of the case or the law applicable to it. Learned Counsel for the respondent did not rely on the cases referred to in the judgment for supporting it as some of these were found to be either misquoted or misapplied.

(2) The plaintiff's right to the shares cannot be disputed as these stand in his name and the plaintiff cannot question the Bank's claim to retain the shares till the amount due in respect of what is called the share loan account is discharged as the shares were given as security for the loan. The case of the plaintiff is not that as a matter of fact the amount was paid by him but only that he offered to pay it, that the Bank unreasonably refus¢d the offer and that, owing to this refusal to receive the amount and release the shares, the plaintiff could not have the benefit of realising about Rs. 11,000/- by disposing of the shares when the value of these had appreciated. According to the Bank there was no acceptable offer and plaintiff has suffered no loss by retention of the shares.

The crux of the case is the factum and legality of tender. Except for a mere reference in the plaint which is controverted, there is no proof of tender of any amount in the year 1941. The allegation concerning this in the letter Exhibit A is so vague and dubious that no weight can be attached to it. Apart from this it is the cheque dated 29-5-1943 for a sum of rupees twenty thousand drawn by the plaintiff in favour of defendant which is alleged to constitute an effective tender. The cheque was not sent to the Manager of the Bank but given to Sri Wajid who was then a Director of the Bank. Mr. Wajid is not examined in this case and the cheque is not encashed. The cheque directs payment in "full and final settlement of all accounts" of the plaintiff. In his evidence the plaintiff states

> "I had known from the defendant that Rs. 21,500/- was due by me on all accounts and if Rs. 20,000/- had been accepted it was in full settlement and the defendant is to give up Rs. 1500/-".

It is admitted that besides the debt contracted by the plaintiff for the purchase of shares, he owed monies in the overdraft account, that in the suit for recovery of the latter, the settlement of both debts by means of the cheque was set up by plaintiff but negatived and there was a decree without relying on the settlement. Absolutely no evidence is adduced in this case to prove that the Bank agreed to forego any part of the amount due from plaintiff. It therefore follows that the amount for which the cheque was issued is less than what was payable to the Bank as admitted by the plaintiff himself for complete discharge of his liabilities. The cheque was stated to be in full discharge of all liabilities and there was no letter qualifying it or intimation for its being appropriated otherwise. Nor did plaintiff make any effort directly with the Manager to reach an understanding or renew the offer to pay on modified terms. In these circumstances the question is whether the Bank can be subjected to liability for not returning the shares.

(3) It is argued on behalf of the plaintiff that since the amount of the cheque was at any rate more than what was due for satisfaction of the share loan, the Bank should have appropriated what was necessary for the same out of the realisation under the cheque & credited the rest towards the other account. In the absence of any instruction from plaintiff in this behalf, the Bank could hardly have adopted this course unless the law required it. Even if this was possible or necessary, the plaintiff, it is alleged is not entitled to insist on delivery of the shares by virtue of Art. 19 of the Articles of Association. The Article is pointedly set out in a letter to the plaintiff wherein a lien is claimed on the shares for the amount due not merely on the share loan account but also on the overdraft account.

An attempt was made on plaintiff's behalf to show that the contract between the parties must be construed as having limited the lien only to the share loan. Even so, the contention for the Bank is that the lien is two-fold — one under the general law of contract as in Section 171 capable of being varied by agreement, another under the Companies Act binding on plaintiff as a shareholder which cannot be avoided. The Bank's contention has, I think, to be upheld though it is enough for the purpose of the decision in this case that the cheque in any event cannot be regarded as a valid tender and the right of the Bank to proceed against the shares for recovery of the debt in respect of the overdraft account is secured by the attachment of the shares in execution of the decree.

A tender to be effective must be, as required by Section 38, Contract Act, unconditional and of the full amount due. Prima facie both these are lacking in the cheque. The amount is admittedly short of what was payable for a complete discharge and yet it is intended to operate as extinction of liability. In — 'Bowen v. Owen', (1847) 11 QB 130 (A), Lord Denman C. J. observed

> "All persons who make a tender in form do so for the purpose of extinguishing a debt. If, in tendering for that purpose, they merely propose that the creditor should take the sum offered and leave it open to him to persist in his claim for more such a tender is free from objection: but if a party says 'I will not pay this money unless you give a receipt for it as the whole amount due' that is no legal tender".

Baron Vaughan put it tersely thus in — 'Mitchell v. King', (1833) 172 ER 1223 (B):

> "A tender clogged with the terms that the money is to be taken as a settlement is not good".

Learned counsel of plaintiff has not pointed out any provision or principle of law which authorises the acceptance by the creditor of a cheque for a sum smaller than what is due without prejudice to his rights, when the cheque describes the payment to be in full discharge of the liability. There is also no authority for the proposition that when the cheque is meant to discharge two debts as a whole without specifying the portion of the amount to be applied to either debt the creditor has an option or obligation to receive the amount and distribute it between the debts in a manner which the debtor considers to be helpful to him. A view definitely against it has been expressed in — 'Hardingham v. Allen', (1843) 136 ER 1091 (C) with the head note

> "A demands from B 11. 7s. for several matters including 10s. for a particular service performed by A. B tenders 19s. 6d. This will not support a plea of tender of 10s. on account of such service."

(4) Cottman J. observed:

"With regard to the tender no doubt if the 19s. 6d. tendered was sufficient to cover the plaintiff's entire demand it would be a good tender as to the 10sh.; but if it was insufficient to cover the entire demand then inasmuch as it was not specifically applied to any portion of it, it does not sustain the replication".

Assuming that a choice of adjustment was open to the Bank, there is apparently no reason why the settlement of the share loan amount had to be preferred to the discharge of the decree debt. On the contrary, consistent with the contention about the lien being confined to the share loan account, the Bank would have better reason in the absence of definite instructions to appropriate the amount towards the debt which was unsecured rather than the one which was secured.

It may be mentioned that plaintiff attempted settlement only after the Bank sued him for recovery of the money due on the overdraft account and in the course of the suit drew the cheque for Rs. 20,000/- for discharge of that debt as well as the one now in dispute. The question of settlement was raised in issue and the learned Sub-Judge Mr. U. D. Narayanamurthy after recording evidence came to the conclusion against plaintiff. The effect of this is that it was not in mind of plaintiff when he gave the cheque, it was given in discharge of one of the debts as is now argued.

The result is that the cheque cannot be held to be a valid tender of the amount due by the plaintiff either for both the debts or any of those. The claim for damages does not arise as the foundation for it of a valid tender is lacking. It is therefore unnecessary to discuss whether the plaintiff can be said to be damnified at all and if so to what extent. The plaintiff has been benefited in a way by the shares not being disposed of as on the strength of being a holder of these he has acquired an equal number at the reallotment, on terms manifestly favourable to him. This is not taken into account but arbitrarily the value of the shares prevalent in 1944, the year following that of the cheque and preceding that of the suit, is taken as basis for awarding the damages as it happened to be higher comparatively. The award of damages being thus untenable and the amount allowed being unreasonable must be set aside.

Though this is the essential part of the plaintiff's case, there are other reliefs for which the suit was unnecessary and about which there is no controversy. Those are returning the shares to the plaintiff on payment of the amount due. Relying on the Bank's accounts Exhibit XVIII the lower Court has held that the amount due on 31-3-1950 by the plaintiff is Rs. 10,843-13-0. The correctness of this is not questioned by the plaintiff.

(5) The learned Judge of the lower Court was of the view that the tender was sufficient and that the Bank has no lien for the overdraft account, and that a sum of Rs. 11,000/- was due to plaintiff towards damages by the Bank on account of the failure of defendant Bank to return the shares to plaintiff. The sum of Rs. 10,843-13-0 due by plaintiff was adjusted to the amount of Rs. 11,000/- due by defendant as damages. He directed the return of the shares unconditionally. As has been stated already he should have held that there was no proper tender and that the Bank had a lien over the shares in respect of the overdraft account. In this view his decree for returning the shares should have been conditional on the plaintiff paying not only Rs. 10,843/- but also money due on the overdraft account. The finding that plaintiff is entitled to damages on the ground of there being a proper tender and on the ground that the Bank had no lien for the overdraft account is therefore set aside.

(6) There will be a decree that in case the plaintiff pays Rs. 10,843-13-0 with interest at 4 per cent. from 31-3-50 and discharges the decree debt due on the overdraft account within three months from this date the Bank will return the shares with dividends thereon from the above date and in case he fails to do so the Bank is at liberty to realise the debts due to them on the security of the shares. The appeal is allowed and the claim for damages is dismissed. The plaintiff will pay the costs of defendant in both Courts as he has not been able to establish his claim to the unconditional delivery of the shares.

D.R.R. Appeal allowed.

A.I.R. 1954 MYSORE 170 (Vol. 41, C.N. 71)

VENKATA RAMAIYA AND BALA-KRISHNAIYA JJ. (2-12-1953)

In the matter of R. Nanjiah, Merchant and Commission Agent, Santhepet, Mysore.

Civil Petn. No. 19 of 1953.

(a) Sales Tax — Mysore Sales Tax Act (1948), Ss. 3 and 2 — "Dealer" — Commission agent licensed by Regulated Market.

The part played by a commission agent licensed by the Regulated Market in the disposal of the goods is not that of a vendor. His role is only to introduce the seller to the places where the goods may be sold and to help him to get into contact with the buyer. He can neither determine the terms of the bargain nor hand over the goods. Such a person can hardly be considered a dealer as defined in the Act and as such is not liable to sales tax. Having regard to the nature of the work done by him, he cannot be called a commission agent and has to be termed only a broker. AIR 1952 Mad 718 (FB); AIR 1950 Mad 521 and AIR 1954 Mad 184, Ref. (Paras 3 and 4)

(b) Sales Tax — Mysore Sales Tax Act (1948), S. 9 — Omission to take out license.

Section 9 provides for a person obtaining a license to exempt from taxation. It cannot imply that all those who do not have the license may be taxed, as what is material is their being 'dealers' and not licensees. Hence if a person is not a dealer (e.g. commission agent) within the meaning of the Act he cannot be taxed although he has not taken out a licence under S. 9. (Para 5)

CASES REFERRED: Paras

(A) (V39) AIR 1952 Mad 718: 65 Mad LW 250 (FB) 4

(B) (V37) AIR 1950 Mad 521: 63 Mad LW 413 4

(C) (V41) AIR 1954 Mad 184: 4 STC 331: 1954 Cri LJ 158 4

The Advocate-General, for the Govt.; S. K. Venkataranga Iyengar, for Assessee.

VENKATA RAMAIYA J.:

The two questions referred to this Court by the Commissioner of Sales Tax under S. 16, Mysore Sales Tax Act are:

"1. Whether on the facts of the case the assessee being a commission agent licensed by the

Regulated Market is required to take out a license under S. 9 of the Mysore Sales Tax Act so that he may not be taxed as a dealer and whether in the absence of a license he is liable for taxation under S. 3 of the Mysore Sales Tax Act?

2. Whether S. 9 of the Mysore Sales Tax Act is a charging Section.....".

(2) The facts bearing on the first question as stated in the reference are: The ryots and sellers of goods bring them to Mysore City. The Octroi Mutsaddi or Octroi Ookad levies market cess and octroi if any. The assessee as holder of a license issued by the Regulated Market to act as commission agent waits at the Ookad, takes the carts in which the goods are brought by the ryots to the Regulated market or deputes his authorised agents to do so. Alternatively the Octroi Mutsaddi notes the name of the commission agent as mentioned by the seller and sends the carts to the Regulated market. At the market the goods are sold in the presence of the Market Authorities by the Commission Agent. If the sellers agree to part with the goods for the highest bidder the goods will be delivered to him. Otherwise these will be resold on a subsequent day and till then remain with the market authorities, a fee being charged for storage.

The seller will be present at the sale whenever it be, signs the papers relating to it and receives the amount. There is no case in which the commission agent is authorised to either accept the bid or receive the amount on behalf of the seller. The commission agent gets a commission of three pies per rupee for the services rendered by him.

(3) The main condition of liability for payment of the tax is mentioned in S. 3 to be that the person concerned should be a dealer in goods. "Dealer" is defined in S. 2 as any person who carries on the business of buying or selling goods; 'Sale' is defined as transfer of the property in goods by one person to another in the course of trade or business for cash or.....Obviously the assessee is not a buyer of goods. He can be charged, if at all, he can be deemed to carry the business of selling the goods and this depends on his effecting the transfer of the property in the goods by one person to another. The part played by him in the disposal of the goods is not that of a vendor and no one can either mistake him to be such as it is known that the price has to be accepted by another and the goods can be obtained with his consent. His role is only to introduce the seller to the places where the goods may be sold and to help him to get into contact with the buyer. He can neither determine the terms of the bargain nor hand over the goods. Such a person can hardly be considered a dealer as defined in the Act.

(4) Having regard to the nature of the work done by the assessee the absence of authority to fix the transaction and of power to hand over the goods, he cannot be called a commission agent and has to be termed only a broker. As pointed out in the Full Bench decision of the Madras High Court — 'Radhakrishna Rao v. Province of Madras', AIR 1952 Mad 718 (FB) (A) in the case of a commission agent he has control over or possession of the goods with the authority from the owner of the goods to pass the property in and title to the goods to anybody to whom he may sell. At p. 722 reference is made to an earlier case, — 'Provincial Govt. of Madras v. Veerabhadrappa', AIR 1950 Mad 521 (B) the facts of which are summarised to be that the sellers were bringing their goods to the plaintiff's shop, plaintiff sent for prospective purchasers who came in person or their representatives, the purchasers themselves inspected the goods and the prices were fixed after discussion between the sellers, buyers and commission agents, thereafter delivery was made to the buyers and plaintiffs were paid with consent of the sellers, commission and other sums such as rusum, Dharma etc.

As regards the view taken in that case it is observed

> "there can be no doubt whatever that the merchants in those cases do not fall within the definition of 'dealer'. They themselves neither sold nor bought the goods. They simply brought the seller and buyer together and received a brokerage or commission by way of remuneration for their trouble".

In another case of the Madras High Court cited by Sri S. K. Venkataranga Iyengar — 'Public Prosecutor v. M. Thommaia Fernando', AIR 1954 Mad 184 (C) it was held that persons who do nothing more than crying out the bids at the auction and who have no custody or possession over the property auctioned and have no authority to pass the property in the goods to the purchasers can only be brokers not falling within the definition of 'dealers' and as such not liable to sales tax. If these principles are applied to the facts in the present reference, the answer to the first question must be in favour of the assessee. The learned Advocate General has not made out that a different view is possible or necessary to justify the assessment.

(5) Section 9 provides for a person obtaining a license to exempt from taxation. It cannot imply that all those who do not have the license may be taxed as what is material is their being 'dealers' and not licensees.

(6) The answer to both the questions raised is in the negative. The parties will bear their own costs.

G.M.J. Answer in the negative.

A.I.R. 1954 MYSORE 171 (Vol. 41, C.N. 72)

MALLAPPA AND VASUDEVAMURTHY JJ.

(15-12-1953)

Bangalore City Municipality—now the Corporation of Bangalore and another, Appellants v. K. Rangappa, Respondent.

Second Appeal No. 141 of 1950-51, against decree of Sub-J., Civil Station, Bangalore, in R. A. No. 44 of 1949-50.

Land Acquisition Act (1894), S. 6 — Public purpose — Acquisition of land at instance of Municipality for private institution — Validity — (Municipalities — Mysore City Municipalities Act (7 of 1933), S. 43) — (Civil P. C. (1908), O. 1, R. 10).

The Government started acquisition proceedings at the instance of the Bangalore City Municipality for acquisition of the two shops in suits and a few other shops and according to the notification the acquisition was necessary for widening a street in the City, and for adding some land to a private institution. The cost of acquisition of the two shops in suit was to be met not by the Government or the Municipality but by the private

institution for which the land was acquired. The plaintiff, the owner of the two shops, sued defendants 1 and 2 who were the Bangalore City Municipality represented by its Commissioner and the Special Land Acquisition Officer attached to that Municipality for a declaration that the acquisition of the suit properties was illegal, invalid and inoperative and for a permanent injunction restraining them from entering upon or otherwise interfering with its possession and enjoyment.

Held that (i) the proposed acquisition was not warranted by S. 6, Land Acquisition Act, and was, therefore, void. Under S. 6, Land Acquisition Act, the Government must be satisfied that the land to be acquired was needed for a public purpose or for a company and it could not be said that the two shops were required for any public purpose or any company. Then again, under the proviso to that section no declaration for the acquisition of the land could be made unless the compensation to be awarded was to be paid by a company or wholly or partly out of the public funds. Hence, the acquisition of the two shops was bad as the cost had to be met by the private institution which was not a company. (Paras 4, 7, 17)

(ii) The acquisition was also not warranted by S. 43, Mysore City Municipalities Act, as it was certainly not one of the duties and obligations imposed on the Municipal Council by the City Municipalities Act. (Paras 5, 17)

(iii) That the suit against the Land Acquisition Officer or other persons interfering with possession, without the Government being made a party was maintainable. 22 Mys CCR 277 and 25 Mys CCR 228, Rel. on. (Para 6)

Anno: Land Acquisition Act, S. 6 N. 2, 5; Civil P. C., O. 1, R. 10 N. 25.

CASES REFERRED: Paras

(A) (V8) AIR 1921 Cal 159: 48 Cal 916 5, 6, 14, 16
(B) ('20) 25 Mys CCR 228 5, 13
(C) ('17) 22 Mys CCR 277 6, 13, 14, 16
(D) (V32) AIR 1945 Mad 304: 1945-1 Mad LJ 480 10
(E) ('07) 34 Cal 470: 5 Cal LJ 669 13
(F) (1900) 24 Bom 600: 2 Bom LR 395 15
(G) (V32) AIR 1945 Mad 394: ILR (1946) Mad 153 (FB) 16
(H) (V12) AIR 1925 Bom 538: 90 Ind Cas 695 17

R. Rangiah, for Appellant; S. N. Krishniah, for Respondent.

MALLAPPA J.:

The plaintiff-respondent filed the suit under consideration in this appeal for declaration that the acquisition of two shops mentioned in the plaint schedule by the Government at the instance of the Bangalore City Municipality is illegal and invalid and for an injunction restraining the defendants, that is, the Bangalore City Municipality and the Land Acquisition Officer from disturbing the possession of the plaintiffs.

(2) The Government started acquisition proceedings at the instance of the Bangalore City Municipality, as it then was, for acquisition of the two shops now under consideration and a few other shops and according to the notification the acquisition was necessary for widening Rangaswamy Temple Street at the junction of the Avenue Road, Bangalore City, and for adding some land to Sri Siddaroodaswami Mutt. As is clear from Ext. II, the plaintiff who is the owner of the two shops, objected to the acquisition on the ground that the two shops were separated by another building which was not acquired, from the other shops acquired for purpose of widening the road, and the acquisition of his two shops was for the private purpose of adding some lands to what is known as Siddaroodaswami Mandali there being no Siddaroodaswami Mutt as such, and that the acquisition also was not valid as the Government had decided that the acquisition of the land must be at the cost of Siddaroodaswami Mandali. It is surprising as was contended that the authorities concerned decided to acquire the shops which had been dedicated to an ancient temple of the City, but we are concerned with the legality of the acquisition and not with the propriety.

(3) It is not seriously disputed that acquisition of the property under the Land Acquisition Act with the purpose of giving the property to a Mutt or any private individual is illegal. But what was urged is that the acquisition is at any rate partly for the purpose of widening the road and as such it cannot be said that the acquisition is not legal. It is not necessary to consider in this case whether an acquisition of some property partly for a public purpose within the meaning of S. 3, cl. (f), Land Acquisition Act, and partly for a purpose not contemplated by that Act is vaild or not, as in this case it is clear that the acquisition is in respect of two different set of properties one set being required for the public purpose of widening the road and the other for the purpose of adding some land so acquired to a building belonging to what is referred to as Siddaroodaswami Mandali.

Exhibit D makes it clear that the plaintiff has been informed that the Government has directed immediate action being taken to hand over possession of the two shops of the plaintiff to the authorities of Siddaroodaswami Mandali. While it is clear that the two shops were acquired for purpose of giving the land on which the two shops have been built to Siddaroodaswami Mandali, the other three shops separated from these two shops by another building not acquired, were acquired for purpose of widening Rangaswami Temple Street at the place where it joins the Avenue Road. It is also clear from the evidence that the cost of acquisition of the shops now in question has to be met not by the Government or by the Municipality.

(4) The acquisition of the two shops is void for more than one reason. Under S. 6, Land Acquisition Act, the Government must be satisfied that the land to be acquired is needed for a public purpose or for a Company and it cannot be said in this case that the two shops were required for any public purpose or any Company. Then again, under the proviso to that section no declaration for the acquisition of the land can be made unless the compensation to be awarded is to be paid by a Company or wholly or partly out of the public funds. In this case, the acquisition of the two shops is bad as the cost had to be met by Siddaroodaswami Mandali. Then again the Municipality can only get lands acquired under S. 43, City Municipalities Act, and it is as follows:

> "When any land, whether within or without the limits of the Municipality, is required for the purposes of this Regulation, the Government may, at the request of the Municipal Council, proceed to acquire it under the provisions of the Land Acquisition Regulation, 1894, and on payment by the Municipal Council of the compensation awarded under that Regulation and of any other charges incurred by the Govern-

ment in connection with the acquisition, the land shall vest in the Municipal Council."

(5) A careful reading of this section makes the following points clear. First it cannot be said that acquisition of land for being added on to the premises belonging to Siddaroodaswami Mandali can be said to be for any purpose under the Municipalities Act. Secondly, the Municipality cannot acquire any land for the use of somebody else. Thirdly, it cannot also be said that the Municipality by the Municipal Council has or could have paid the compensation or other charges incurred by the Government as contemplated by this section. It was observed in — 'Manickchand Mehta v. Corporation of Calcutta', 48 Cal 916: (AIR 1921 Cal 159 (A)):

"Though the notification under S. 6, Land Acquisition Act, is conclusive so far as S. 4, Evidence Act, is considered, yet the Court is entitled to inquire into the validity of the steps leading up to the recommendation, and was competent to inquire into the legality or otherwise of the acts of the Corporation and the Trust. Also, held, that special powers of the Corporation for purposes of acquiring land cannot be used to enable another body to acquire land through them, however estimable the purpose. The power to acquire is limited to cases where the Corporation itself undertakes the work".

It can be stated in this case, as was done in the case reported in — '25 Mys CCR 223 at p. 234 (B)':

"In the case before us an essential pre-requisite to the exercise by Government of the power to take compulsory proceedings for acquisition is absent, in that the compensation to be awarded is not to be paid wholly or partly out of public revenues".

(6) Regarding the objection that the Government is a necessary party to the suit, it cannot be said in cases of this kind that the suit against the Land Acquisition Officer or other persons interfering with possession, without the Government being made a party, is not maintainable in view of the decision in — '22 Mys CCR 277 (C)'. As was observed in — '48 Cal 916: (AIR 1921 Cal 159) (A)':

"It is to be assumed that the Local Government and the Land Acquisition Authorities will stay their hands in view of a decision of the Court, and not be parties to what may be held to be illegal and ultra vires action".

(7) The judgment and decree of the learned Subordinate Judge, therefore, declaring the acquisition as void and granting an injunction restraining the defendants from taking possession must be affirmed. The appeal stands, therefore, dismissed with costs.

VASUDEVAMURTHY J.:

(8) The plaintiff sued defendants 1 and 2 who are, the Bangalore City Municipality represented by its Commr. and the Special Land Acquisition Officer attached to that Municipality for a declaration that the acquisition of the suit properties consisting of two shops in Rangaswamy Temple Street, Bangalore City, was illegal, invalid and inoperative and for a permanent injunction restraining them from entering upon or otherwise interfering with its possession and enjoyment. His suit was dismissed by the Munsiff but on appeal the Subordinate Judge has set aside the judgment and made a decree as prayed for against both the defendants. The Bangalore City Municipality by its Commissioner and the Special Land Acquisition Officer have now come up in second appeal.

(9) The case for the plaintiff is that defendant 1, at the instance of an association called Siddharudaswamy Mandali proceeded to acquire the plaint schedule shops for making them over to that Mandali and that such an acquisition was not for a public purpose and was not in law permissible either under the Mysore Land Acquisition Act or the Mysore City Municipalities Act. The defendants pleaded that the proposed acquisition was for the purposes of widening the road at the place where the property is situate and also to add land to the property of the Mandali which is said to be a religious and charitiable institution and was registered under the "Religious and Charitable Associations Act". There is no Act of that name and apparently what is meant is the Societies Registration Act 30 of 1904. They also pleaded that the plaintiff's suit was not maintainable and was also barred under S. 6, Land Acquisition Act.

(10) It is contended by Mr. B. R. Keshava Iyengar, learned Counsel for the appellants, that the purpose for which the acquisition is proposed is really a "public" purpose, i.e., the widening of the road, and that even if it is found that the other object which is tacked on to that purpose and is mentioned in the notification, i.e., to give some land to the Mandali is not such a purpose, it cannot be said that the combined object is not a public purpose. He represents that the cost of the acquisition or the compensation amount is to be met from out of the funds of the Bangalore City Municipal Council as well as of the Mandali, and that therefore the acquisition is for a public purpose according to the test laid down by S. 6 (2), Mysore Land Acquisition Act.

He has relied in this connection on a case reported in — 'Abdul Rasak v. Abdul Rahim', AIR 1945 Mad 304 (D) where it has been held that it is sufficient compliance with the proviso to S. 6 (1) if any part, however small, is paid out of public funds.

(11) Mr. S. N. Krishniah, learned counsel for the respondent, has urged that the Mandali, which is called Sri Siddharudhaswami Mutt in the notification for acquisition, Ex. I, is not either a company registered under the Companies Act or a local authority as contemplated in S. 6, Land Acquisition Act; that the Mandali cannot obviously be contributing its funds to the widening of the road and that such a thing is not urged or even pleaded. That the Mandali is therefore contributing its funds for the cost of acquisition only in so far as it concerns it, viz., the addition of some land or additional property to itself. There is considerable force in this contention of Mr. Krishniah and it must be accepted.

Exhibit D is an endorsement by the Special Land Acquisition Officer on 2-11-1945 with reference to an application by the plaintiff protesting against the proposed acquisition of the plaint schedule shops and the plaintiff is thereby informed that that officer had been directed by Government to take immediate action to hand over possession of the said (suit) buildings to the authorities of the Siddharudaswami Mandali and calling upon the plaintiff to deliver up possession of the properties to the Municipal Engineer failing which coercive steps would be taken under S. 47, Land Acquisition Act, before the City Magistrate. It is thus clear that the suit shops were being acquired for the express purpose of making them over to the Mandali who were to meet the cost of its acquisition and that there could be no connection between this object and the widening of the Municipal road for which other properties were being acquired as seen from Ex. I, the notification, under S. 4, Land Acquisition Act.

(12) Mr. Krishniah further urges that a Municipal Council can ask the Government to acquire land only for certain purposes and to fulfil certain objects prescribed by the Mysore City Municipalities Act 7 of 1933 and that the present acquisition does not fulfil those requirements. Under S. 43 of that Act it is only when any land "is required for purposes of the Act" the Government may at the request of the Municipal Council proceed to acquire it and on payment by the Municipal Council of the compensation awarded under the Land Acquisition Act the land vests in the Municipal Council. Under Ss. 58 & 61 of that Act the obligatory and discretionary functions of the Municipal Councils are set out: & it is not even suggested that it is any part of the Municipal Council's functions or duties to take away the land of a private individual through acquisition and make it over to a private individual or institution like the Mandali or that it is so empowered; and the acquisition of the suit property is not being defended on that basis.

(13) Mr. Keshava Iyengar, however, contends that the suit as brought by the plaintiff for a declaration against the Municipal Council and the Land Acquisition Officer without making Government a party is not maintainable. He urges that the Land Acquisition Officer is merely an officer of Government who is acting for and on behalf of the Government and is merely carrying out the duties prescribed under the Land Acquisition Act and that in Mysore no such suit could have been brought against the Government in 1946 before the Constitution. These objections have, however, been considered in two cases of this Court reported in — '22 Mys CCR 277 (C)' and — '25 Mys CCR 228 (B)'.

In — '22 Mys CCR 277 (C)' the plaintiff sued the Secretary to the Government of Mysore in the General and Revenue Departments and the Deputy Commissioner of Mysore who was the officer authorised to take action under the Mysore Land Acquisition Act, for a declaration that an order of Government authorizing him to take action for the acquisition of certain lands in Mysore under the Land Acquisition Act was contrary to the Act and of no effect and for an injunction restraining the Deputy Commissioner from taking possession of the land. The District Judge dismissed the suit on the ground that it was a suit against the Government and that in Mysore such suits do not lie against the Government. Sir Leslie Miller, C. J. and Paramasiva Iyer, J. held in that case that there was no cause of action against the Secretary to Government as he had merely signed a declaration under S. 6, Land Acquisition Act. He was neither the Government of Mysore nor an officer authorized by that Government to direct the Deputy Commissioner to acquire the land but only the hand by which the authority of Government was transmitted.

They further held that the Courts in Mysore have jurisdiction to decide whether an act of the Government which purports to be done under the warrant of an enactment is or is not warranted by that enactment and if it is not so warranted to make a declaration to that effect in a suit against the officer authorized to give effect to the illegal act and that a public officer who acts illegally cannot protect himself by pleading the authority of Government and the Courts are not powerless to issue an injunction in a proper case to restrain a public officer from committing an illegal act. They, therefore, held that the suit as against the Secretary to Government did not lie and that the suit against defendant 2 did lie. There still remained two questions to be answered: (1) Whether the Courts were entitled to decide that the purpose stated in the notification is not a 'public purpose' within the meaning of the Act? and (2) If they were so entitled whether the purpose stated in the case before them was a public purpose or not? They remanded the case to the lower Court for a determination of those questions.

After the case went back to the District Judge he declared the notification issued in the case illegal and the subsequent acquisition proceedings null and void. The case again came up before Chandrasekhara Aiyar, Offg. C. J. and Plumer, J. and their decision is reported in — '25 Mys CCR 228 (B)'. It was urged before them by the Government Advocate that inasmuch as the declaration of the intended acquisition of the land published in the Official Gazette was conclusive evidence that the land was needed for a public purpose, the District Judge was wrong in making a declaration to the contrary. In that case the first Government order sanctioning acquisition of certain lands directed that the cost of acquisition should be charged to the Third Maharajakumari's Estate, and a later one authorized the Comptroller to place certain sum at the disposal of the Deputy Commissioner, the charge being debited to the Third Maharajakumari's Estate as directed in the previous order. Their Lordships held that there was no intention to pay, though it was arranged to advance the amount of compensation from the public revenue, and that essential prerequisite being absent in that the compensation was not to be paid out of the public revenue, the entire proceedings for acquisition were 'ab initio' null and void.

They further held that the direction contained in the proviso to sub-s (1) to S. 6, Land Acquisition Act, was a condition imposed by the Statute which must be complied with in substance and spirit before the Government can become clothed with the power to make a declaration which is the starting point for proceedings under acquisition. They relied for so holding on the following passage in — 'Rameswar Singh v. Secretary of State', 34 Cal 470 (E) at pp. 480 and 481:

> "In order to give validity to the proceedings and finality to the award in which they terminate, the power of acquisition with all statutory limitations and directions for its use must be strictly pursued; every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with. It is an elementary proposition that statutory provisions in respect of acquisition of lands must be strictly complied with, and the burden of proof of compliance rests upon those who claim statutory powers or base their title upon the exercise of statutory provisions".

(14) In — '48 Cal 916: (AIR 1921 Cal 159) (A)' it has been held that though the notification under S. 6, Land Acquisition Act, is conclusive so far as S. 4, Evidence Act, is concerned yet the Court is entitled to enquire into the validity of the steps leading to the recommendation and is competent to enquire into the legality or otherwise of the acts of the Corporation and for whose benefit the land is being acquired. It was also held in that case that the special powers of the Corporation of Calcutta for the purpose of acquiring the land could not be used to enable another body the Calcutta City Improvement Trust, to acquire land through them however estimable the purpose. The power to acquire was limited to cases where the Corporation itself undertook the work. They also observed that it was to be assumed that the Local Government and the land acquisition autho-

rities would stay their hands in view of a decision of the Court and not be parties to what may be held to be an illegal and 'ultra vires' action. This observation was necessitated by an argument which was advanced before the learned Judge as has also been put forward in the case before us, viz., that as the Government was not a party to the suit they may not feel themselves bound by the decision of the Court and give effect to it. Such an objection is also answered by Sir Leslie Miller, C. J. in — '22 Mys CCR 277 (C)' in the same way.

(15) For the appellants reliance has been placed on some cases which may be examined. In — 'Shastri Ramchandra v. Ahmedabad Municipality', 24 Bom 600 (F) the District Municipality purchased through Government a narrow strip of land at the entrance of a private street for the purpose of widening the street in order to facilitate the effective use of fire engines. It was clearly a purpose within the powers of the Municipality and was conducive to the promotion of public health, safety and convenience and it was therefore held that the Civil Court had no jurisdiction to restrain the Municipality from the exercise of such powers. Even in that case Parsons, J. pointed out that the land acquired would not be "thrown into and become a part of" the private road:

> "It would become vested in the defendant Municipality for being used by them for any purpose sanctioned by the Bombay District Municipal Act."

(16) In — 'Suryanarayana v. Province of Madras', AIR 1945 Mad 394 (FB) (G) it has no doubt been held that S. 6, Land Acquisition Act, is a bar to a Civil Court questioning a declaration by a Provincial Government that a land is required for a public purpose. But it is, however, pointed out in that decision that:

> "Of course, if the Provincial Government in fraud of its powers directed land to be acquired a suit would no doubt lie; but where there is no charge against the Provincial Government that it has acted in fraud of its powers, its action in directing the acquisition cannot be challenged in a Court of law."

In that case it was conceded for the appellant that it could not be said that the Provincial Government had acted "in fraud of its powers". Mr. Keshava Iyengar has laid stress on this observation and urged that it is only if "fraud" is alleged or proved that a suit will lie and that there was no such charge in this case. There seems to be no justification for construing that observation as confining to the class of cases so punishable but only to cases where "fraud" is alleged. The expression "fraud of its powers" has a wider significance. If the avowed or real object which may or may not be expressed in the notification can be proved to be illegal or 'ultra vires' of the Land Acquisition Act as in — '22 Mys CCR 277 (C)' or the City Municipalities Act or other enactment as in—'48 Cal 916: (AIR 1921 Cal 159) (A)' it is obvious that a suit does lie even according to the principle conceded by their Lordships in their observation.

(17) In — 'Municipal Corporation of Bombay v. Ranchordas Vandravandas', AIR 1925 Bom 538 (H) the notification under S. 6, Land Acquisition Act, stated that the land was required for a public purpose, viz., the building of quarters for Municipal servants of the Bombay City Municipality. It appeared that the Bombay Municipality contemplated designing the ground floor portion as shops to be let on hire. The plaintiffs who were interested in the property proposed to be acquired challenged the purpose of the acquisition on the ground that the building of shops for renting them out was not a public purpose. On the facts and circumstances of that case that objection was not upheld, the learned Judges based their decision on the ground that the contemplated utilization of the ground floor of the premises to be built upon the area in suit as shops was not sufficient to invalidate the whole scheme.

There could be no doubt that as held in that case the building of quarters for Municipal servants was a measure likely to promote public convenience and could properly have been undertaken by the Municipal Council. This is permitted also under the Mysore City Municipalities Act, S. 61 (2) (e). That was the real and only purpose of the acquisition and was within the discretion of the Municipal Council. A Court of law could not be asked to interfere with the exercise of that discretion. That case has no bearing on the present case. The grant of grounds or shops to the Mandali is certainly not one of the duties and obligations imposed on the Council by the City Municipalities Act. The proposed acquisition of the plaint schedule shops is therefore clearly not warranted by the Mysore City Municipalities Act and by S. 6, Land Acquisition Act.

(18) In the result the judgment and decree of the learned Subordinate Judge are affirmed and this appeal is dismissed with costs.

K.S.B. Appeal dismissed.

A.I.R. 1954 MYSORE 175 (Vol. 41, C.N. 73)

VENKATA RAMAIYA AND BALAKRISHNAIYA JJ. (30-3-1953)

B. V. Venkatacharya, Appellant v. The Mysore Sugar Co., Ltd., Respondent.

Regular Appeal No. 159 of 1949-50, against decree of Addl. Sub. J., Bangalore in O. S. No. 131 of 1946-47.

Master and servant — Person appointed on probation — (Contract Act (1872), S. 73).

Person appointed on probation for one year — Person's services can be terminated before expiry of period of one year — No damages can be claimed. (Paras 4, 5)

Anno: Contract Act, S. 73 N. 13.

A. R. Somanatha Iyer and S. Suryanarayana Rao, for Appellant; Gutur Sreenivasa Rao, for Respondent.

VENKATA RAMAIYA J.:

This is a plaintiff's appeal against the dismissal of a suit for damages claimed on the ground of wrongful termination of service. The plaintiff who is a graduate in Agriculture was appointed Farm Superintendent on a salary of Rs. 300/- in the grade Rs. 300-25-500 on prohibition for 1 year, entered on his duties as such on 10-8-1946 and was served on 23-11-1946 with a notice intimating termination of his employment from 9-12-1946. He issued a notice on 23-1-1947 alleging that the termination of service was wrongful but the defendant in its reply of 21-2-1947 maintained that it was justified. Thereupon the suit was filed on 5-4-1947 seeking payment of Rs. 2487-1-6 as salary for unexpired period of appointment, Rs. 331-10-0 high

price allowance, compensation of 1000-0-0 for mental worry, of 2000-0-0 for loss of reputation, of 500-0-0 for loss due to dislocation of affairs and 25-5-6 as notices charges, in all Rs. 6344-1-0.

Defendant denied liability to pay any amount and contended that the appointment of the plaintiff was not regular, that even otherwise its termination could not be questioned. The learned Subordinate Judge on a consideration of the evidence adduced in the case held that the appointment of the plaintiff was quite valid and legal, that there was no good reason for the termination of the service but it afforded no cause of action for the suit as the employment was at the will of the defendant. He therefore dismissed the suit with costs.

(2) In this appeal the claim is limited to the salary and allowance besides a sum of Rs. 500/- as damages for wrongful dismissal, the other amounts being given up. The arguments on either side were confined to the nature and extent of the rights which an employee has when he is appointed on probation. No case in which the question was raised or decided has been brought to our notice. The term 'probation' is not defined or explained anywhere by the defendant in the rules governing appointments. The plaintiff did not ascertain the exact implication of the words "on probation for one year" when he entered service.

It is possible that the plaintiff had the impression that he would not be disturbed at all. Likewise it is improbable that defendant would have sent away plaintiff if the former incumbent for the post was not restored. At the time the plaintiff was appointed the previous Superintendent was reverted to the post of Chemist. The reversion was subsequently held to be unjust or unnecessary and as such recalled so that plaintiff had to vacate the office in his favour. Both parties rely on the terms of the order of appointment to justify the stand of each and the question is as to which of these is to be upheld.

(3) In Exhibit E which is a publication in the Hindu inviting applications for the post it is stated that "candidates selected will be on probation for one year and salary will be according to qualifications". There is no mention of the possibility of the candidate being confirmed at the end of one year. Exhibit J dated 8-8-1946 addressed to the plaintiff states

> "....it has been decided to appoint you to the post on probation for one year on a salary of Rs. 300/- in the grade.... plus .....and to request you to report yourself for duty as early as possible"

The plaintiff applied for the post in response to Exhibit E and accepted the offer made in Exhibit J. Emphasis is laid on the period of one year on behalf of plaintiff and on the word "probation" for the defendant, the argument on one side being that the period being fixed cannot be cut short by exercise of the defendant's option to terminate the service before the expiration of the period while the contention of the other party is that the option may be exercised at any time.

If as urged for the plaintiff the expression "on probation for one year" entitles him to be employed for one year, irrespective of the wishes of defendant, the words "on probation" will be superfluous and meaningless. Such a construction will perhaps place him even in a better position than a person appointed without that condition though ordinarily the absence of the condition implies that the appointment is permanent in the sense of not being liable to be brought to an end by the will of the employer. "Probation" according to Law Lexicon of Ramanath Iyer means "testing of a person's capacity, conduct or character especially before he is admitted to regular employment". In Webster's Dictionary "Probation" is said to have been derived from the Latin word 'Probatio' and French "Probare" meaning to try, examine, prove and is itself defined as any proceeding designed to ascertain truth to determine character, qualification, etc.; examination; trial or a period of trial; as, to engage a person on probation.

(4) Obviously a probationer is not in the same position as others in service. His is a state of suspense attended with the uncertainty of an inchoate arrangement. Prima facie his rights and claims against the employer are less than those of others. "Probation" cannot be taken to bind the parties to be employer and employee till it is over and confer on the employee rights not available to others. That would be contrary to the accepted notions of service as "probation" is understood to be a stage preparatory and prior to confirmation. It is not disputed that the services of a person on probation can be dispensed with on grounds on which a person appointed without it can be dismissed. While the two to that extent are on a par, it is more reasonable to imply a disability or disadvantage for a "probationer" than a privilege as against one who is not on probation. The period denotes the time up to which he will be on trial and not an assured duration of service. The plaintiff, it is conceded, could not have complained against the termination of service at the end of one year.

(5) No objection can possibly be raised to a person on probation for any given time being confirmed even before the lapse of the said period. The employee will welcome it. Another way of examining the position is to see whether plaintiff himself could not have left the service before the completion of one year and whether by virtue of his being on probation for one year he was subject to the obligation to work so long under the defendant. If so, probation is not different from contract. The words have to be taken to convey the meaning ordinarily attaching to them. So read, the plaintiff having accepted the terms proposed cannot insist on being kept in service for a full year and make the termination of the service earlier the basis of an action for damages.

It was open to the plaintiff to seek modification of the terms proposed as he deemed fit but having agreed without demur to serve "on probation" for whatever period it be cannot now be aggrieved, the option vested in the defendant to terminate the plaintiff's service being exercised, on the ground that it was done sooner than was expected. The defendant having the option to terminate the service must be deemed to have the option to fix the time at which the service is terminated. The plaintiff by submitting himself to work on trial for one year must be considered to have agreed to the contigency of being sent away and put himself in the hands of the defendant.

(6) The claim in my opinion was rightly disallowed by the lower Court. The appeal is dismissed without costs.

D.H.Z. Appeal dismissed

A.I.R. 1954 MYSORE 177 (Vol. 41, C.N. 74)

VENKATARAMAIYA AND BALAKRISHNAYYA JJ. (29-1-1954)

Hutchappa, Plaintiff-Appellant v. Mallappa and others, Defendants-Respondents.

Second Appeal No. 405 of 1950-51, against decree of Addl. Sub-J., Mysore, in Regular Appeal No. 10 of 1950-51.

T. P. Act (1882), Ss. 58, 67 and 68 — Simple mortgage usufructuary — Right to sue for sale.

Where a mortgage deed after reciting that a sum of Rs. 650/- was received from the mortgagee and that the properties were left in his possession for a period of two years, stated that immediately after the expiration of the said period the mortgagor would pay the amount to the mortgagee and in case of default the mortgagee may continue to be in possession of the properties:

Held, that the mortgage contained a personal covenant to pay and therefore it could not be regarded a purely usufructuary mortgage but may be called a simple usufructuary mortgage. The mortgagee under such a mortgage had a right to sue for realisation of the mortgage debt by sale of the mortgaged property. The subsequent clause for continuance of enjoyment in case of default in payment was not to nullify the previous covenant to pay on expiry of the period. Case law ref.

(Para 5)

Anno: T. P. Act, S. 58 N. 41; S. 67 N. 15; S. 68 N. 17.

CASES REFERRED: Paras

(A) ('08) 13 Mys CCR 145 5

(B) (V40) AIR 1953 Mys 1: ILR (1952) Mys 286 5

(C) ('91) 14 Mad 232 5

(D) ('04) 27 Mad 526: 14 Mad LJ 61 (FB) 5

(E) (V20) AIR 1933 Mad 613: 56 Mad 892 5

(F) ('96) 19 Mad 411: 6 Mad LJ 210 5

(G) (V20) AIR 1933 Lah 151: 141 Ind Cas 377 5

(H) (V34) AIR 1947 Lah 40: ILR (1946) Lah 805 (FB) 5

(I) ('10) 6 Ind Cas 153 (Cal) 5

V. Krishnamurthy, for Appellant; N. A. Gopalaswamy Iyengar, for Respondents.

VENKATARAMAIYA J.:

The main question for determination in this appeal is whether the plaintiff is entitled to seek recovery of the amount advanced by him on the mortgage of two items of property described in the plaint schedule, by means of sale thereof through Court. Exhibit A dated 20-4-1946, on the terms of which the decision depends is styled as a document of mortgage with possession. After reciting that a sum of Rs. 650/- is received from the mortgagee and the properties are left in his possession for a period of two years, it states that immediately after the expiration of the said period the mortgagor will pay the amount to the mortgagee and in case of default the mortgagee may continue to be in possession of the properties. Defendant 1 and his wife defendant 2 have executed the document stating that they have signed it also as guardians of their three minor sons defendants 3, 4 and 5. Defendant 5 died during the pendency of the suit.

(2) The suit from which this appeal arises was filed after the lapse of two years from the date of the mortgage for realisation of the principal sum with interest by sale of the properties alleging that possession of the properties was not delivered to the plaintiff and that the mortgage was effected for purposes binding on the family of defendants. Denying these allegations defendants pleaded that plaintiff is not entitled to the relief asked for and has only the right to be in possession of the properties.

(3) Both Courts have held that plaintiff obtained and is in possession of the mortgaged properties and the finding has to be taken as correct. On the question of legal necessity needlessly raised with regard to one item of property and about the right of plaintiff to claim payment of money there are divergent findings, the trial Court's view being in favour of plaintiff and that of the appellate Court against him. Consequent on this the decree passed by the learned Munsif for payment of the amount has been reversed and the suit dismissed. Plaintiff has appealed.

(4) Item I which is a land belongs to defendant 2 according to the sale deed in her favour and so the mortgage with respect to this cannot be questioned by the other defendants. The mere fact of others having joined her in executing the deed cannot imply that they have interests in the property subject to the mortgage. Consideration of legal necessity can arise in regard to only the other item which is a house as it is admittedly ancestral or joint family property. The inclusion of this in the mortgage cannot be said to have been imprudent or improper as part of the consideration for Exhibit A is shown to have been utilised for discharge of a prior mortgage debt and the deed mentions that the balance was required for expenses of the marriage of the daughter of defendants 1 and 2. Neither of these defendants has stepped into the witness-box to deny this. The evidence and probabilities support the version of plaintiff and the mortgage of both items of property must be held valid.

(5) The learned Sub Judge has stated that the mortgage is purely usufructuary, there is no covenant express or implied for payment of the amount and therefore a decree for sale cannot be granted. Sri Krishnamurthy learned counsel for the appellant contends that this is not correct and not warranted by the provisions of law applicable to the case or fair construction of Exhibit A. The mortgage is not one in which the entire debt is to be discharged by the creditor appropriating the income of the properties during a certain or any period. The income is meant to be a substitute for interest and the debtor is free from obligation to pay interest as the mortgagee is given a right to enjoy the usufruct of the properties. There is no provision for the income being applied to any extent towards the principal amount and irrespective of the quantum of the income or the period during which it is received by the mortgagee, the principal sum has to be repaid to the

mortgagee for possession of the properties being restored to the mortgagors.

In addition there is a specific undertaking in the deed for payment of the amount at the end of two years. The mortgage has thus the characteristics of what is termed usufructuary and what is called simple. It cannot be regarded a purely usufructuary mortgage as stated by the learned Sub Judge but may be called a simple usufructuary mortgage. A mortgagee under such a mortgage was in — '13 Mys. CCR 145 (A)' considered to have a right to sue for realisation of the mortgage debt by sale of the mortgaged property. This case has been followed and similar relief granted in — 'S. N. Rajan v. Govindaraj Mudaliar', AIR 1953 Mys 1 (B). The case in — '13 Mys CCR 145 (A)' was decided before the Transfer of Property Act came into force in Mysore but is based upon the principles and reasoning adopted by other courts in applying the provisions of the Transfer of Property Act. — 'Ramayya v. Guruva', 14 Mad 232 (C) and — 'Kangaya Gurukal v. Kalimuthu Annasei', 27 Mad 526 (FB) (D) are preferred to support the appellants' claim. Sri Gopalswamy Iyengar learned counsel for respondents argued that the covenant for repayment is qualified by the succeeding condition that the mortgagee is to continue in possession of the properties if the amount is not paid and read as a whole the document does not confer a right on the mortgagee to sue for payment of the mortgage debt.

'Damodara Shanbhogue v. Chandapur Pujary', AIR 1933 Mad 613 (E) cited for this position is distinguishable as the terms of the document on the consideration of which the right of sale was held to be not available to the mortgagee in that case are different from those in the present case. It is however stated that — '14 Mad 232 (C)' which has been relied upon in — '13 Mys CCR 145 (A)' lays down the correct rule and that the words "on the expiry of the terms I shall pay the said sum and redeem the lands" in — 'Udayana Pillai v. Senthivelu Pillai', 19 Mad 411 (F) were rightly held to constitute a personal covenant to pay. It is also observed that

> "In those deeds there was a further clause that in default of such payment the mortgagee should continue to enjoy the property in the aforesaid manner till redemption. In view of the fact that there was a clear and unequivocal personal covenant to pay the money as an independent provision the learned Judges held that the subsequent clause for continuance of enjoyment in case of default in such payment was not to nullify the previous covenant to pay on a certain day".

A clause of that kind is as stated in — '14 Mad 232 (C)' at p. 234

> "one in favour of the mortgagee extending his security beyond the prescribed period and does not take away the right arising out of the covenant to pay, to sue for sale of the mortgaged property".

'Mahomed Abdullah v. Mahomed Yasin', AIR 1933 Lah 151 (G) cited for respondents is to some extent against the plaintiff's claim but this is distinguished from in — 'Mohd. Saeed v. Abdul Alim', AIR 1947 Lah 40 (FB) (H) where a Full Bench answered the question

> "When a mortgage with possession contains a personal covenant to pay the principal by a certain date .. .. does it cease to be a purely usufructuary mortgage or does it become at the same time a simple mortgage on which the mortgagee can bring the mortgaged property to sale"?

in the affirmative. Mahajan J., as he then was, while delivering the opinion expressed:

> "To my mind it is a settled proposition of law that if a deed of mortgage contains a personal covenant to pay the principal mortgage debt or interest by the mortgagor such a covenant implies the right of sale unless there is some specific term to the contrary".

Since there are no such words in Exhibit A the plaintiff must be held to be entitled to a decree for sale according to the above decisions. The decision of the Calcutta High Court in — 'Pitambar Purkait v. Madhu Sudan Mandal', 6 Ind Cas 153 (B) is also to the same effect. The mortgagor in that case took a loan and executed a mortgage deed agreeing to repay the money on a certain day. The instrument provided that the mortgagee would be placed in possession and during the period of such possession the profits would be set off against the interest due on the sum advanced. The judgment states

> "It is well settled that when an instrument of mortgage gives a right to possession and also contains a covenant to pay thus presenting a combination of a usufructuary and simple mortgage the two rights are independent and the mortgagee may sue for sale though he may have given up possession."

(6) The learned Munsiff while upholding the plaintiff's claim granted a decree for payment of the amount by the defendants personally. This is not what the plaintiff sought in the plaint and he was therefore justified in filing cross-objections to the decree under appeal before the Sub Judge. The dismissal of the suit by the appellate Court is based on an erroneous view of law and wrong interpretation of Exhibit A. The appeal has to be consequently allowed and a decree for realisation of the principal sum of Rs. 650/- by sale of the plaint schedule properties has to be passed. On the ground of defendants being held to be agriculturists, learned counsel for respondents pressed for an account of the income of the properties from the date of the mortgage being taken and for the amount due to plaintiff being reduced by fixing a reasonable rate of interest for the debt and adjusting the residue of the income towards principal after appropriation for interest.

Apart from the permissibility of this course being doubtful when the understanding between the parties is reduced to writing and it is not shown to be vitiated by defects invalidating it, the contention implies that the income was more than what may be deemed to be a fair return for the loan. The materials placed before the court for fixing these are very meagre. Defendants 1 and

2, as already stated, have not given evidence in the case and there is only a suggestion that plaintiff attempted to lease the land for more than Rs. 300/- and possibility of two or more mulberry crops per year being raised in the land. There is absolutely no proof of the plaintiff having realised any amount or the mulberry crop being raised at any time. In these circumstances, there is no justification for the principal sum mentioned as payable in the deed being reduced and the income whatever it is, must be taken to represent the interest for the debt.

(7) The decrees of the Courts below are set aside and in lieu thereof there will be a decree in plaintiff's favour for Rs. 650/-, the amount being payable in two annual instalments from this date and on default of such payment the plaint schedule properties will be sold and proceeds of such sale appropriated towards the said amount. Plaintiff will have his costs throughout.

G.M.J. Order accordingly.

A.I.R. 1954 MYSORE 179 (Vol. 41, C.N. 75)

VASUDEVAMURTHY J. (25-3-1954)

Ningamma and another, Plaintiffs-Appellants v. Patel Linge Gowda and others, Defendants-Respondents.

Second Appeal No. 329 of 1952-53, against decree of Sub-J. Mandya, in Regular Appeal No. 30 of 1950-51.

(a) (Mysore) Hindu Law Women's Rights Act (10 of 1933), Ss. 4 and 21 — Applicability.

K, a Hindu, died issueless before the introduction of Mysore Act 10 of 1933. K's nearer heirs according to Mitakshara law succeeded to his properties as absolute owners. By a deed of settlement dated 6-1-1919 these heirs gave some of these properties to K's brother's widow for her enjoyment during her lifetime. She was constituted by that arrangement not the holder of a limited estate under Hindu law but a person entitled to enjoy a life interest according to the terms of the release deed, the express terms of the release deed being that the properties should, after her death, revert back to the owners. The widow died after the Act came into force and the question was whether the widow's heirs would succeed to the properties given to her after her death under the provisions of the Act.

Held that the provisions of the Act were not applicable to such a case. To hold otherwise would mean that Act 10 of 1933 can affect conveyances and transfers which had been effected by persons who were absolute owners before that Act came into force, and that could never be possible or permissible. 48 Mys HCR 29, Distinguished. (Para 2)

(b) (Mysore) Hindu Law Women's Rights Act (10 of 1933), Ss. 3(h), 16, 17, 18, 19, 20 and 21 — 'Limited estate', meaning of — (Words and phrases).

The expression "limited estate" defined in S. 3(h) has been used in various places in the Act, e.g. in Ss. 16, 17, 18, 19, 20 and 21. In all those places and by necessary implication it can only mean the limited estate of a woman according to the Hindu Mitakshara Law. (Para 3)

CASE REFERRED: Para

(A) ('43) 48 Mys HCR 29 2

M. Sadanandaswamy, for Appellants; Ramamurthy, for Respondents 2 to 9.

JUDGMENT: The plaintiffs 1 and 2 are a daughter and daughter's son respectively of one Linge Gowda by his widow Chikkamma. Both Linge Gowda and Chikkamma are dead. Linge Gowda had another brother Kempe Gowda, who died after him without issue long before the introduction of Act 10 of 1933, the Hindu Law Women's Rights Act. The heirs to his properties then were according to Mitakshara Law P. Lingegowda and Nanjegowda, fathers of defendants 1 and 2, and defendant 3 respectively, as also the father of defendant 4. It appears that P. Lingegowda, Nanje Gowda, Boregowda, father of defendant 4 and one Lingegowda, uncle of defendant 4, entered into a settlement with Chikkamma. By that settlement which is evidenced by a document dated 6-1-1919 some of the properties which had been owned by Kempe Gowda were left in the possession of Chikkamma to be enjoyed by her during her lifetime and the other properties of Kempegowda were taken over by Linge Gowda and others.

The plaintiffs brought a suit in the Court of the Munsiff, Mandya, for recovery of possession of the plaint schedule properties which belonged to Kempegowda on the ground that they were the nearer heirs of Kempegowda than the defendants and could claim them after Chikkamma's death in 1948 or thereabouts. Their suit was dismissed, it being held that Act 10 of 1933 could not apply to the case as Kempegowda had died before the coming into force of that Act. That decision was confirmed by the learned Subordinate Judge of Mandya on appeal.

(2) For the plaintiffs Mr. Sadandaswamy, their learned Counsel, has urged that as the settlement deed of 6-1-1919 created "a life estate" in favour of Chikkamma, the succession to the items of properties covered by the release deed at least should be given effect to in accordance with S. 4 of Act 10 of 1933 which had come into force by the time she died and that according to S. 21 of that Act the nearest heirs to Kempegowda in 1948 were the plaintiffs. For this position he has relied on a case reported in — '48 Mys HCR 29 (A)'.

In that case it was observed that Ss. 4 and 21 of the Act provide that even when the last male owner died before the Act came into force, if a limited estate of a woman followed and terminated after the Act came into force, succession to the last male owner is to be regulated by the provisions of the Act. But that was a case where the limited estate of the woman was one created or falling under Hindu Law. It was not a life interest created 'inter partes' by any document as in the present case. The present is a case where P. Lingegowda, Nanjegowda, Boregowda and

Ningegowda who were at the concerned time absolute owners of Kempegowda's properties, having succeeded to them as nearer heirs, chose to give some items to Chikkamma for her enjoyment during her lifetime. She was constituted by that arrangement not the holder of a limited estate under Hindu Law but a person entitled to enjoy a life interest according to the terms of the release deed, the express terms of the release deed being that the properties should, after the death of Chikkamma, revert back to the owners Lingegowda and others. The case in — '48 Mys HCR 29 (A)' has therefore no application to the present case. To hold otherwise would mean that Act 10 of 1933 can affect conveyances and transfers which had been effected by persons who were absolute owners before that Act came into force, and that could never be possible, or permissible.

(3) Mr. Sadandaswamy has referred to the definition of "limited estate" in S. 3, Cl. (h) of Act 10 of 1933, as meaning "any estate other than a full estate". The expression "limited estate", has been used in various places in the Act: e.g. in Ss. 16, 17, 18, 19, 20 and 21. In all those places and by necessary implication it can only mean the limited estate of a woman according to the Hindu Mitakshara Law.

(4) There are therefore no grounds to interfere with the judgments and decrees of the Courts below. This appeal fails and is dismissed. The parties will bear their own costs of this appeal.

K.S.B. Appeal dismissed.

A.I.R. 1954 MYSORE 180 (Vol. 41, C.N. 76)

MEDAPA C. J. AND VASUDEVAMURTHY J.

(25-3-1953)

Union of India and another, Appellants v. M. Hanuman Das, Respondent.

Regular Appeal No. 193 of 1950, against decree of Principal Sub. J., Bangalore, in S. No. 208 of 1948-49.

Railways Act (1890), S. 75 — Loss — Proof.

It must be decided upon the facts of each case whether loss has occurred within the meaning of S. 75. Mere proof of non-delivery is by no means conclusive evidence as to whether or not the loss has occurred. (Para 4)

Where it was proved that the consignment had reached a midway station but it was not put into the train again to be despatched to the station of destination. Held that it was not a case of a loss in transit within the meaning of S. 75(1) and the consignor was not deprived of his right to claim compensation for non-delivery. 30 Mys CCR 153; AIR 1934 Cal 783; AIR 1926 All 299. Dist. and explained; AIR 1946 All 198 and AIR 1949 All 223, Foll. (Para 6)

Anno: Railways Act, S. 75 N. 7.

CASES REFERRED: Paras

(A) ('25) 30 Mys CCR 153 3
(B) (V21) AIR 1934 Cal 783: 61 Cal 599 4
(C) (V11) AIR 1924 Cal 725: 51 Cal 615 4
(D) (V13) AIR 1926 All 299: 92 Ind Cas 622 5
(E) (V33) AIR 1946 All 198: ILR (1946) All 250 6
(F) (V36) AIR 1949 All 223: 1949 All LJ 166 6

A. R. Somanatha Iyer, the Advocate General, for Appellants; V. Krishnamurthy, for Respondent.

VASUDEVAMURTHY J.:

This is an appeal by the Union of India and the Agent and General Manager of M. & S. M. Railway, Madras, against the judgment and decree of the Subordinate Judge, Bangalore, granting a decree against them in respect of two bundles of goods which had been entrusted to the railway authorities at Bombay (Victoria Terminus) for transport by rail to Yeshwanthpur near Bangalore City in May 1948.

(2) The main and practically the only defence of the defendant-railway was that the plaintiff had failed to make a declaration as regards the contents of the two bundles in dispute as required by S. 75, Indian Railways Act, 1890 (which corresponds to S. 59, Mysore Railways Act) and that as those bundles contained goods worth more than Rs. 300/-, the plaintiff could not recover their value. That defence has been rejected by the Subordinate Judge.

(3) Section 75 of the Indian Railways Act provides that—

"....the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk."

In this Court the learned Advocate-General who appears for the appellants strongly relied on a case reported in — '30 Mys CCR 153 (A)'. In that case a bale of silk exceeding Rs. 100/- in value was consigned from Maddur to a firm of silk merchants trading in Bangalore City, on a "risk note" form without declaring its value to the railway administration; and it was found, as a question of fact, that the parcel was lost during its carriage by the railway company's agents by road from the railway station to the address of the consignee. The decision in that case turned mainly on the terms of the risk note, form Y, which was exhibited in the case, and the question whether or not the goods had been "lost" within the meaning of S. 75 did not arise for consideration, it being accepted or found that they were lost.

(4) It is urged by the learned Advocate General that the goods in the present case have been lost because they are not forthcoming for delivery and in support of his contention he has relied on a case reported in — 'Secretary of State v. Surjyamall Haribaksh', AIR 1934 Cal 783 (B). The headnote in that case appears rather misleading. What their Lordships have really said in that case is that it must be decided upon the facts of each case whether loss has occurred within the meaning of S. 75. In that case the goods had been mis-delivered on the basis of a forged telegram purporting to be from the plaintiff as also a forged

letter written on the plaintiff's printed note-paper addressed to the Station Master at the station from which delivery had to be made. Loss by theft or by means of fraud was, in their Lordships' opinion, clearly a loss within the meaning of S. 75, and it was not necessary that the goods should have been lost only through inadvertence or involuntarily to enable the railway to claim the benefit of S. 75. In support of their view they referred with approval to a decision reported in — 'East Indian Rly. Co. v. Jogpat Singh', AIR 1924 Cal 725 (C). They further held that mere proof of non-delivery was by no means conclusive evidence as to whether or not the loss has occurred.

(5) For the appellants reliance was also placed on a case reported in — 'Chandrabhan v. E. I. Rly. Co.', AIR 1926 All 299 (D). That case was decided by a single Judge who said that it was only when the articles had been lost by the company that it could claim protection under S. 75. He also observed that

> "when a certain article delivered to the railway company is not forthcoming for delivery at the destination 'and' its whereabouts are not known, the article is 'lost' within S. 75."

Obviously that decision cannot support the rather large claim that is being made in the present case by the railway administration, viz., that merely because the articles are not forthcoming for delivery they must be presumed to have been lost.

(6) The learned counsel for the respondent relied on two cases reported in — 'Governor-General in Council v. Debi Sahai', AIR 1946 All 198 (E) and — 'Governor-General in Council v. Mohd. Badr-i-alam', AIR 1949 All 223 (F) respectively. In the former case it has been held that in a suit to recover damages for non-delivery of a parcel consigned to a railway if the defendant claimed protection under the provisions of S. 75 of the Railways Act, and the plaintiff proved non-delivery, it was incumbent upon the defendant to show that the parcel had been lost or destroyed; the defendant must show that everything possible had been done to trace the missing article, that the whereabouts of the article were not known or must adduce some other evidence from which it can be inferred that the parcel had been lost before the Court can hold in its favour that the parcel had been lost. In the latter case it has been held that:

> "Such a meaning should be put on the word "loss" in S. 75 as would be 'ejusdem generis' in its effect with the implication of the words "destruction or deterioration" which follows."
>
> ** ** **

And that

> "where it was proved that the consignment had reached a midway station but it was not put into the train again to be despatched to the station of destination, it is not a case of a loss in transit within the meaning of S. 75 (1) and the consignor is not deprived of his right to claim compensation for non-delivery".

We are therefore to see whether in the present case the railway company has proved that the goods have been lost. The plaintiff has examined himself and one witness and has sworn that in spite of repeated demands, the railway company did not deliver the bundles in question. For the railway only one witness has been examined. He was at the time an Assistant Parcel Clerk at Gadag Station and was on night duty. He has deposed that he unloaded at Gadag, goods booked from Bombay V. T. to Yesavanthanagar near Hospet; that two bundles were unloaded along with nine other packets on that date at Gadag; that there was no record to show that the two bundles were again reloaded on the forwarding railway and that he could not say whether those two bundles were reloaded at all. The railway company has not examined any other witness nor has it produced any registers or documents to show what happened subsequently to these bundles.

The company has also failed to show that these bundles were again reloaded into the train going to Yeshwanthpur which place is of course different from Yesavanthanagar referred to by D. W. 1. Exhibit II is a report said to have been made by the Chief Commercial Manager of M. & S. M. Railway to the Traffic Manager, Mysore Railway. The Officer who is referred to in para. 3 of that report and who conducted the investigation has not been examined. The railway company has not taken the trouble to place before the Court sufficient material to show that the bundles were actually lost. From the evidence of D. W. 1 it is quite possible to assume that the goods are still in Gadag. In this unsatisfactory state of evidence we think the lower Court was fully justified in holding that the railway company had not established the loss which alone would entitle the company to the benefit of S. 75, Railways Act.

(7) In the result, this appeal fails and is accordingly dismissed with costs.

H.G.P. Appeal dismissed.

A.I.R. 1954 MYSORE 181 (Vol. 41, C.N. 77)

VENKATARAMAIYA AND BALAKRISHNAIYA JJ. (13-8-1954)

Kursedji Wookerji Bananji, Petitioner v. State of Mysore, Opposite Party.

Criminal Revn. Petn Nos. 106 and 107 of 1954, against order of City Magistrate, Mysore, D/-23-3-1954.

Criminal P. C. (1898), Ss. 205, 353 — Exemption from appearance — Issue of warrant — 3 My LH 66 (Notes); 7 My LJ 429, 38 My HCR 92, Dissented from.

Section 205 is not exhaustive of the conditions under which exemption can be granted to an accused from appearance in court and absence of summons in the first instance is not an impediment to exemption being allowed. The issue of summons or warrant to the accused in the first instance is not the criterion. Apart from S. 205, the court has an implied power to exempt an accused from being present under S. 353. There may be cases in which the accused voluntarily appears without either a summons or a warrant and apply for exemption. It would be unreasonable to reject such applications only because the summons

was not issued to the accused. Case law discussed. (Paras 2, 3)

Anno: Cr. P. C., S. 205 N. 2.

CASES REFERRED: Paras

(A) ('25) 3 Mys LJ 66 (N) 1, 3
(B) (V11) AIR 1924 Pat 46: 24 Cri LJ 872 1
(C) ('12) 14 Bom LR 236: 13 Cri LJ 464 2
(D) ('13) 17 Cal WN 1248: 15 Cri LJ 281 2
(E) (V34) AIR 1947 Mad 433: 48 Cri LJ 874 2
(F) (V35) AIR 1948 All 393: 49 Cri LJ 573 2
(G) (V36) AIR 1949 Nag 334: 50 Cri LJ 932 2
(H) (V37) AIR 1940 All 178: 41 Cri LJ 500 3
(I) ('29) 7 Mys LJ 429 3
(J) ('33) 38 Mys HCR 92 3

V. K. Govindarajulu, for Petitioner; Advocate-General, for Opposite Party.

VENKATARAMAIYA J.:

The petitioner in these two cases is an accused in two cases on the file of the Court of the City Magistrate, Mysore, which arose from police charge sheets alleging commission of offence of cheating. The petitioner who is said to be a resident in Bombay applied for exemption from appearance in Court at the hearing but permission was refused on the ground that warrant and not summons was issued to him for his appearance. A decision of this Court in 3 Mys LJ 66 (N) (A) is referred to in support of the refusal. In that case summons was issued at first to the accused and later on a warrant. But before the warrant was executed the accused applied for and obtained exemption. This was considered by Doraswamy Iyer J. to have the effect of the cancellations of the warrant and not as such to offend the provisions of S. 205, Criminal P. C. which states:

"Whenever a magistrate issues a summons he may, if he sees reason to do so, dispense with the personal attendance of the accused and permit him to appear by his pleader."

The learned Judge seems to have taken the view that if summons is not issued to the accused for his appearance he cannot seek exemption and for this — 'Abdul Hamid v. Emperor', AIR 1924 Pat 46 (B) is cited. That was a case in which warrant was issued to accused in the first instance and the question was not that of granting exemption but of the effect of recording evidence in the absence of an accused due to his exemption. Both cases deal with the provisions of only S. 205 and not any other.

(2) There are several reasons to hold that S. 205 is not exhaustive of the conditions under which exemption can be granted to an accused from appearance in court and also to consider that absence of summons in the first instance is not impediment to exemption being allowed. The section is found in Chapter XVII the heading of which is 'Of the commencement of proceedings before Magistrates". Section 204 relates to the issue of process to secure the presence of the accused and the form of the summons as given in Schedule V enables the accused to appear either in person or by pleader before the Magistrate. This would suggest that what is provided for in S. 205 is exemption at the initial stage of the proceedings as the heading to the chapter denotes and not exemption at later stages of the case. Power is given to a Magistrate under the section and not to any Judge to allow an accused to be absent. It looks anomalous if Sessions Judges cannot exercise powers similar to those of magistrates in regard to accused tried by them. There is ample authority to show that apart from S. 205 the Court has an implied power to exempt an accused from being present under S. 353, which is as follows:

"Except as otherwise expressly provided all evidence taken under Chapters ..... shall be taken in the presence of the accused or when his personal attendance is dispensed with in presence of his pleader."

'Emperor v. King', 14 Bom LR 236 (C); — 'Raj Rajeshwari Debi v. Emperor', 17 Cal WN 1248 (D) and — 'In re, Ummal Hasanath', AIR 1947 Mad 433 (E) are cases in which it is held that existence of power is implied under the section in courts presided by Magistrates or others; and to the same effect is the decision in — 'Aditya T. D. Bagchi v. Jogendra Nath', AIR 1948 All 393 (F). The Nagpur High Court has not accepted this construction but relied on S. 561A to grant exemption in — 'Madhao Rao v. Ishwardas Sheoratan', AIR 1949 Nag 334 (G). Section 561A can be availed of by the High Court and not by other Courts. Section 540A too limits the exercise of discretion to cases in which the accused are more than one, and the accused is or are being incapable of remaining in Court.

(3) There may be cases in which the accused voluntarily appears without either a summons or a warrant and applies for exemption. It would be unreasonable to reject such applications only because the summons was not issued to the accused, and in — 'Jagdish Narain v. Emperor', AIR 1940 All 178 (H) it was held that such an application is entitled to consideration. These aspects of the matter have not been noticed and discussed in 3 Mys LJ 66 (N) (A) or in the two later cases in 7 Mys LJ 429 (I) and 38 Mys HCR 92 (J). In the latter case warrant was served on the accused and yet exemption was granted. The reason given in the other case for making a similar order is that the accused is a practising advocate.

In all the cases S. 205 is construed liberally, so as to indicate that the court has a larger latitude than what is expressed in the section to grant exemption. Without attempting to enlarge the scope of the section or the extent of its application, it is possible to rely on S. 353 and exercise the power implied by it to dispense with the attendance of an accused in the light of the large volume of authority in support of the existence of such a power. The orders of the lower Court are set aside. The lower Court will pass appropriate orders afresh on a consideration of the grounds on which exemption is sought, bearing in mind that the issue of summons or warrant to the accused in the first instance is not the criterion for disposal of the applications.

D.H.Z. Revision allowed.

A.I.R. 1954 MYSORE 183 (Vol. 41, C.N. 78)

VENKATARAMAIYA AND BALA-KRISHNAIYA JJ. (28-8-1954)

State of Mysore v. A. C. Hanumanthappa, Respondent.

Civil Petn. No. 142 of 1953.

(a) Sales Tax — Mysore Sales Tax Act (46 of 1948), S. 2(d) — 'Dealer.'

A person whether he himself sells direct or through an employee or through a commission agent or through other means comes under the definition of a dealer irrespective of the nature of the machinery he employs to sell the goods. AIR 1954 Mad 96, Relied on. (Para 4)

(b) Sales Tax — Mysore Sales Tax Act (46 of 1948), Ss. 3 and 9 — Unlicenced agent — Sales effected by — Exemption from tax when can be claimed — Liability of principal and agent.

An agent may be a principal in respect of any transaction done on his own account; there is nothing in law to prevent the same person from acting as an agent on behalf of others; if he deals in the capacity of an owner he must pay tax either as buyer or as seller but if the goods sold by him belong to others on whose behalf he acts as a mere agent or as a broker, then the licence he has taken under S. 9 of the Act will protect him provided he proves that he has sold the goods on behalf of a known principal, who is specified as such in his accounts though it is not necessary that he should disclose the principal to the persons who deal with him. Besides, another important condition to entitle him to exemption is that the transaction should have been included in the turnover of the principal on whose behalf he deals, under the proviso to S. 9. In the case of an unlicensed agent no such exemption is available as he is deemed to be a dealer, like any others; the tax collected by him on the sale of goods must be paid over to the Government. In any case either the principal or the agent, not licenced, has to pay the tax, but tax need not be paid by both on the same transaction. (Para 4)

In case the unlicenced agent himself pays the tax, the principal is exempted, but in that case the principal is bound to prove that the agent has in fact paid the tax, otherwise the responsibility of the principal will not cease. The burden is always on the dealer, on whom the liability of payment of tax primarily rests, to prove that a particular transaction is exempt by reason of payment through an agent or otherwise. The inclusion in the turnover of sales through a licenced agent will relieve the agent from liability, but the principal cannot escape taxation by reason of omission of such sales in his annual turnover. (Para 5)

It follows that the principals are liable for taxation for sales through licenced agents, even though the principals have not collected sales tax and have not included the said commission sales in their turnover. The agents who have not been licenced under S. 9 can claim no exemption from tax in respect of sales effected by them. They are taxable as any other dealer and the principal who sells his goods to an agent will also be liable. Though the liability of both the principal and the unlicenced dealer is joint and several, the tax on the same transaction cannot be collected twice or from both the principal and the agent. (Para 6)

CASE REFERRED : Para

(A) (V41) AIR 1954 Mad 96: 1954 Cri LJ 21 4

Asst. Advocate-General, for the State; K. R. Gopivallabhaiengar, for Respondent.

ORDER : This petition has been registered on a reference made under S. 16(1), Mysore Sales Tax Act of 1948 by the revising authority, the Commissioner of Sales Tax in Mysore.

(2) The facts of the case as disclosed in the statement of case are as under: The respondent Hanumanthappa is a merchant in Chickkaballapur, dealing on his own account as well as on commission basis inside the State and also consigning goods outside the State. He claimed exemption in respect of goods sold by him or on his behalf on commission basis both by agents within and outside the State. The Sales Tax Officer granted exemption on all sales outside the State, but disallowed the claim on sales which took place within the State, holding that the respondent being the principal was liable to pay tax irrespective of the fact whether or not his agent had taken out a license under S. 9, Mysore Sales Tax Act.

(3) The Deputy Commissioner rejected the appeal on the ground that the commission agent selling goods on behalf of the principal has not obtained license under S. 9 of the Act and that in the absence of license under S. 9 of the Act by the commission agent, both the principal and the commission agent become liable to pay tax. The respondent raised the same points in a revision petition filed before the Commissioner of Sales Tax and the said revision petition was also dismissed; he then filed a petition under S. 16, Mysore Sales Tax Act to refer the points of law raised by him for decision to the High Court.

The following two questions are suggested by the respondent and referred to by the revising authority; (a) Whether the principals can be assessed on sales effected by commission agents who have obtained license under S. 9, Mysore Sales Tax Act even though the principals have not collected sales tax and have not included the said commission sales in their turnover or whether the commission agents themselves are liable to pay sales tax on such turnover and (b) in cases where the sales are effected by commission agents who have not taken licenses under S. 9, Mysore Sales Tax Act, whether both the principal and the agents are liable to pay sales tax on the turnover.

(4) Mr. Gopivallabha Iyengar on behalf of the respondent contended that under S. 9 of the Act, it is only the licensed agents who sell on behalf of known principals that are exempt from sales tax provided such sales are included in the turn-over of the principals or of the dealers from whom purchases were made and that inferentially he argued

that an unlicensed agent selling goods on behalf of an unknown principal shall make himself liable to pay sales tax which excludes the responsibility of the principal and that in consequence, sales tax must be levied and recovered from an unlicensed agent and the department should not, on any account, look to the principal for payment of the tax. We are unable to agree fully with the contentions advanced. Section 3 obliges every dealer to pay tax on his total turn-over for the year and the dealer is defined under S. 2(d) as meaning any person who carries on the business of buying or selling goods. Therefore a person whether he himself sells direct or through an employee or through a commission agent or through other means comes under the definition of a dealer irrespective of the nature of the machinery he employs to sell the goods. (Vide — 'In re, K. T. Pappanna', AIR 1954 Mad 96 (A)). An agent may be a principal in respect of any transaction done on his own account; there is nothing in law to prevent the same person from acting as an agent on behalf of others; if he deals in the capacity of an owner he must pay tax either as buyer or as seller but if the goods sold by him belong to others on whose behalf he acts as a mere agent or as a broker, then the license he has taken will protect him provided he proves that he has sold the goods on behalf of a known principal, who is specified as such in his accounts though it is not necessary that he should disclose the principal to the persons who deal with him. Besides, another important condition to entitle him to exemption is that the transaction should have been included in the turn-over of the principal on whose behalf he deals, under the proviso to S. 9. In the case of an unlicensed agent no such exemption is available as he is deemed to be a dealer, like any others; the tax collected by him on the sale of goods must be paid over to the Government. In any case either the principal or the agent, not licenced has to pay the tax, but tax need not be paid by both on the same transaction.

(5) In case the unlicenced agent himself pays the tax, the principal is exempted, but in that case the principal is bound to prove that the agent has in fact paid the tax, otherwise the responsibility of the principal will not cease. The burden is always on the dealer, on whom the liability of payment of tax primarily rests, to prove that a particular transaction is exempt by reason of payment through an agent or otherwise. The inclusion in the turn-over of sales through a licenced agent will relieve the agent from liability, but the principal cannot escape taxation by reason of omission of such sales in his annual turn-over.

(6) From the foregoing discussion the answer to the first point in the statement of case is that the principals are liable for taxation for sales through licenced agents, even though the principals have not collected sales tax and have not included the said commission sales in their turn-over. The sales effected by agents who have not been licenced under S. 9 can claim no exemption from tax. They are taxable as any other dealer and the principal who sells his goods to an agent will also be liable. Though the liability of both the principal and the unlicenced dealer is joint and several, the tax on the same transaction cannot be collected twice or from both the principal and the agent. The reference is thus answered. The respondent will pay the costs of the State of Mysore. Advocate's fee Rs. 100/-.

K.S.B. Reference answered accordingly.

A.I.R. 1954 MYSORE 184 (Vol. 41, C.N. 79)

MALLAPPA J. (16-12-1953)

Shankariah and others, Appellants v. Ramiah, Respondent.

Second Appeal No. 466 of 1953, against decree of Sub. J., Tumkur in R. A. No. 221 of 1951-52.

Easements Act (1882), S. 13 — Continuous easements — Right to water.

Where the plaintiff and the defendant who were brothers were entitled to equal rights and both portions of the lands were entitled to get water not only from the tank, but also from the well, as stated and recognised in Survey records, and it was not the case of the defendant that the right of the plaintiff to take water from the well had been taken away by any agreement at the time of the partition:

Held, that the right of taking water to the plaintiff's land from the well situated in the land belonging to the defendant continued to exist as before even after partition and it was unnecessary to prove any agreement giving such right after the partition. 9 Mys LR 168, Foll. (Para 2)

Anno: Easements Act, S. 13 N. 3, 5.

CASE REFERRED: Para

(A) ('86) 9 Mys LR 168 2

E. Kanakasabhapathy, for Appellants.

JUDGMENT: The point for consideration in this appeal is whether the learned Subordinate Judge was right in holding that the plaintiff-respondent has a right to take water from the well situated in the land that has fallen to the share of the defendant and in awarding damages of Rs. 200/- on the ground that the appellant-defendant prevented the plaintiff from taking water to his land and thus caused his garden to dry up.

(2) It is not disputed that the entire land which belongs to the plaintiff and the defendant who are brothers was fed not only by tank water but also by the water from the well situated in the portion of the land that has fallen to the share of the defendant. In fact there is Ex. A Uttaar copy which clearly shows that both portions are entitled to water from both sources. It has to be noticed that the defendant could only get water through a channel situated in the plaintiff's land while the plaintiff has to take water from the well situated in the land that has fallen to the share of the defendant. There is nothing to show that at the time of the partition either the right of the defendant to take water through the plaintiff's land or the right of the

plaintiff to take water from the well situated in the land that fell to the share of the defendant was curtailed and in the absence of any such curtailment, it has to be taken that the two lands are entitled to take water in the manner stated in the survey records. In fact this would be the case even in a case of grant of land. As observed in — '9 Mys LR 168 (A)':

"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rule governing cases of this kind, (i.e. cases of implied grant or reservation of quasi easements). The first of these rules is that, on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean quasi easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly. Those are the general rules governing cases of this kind, but the second of these rules is subject to certain exceptions. One of those exceptions is the well known exception which attaches to cases of what are known as ways of necessity."

These observations are applicable with greater force to a case of partition. Both the brothers in this case were entitled to equal rights and both portions of the lands were entitled to get water not only from the tank, but also from the well. This has been, as already observed, specifically stated and recognised in the Survey records. After partition, in cases of this kind, the rights which the parties had at the time of partition will continue unless any such right is specifically taken away at the time of the partition. It is not the case of the defendant that the right of the plaintiff to take water from the well has been taken away by any such agreement.

The learned Munsiff is wrong in thinking that the plaintiff should have proved an agreement by which he got a right to take water from the well, situated in the portion of the land that has fallen to the share of the defendant. In fact no such agreement was alleged in the plaint and it was unnecessary to prove any such agreement. The learned Subordinate Judge was therefore right in holding that the right of taking water to the plaintiff's land from the well situated in the land belonging to the defendant continued to exist as before even after partition and it is in evidence that the plaintiff continued to enjoy its right even subsequent to the partition. The defendant was wrong in preventing the plaintiff from taking water to his land from the well in question and as such the plaintiff was rightly awarded damages.

As regards the quantum of damages, it may be remembered the plaintiff's land is an areca garden and the damage caused to it by the defendant's illegal obstruction is such that the learned Subordinate Judge is correct in awarding Rs. 200/- as damages.

(3) The appeal stands therefore dismissed without notice to the respondent.

H.G.P. Appeal dismissed.

A.I.R. 1954 MYSORE 185 (Vol. 41, C.N. 80)

VENKATARAMAIYA AND BALAKRISHNAIYA JJ. (30 6-1954)

D. Narasimhiah, Appellant v. Lakshamma and others, Respondents.

Regular Appeal No. 267 of 1950-51, against decree of Sub-J., Civil Station, Bangalore, in O. S. No. 10 of 1950-51.

Negotiable Instruments Act (1881), Ss. 26, 87 — Execution of document by one — Material alteration.

The question whether want of execution by one can absolve the other who has executed the document is to be determined by ascertaining the intention of parties. If the understanding was that either both A and B or neither of the two should be liable and execution of the pronote by B was a condition precedent to the obligation for payment by A, it is a matter for proof. If the transaction was not intended to be effective unless B was an executant, the creditor would not fail to protest against A, taking away the money or would at least attempt to obtain the signature of B who was present at the time. The fact that this was not done and it was considered sufficient to strike off the recital about B being a party to the instrument shows that B's execution though desired was not deemed vital for the purpose of the transaction.

Further the deletion of the words having reference to B being an executant of the pronote is not a material alteration of the instrument so as to render it void. Because it could not be said that the right or liability of A was varied or that he was in any way prejudiced by reason of B not being an executant. If B had received the amount or the liability had to be apportioned between B and A, there might be room for grievance. Nor is it possible to hold that by reason of the recital about B's execution being struck off there is a material alteration under S. 87 so as to render the instrument void when the words were struck off immediately after the execution of the pronote by A and B who was then present declined to affix her signature and secondly the rights or liabilities of the parties inter se were in no way altered by the words being scored off. AIR 1940 PC 160, Foll. (Paras 2, 3, 5)

Anno: N. I. Act, S. 26 N. 1; S. 87 N. 1.

CASES REFERRED: Paras

(A) (V1) AIR 1914 Mad 369(1): 23 Ind Cas 464 (1) 3

(B) (V12) AIR 1925 Mad 929: 87 Ind Cas 48 3

(C) (V15) AIR 1928 Mad 1092: 112 Ind Cas 404 3
(D) (V27) AIR 1940 PC 160: 67 Ind App 318 (PC) 4

M. R. Janardhan, for Appellant; F. M. Xavier, for Respondents 1 to 3.

VENKATARAMAIYA J.:

Appellant sued the Respondents for recovery of money due under an on demand promissory note executed by the 1st Respondent in favour of 10th Respondent and endorsed by the latter to appellant. Respondents 2 and 3 are children and Respondent 4 sister of the 1st Respondent. Respondents 5 to 9 are children of 4th Respondent. Appellant claimed to be a holder in due course and to be entitled to a decree against all the Respondents on the ground, money was advanced under the pronote for the benefit of Respondents 1 to 9 and payment was made to the 10th Respondent as consideration for the endorsement. The claim was contested by Respondents 1 to 9 and various pleas were put forward by them. Upholding these pleas the lower Court has dismissed the suit. Although the decree as a whole is challenged in the memorandum of appeal, Sri Janardhan learned Counsel for the appellant conceded that the dismissal of the suit against Respondents 2 to 9 was justified and sought for a decree only against the 1st Respondent.

(2) The main reason for the dismissal of the suit against the 1st Respondent is that the 4th Respondent is not a joint executant of the pronote along with the 1st Respondent and that the deletion of words in the body of the instrument about 4th Respondent being an executant constitutes a material alteration under S. 87, Negotiable Instruments Act so as to render the instrument void. The question whether want of execution by one can absolve the other who has executed the document is to be determined by ascertaining the intention of parties. If the understanding was that either both or neither of them should be liable and execution of the pronote by the 4th Respondent was a condition precedent to the obligation for payment by the 1st Respondent, it is a matter for proof. The evidence shows that the husband of the 10th Respondent wanted the pronote to be executed by both the sisters and the pronote was also written as if both would be executants. The consideration was paid to the 1st Respondent and after she signed the pronote the 4th Respondent refused to sign it as no money was paid to her.

If as alleged by the 1st Respondent the transaction was not intended to be effective unless 4th Respondent was an executant, there would have been discussion about the matter and the creditor would not have failed to protest against 1st Respondent taking away the money or would have at least attempted to obtain the signature of the 4th Respondent who was present at the time. The fact that this was not done and it was considered sufficient to strike off the recital about 4th Respondent being a party to the instrument shows that 4th Respondent's execution though desired was not deemed vital for the purpose of the transaction. Respondent 1 appears to have been the person who applied for the loan and negotiated with the 10th Respondent's husband to obtain it as seen from the letter Exhibit IV. When payment was demanded by means of a notice sent by a lawyer, she kept silent and raised no objection. The amount is said to have been required for the expenses of the marriage of her daughter. In view of all this, it is difficult to hold that there was an agreement by which the non-execution of the 4th Respondent can be a ground on which 1st Respondent can escape liability.

(3) The next question for consideration is whether the deletion of the words having reference to 4th Respondent being an executant of the pronote is a material alteration of the instrument so as to render it void. Section 87, Negotiable Instruments Act relied upon by the 1st Respondent's Counsel and lower Court to make out that the instrument is invalid on account of the words being scored off does not specify expressly or by means of illustration the kind or category of alterations which are to be regarded as material to have the effect mentioned. No case in which the deletion such as that in the suit pronote is deemed to be a material alteration has been cited by Sri Xavier, learned counsel for Respondent 1. 'Amritham Pillai v. Nanjah Gounden', AIR 1914 Mad 369 (1) (A) referred to is distinguishable as the document was found to be forged in that case. 'Madam Pillai v. Athinarayana Pillai', AIR 1925 Mad 929 (B) and — 'Santhu Mohideen Pillai v. Jamal Md. Jamaluddin', AIR 1928 Mad 1092 (C) are also not helpful to treat the deletion as a material alteration. In the first of these two Devadoss J. observed that S. 87 has no application to alterations made at the time of execution of the documents and granted a decree against the person who had executed the document though it was found that the signature of the other was a forged one. Wallace J. took a contrary view in — 'AIR 1928 Mad 1092 (C)' and dismissed the suit on account of the signature of one of the alleged executants being a forgery. This is not a case of any signature being forged or struck off but one of absence of signature and the effect of the two cannot be taken to be the same.

(4) The test of an alteration being material or not is stated in — 'Nathu Lal v. Mt. Gomti Kuar', AIR 1940 PC 160 (D) thus:

> "A material alteration is one which varies the rights, liabilities or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed or reduces to certainty some provision which was originally unascertained and as such void or may otherwise prejudice the party bound by the deed as originally executed."

(5) If this test is applied, it cannot be said that the right or liability of 1st Respondent is varied or that she is in any way prejudiced by reason of 4th Respondent not being an executant. If the latter had received the amount or the liability had to be apportioned between her and 1st Respondent, there may have been room for grievance. 1st Respondent admits that the entire amount was paid to her and under the law her liability would have been no less than what it is, even if 4th Respondent had been an executant. Nor is it possible to hold that by reason of the recital about the 4th Respondent's execution being

struck off there is a material alteration under S. 87, Negotiable Instruments Act so as to render the instruments void as in the first place the words were struck off immediately after the execution of the pronote by the 1st Respondent and 4th Respondent who was then present declined to affix her signature and secondly the rights or liabilities of Respondents 1 to 10 inter se are in no way altered by the words being scored off. It is unnecessary to consider whether the plaintiff is a holder in due course as he is entitled to succeed even if his rights are only those of the original promisee who is the 10th Respondent.

(6) As regards the amount due, it has been found that though Rs. 3000/- are mentioned in the pronote and the receipt as the consideration, Rs. 180/- were not paid. The principal amount therefore is only Rs. 2820/-. Interest on this for the period relating to the claim is Rs. 356/-. A sum of Rs. 300/- is allowed as damages to Respondents on account of the plaintiff having wrongfully got their properties attached before judgment. Deducting this, the total amount payable to the plaintiff is Rs. 2876/-.

(7) In reversal of the decree of the lower Court there will be a decree in Appellant's favour for payment of this amount by the 1st Respondent. The dismissal of the suit against the other respondents is confirmed. As the claim was to some extent excessive in regard to the amount and persons liable for the same and the endorsement to the plaintiff of the instrument seems to have been effected for the purpose of the litigation, we direct the parties to bear their own costs throughout.

D.H.Z. Order accordingly.

A.I.R. 1954 MYSORE 187 (Vol. 41, C.N. 81)

VASUDEVAMURTHY J. (30-7-1954)

Paremajalu Chettiappa, Appellant v. Pattangeri and others, Plaintiffs-Respondents.

Second Appeal No. 300 of 1953, against decree of Dist. J., Coorg, in Civil Appeal No. 8 of 1949.

(a) T. P. Act (1882), S. 60 — Coorg Land Revenue Act, Ss. 106 (4) and 145 — Scope and applicability — Benami purchase by usufructuary mortgagee at revenue sale brought about by his own default — Effect of, on right to redeem — (Trusts Act (1882), S. 90) — (Coorg Land Revenue Act, Ss. 106 and 145).

Where a usufructuary mortgagee who is bound under the terms of the mortgage to pay the land revenue to the Government, fraudulently allows the property to be sold for arrears of Government revenue and purchases the property benami in the name of a third person, neither S. 106(4) nor S. 145, Coorg Land Revenue Act can operate as a bar to the mortgagor's suit for redemption and possession of the mortgaged property which has continued all along in the possession of the mortgagee. Section 106 (4) of the Coorg Land Revenue Act is meant to bar a suit against a real purchaser in a revenue sale, where a certificate has been issued to him and he has been put in possession, for a declaration that the sale is benami; and cannot be invoked to assist a benami purchaser who has been a party to the fraud with the mortgagee and has sought to assist the mortgagee to commit breach of a constructive trust as defined under S. 90 of the Indian Trusts Act. 10 Moo Ind App 540 (PC); AIR 1916 PC 227, Rel. on. (Para 3)

Anno: T. P. Act, S. 60 N. 23, Pts. 8, 27; Trusts Act, S. 90 N. 10.

(b) Limitation Act (1908), Arts. 12 and 148 — Applicability.

Mortgaged property sold for arrears of revenue due to default of usufructuary mortgagee -- Mortgagee fraudulently purchasing property benami in the name of third person and continuing in possession even after the sale — Mortgagor can ignore the sale and need not sue for setting it aside within the period prescribed by Art. 12 — Mortgagee must hold the property subject to the mortgage and the mortgagor is entitled to redeem it. (Para 4)

Anno: Lim. Act, Art. 12 N. 1; Art. 148 N. 1a.

(c) Civil P. C. (1908), Ss. 11 and 96 — Finality of appealable decision.

Suit for redemption against usufructuary mortgagee and his benamidar auction purchaser at a revenue sale brought about by fraudulent conduct of mortgagee -- Plea by mortgagee alone that suit is premature — Plea decided against mortgagee and plaintiff held entitled to redeem — Appeal by benamidar purchaser alone — Decision that suit is not premature is final and the purchaser cannot be allowed to raise it in appeal. (Para 5)

Anno: Civil P. C., S. 11 N. 111; S. 96 N. 6.

(d) T. P. Act (1882), Ss. 60 and 62 — Right of redemption when arises.

Where a usufructuary mortgagee who is entitled to appropriate the usufruct of the property for a period of 50 years in discharge of the mortgage debt allows the mortgaged property to be sold for arrears of revenue which he was bound to pay under the terms of the mortgage and the mortgagor brings a suit for redemption and possession of the mortgaged property before the expiry of the period, the mortgagee is not entitled to resist the suit on the ground that it is premature. AIR 1925 Mad 825; 34 All 659; 1 Mys LJ 30, Ref. to. (Para 6)

Anno: T. P. Act, S. 60 N. 5; S. 62 N. 5.

CASES REFERRED: Paras

(A) (V3) AIR 1916 PC 227: 44 Cal 573 (PC) 3
(B) (1865-66) 10 Moo Ind App 540: 5 Suth WR 83 (PC) 3, 4, 10
(C) (V12) AIR 1925 Mad 895: 90 Ind Cas 138 8
(D) ('12) 34 All 659: 17 Ind Cas 340 9
(E) ('12) 34 All 273: 13 Ind Cas 573 9
(F) 1 Mys LJ 30 10
(G) ('96) 20 Bom 492 10
(H) ('03) 26 Mad 385 10

K. P. Muddappa, for Appellant; V. Krishnamurthy, (for Nos. 1 to 5) and A. C. Nanjappa (for Nos. 7 to 9), for Respondents.

JUDGMENT: The suit by the plaintiffs for redemption and possession of the plaint schedule lands has been decreed by the Court below and defendant 5 has come up in second appeal. The lands were mortgaged with possession by Pattangeri alias Markje Thammiah, father of plaintiffs 2 to 5, and Belliappa, father of plaintiff 1, in favour of Thekkada Belliappa the father of defendants 1 and 2 and grand-father of defendants 3 and 4 under a usufructuary mortgage deed dated 19-3-1894. According to the plaintiffs the mortgagee was entitled to the usufruct of the property for a period of 50 years from the date of that mortgage. He was bound to pay land revenue and other dues payable to Government upon the said property and to pay hismelf a sum of Rs. 600/- and interest thereon from the income of the property during that period, and thereafter restore back possession of the property to the mortgagors.

It was also alleged in the plaint that while defendants 1 to 4 were in possession as legal representatives of the original mortgagee they wilfully allowed the property to be sold for arrears of land revenue due to Government and got it knocked down for their benefit in the name of their own sister's husband Belliappa, father of defendant 5, who has since died; and that in spite of the sale defendants 1 to 4 have continued to be in possession and enjoyment of the property. Defendants 1 to 4 pleaded that the suit, which was brought on 15-5-1944, was premature as the plaintiffs were not entitled to redeem the properties before 19-3-1951. They denied that there was any collusion between them and the 5th defendant's father and pleaded that the lands were sold for arrears of land revenue because they themselves were unable to pay the assessment and that the fifth defendant's father is a bona fide purchaser and not a benamidar for them. Defendant 5 pleaded similarly that the property was his by virtue of the purchase in the revenue sale by his father and that the sale was not fraudulent.

(2) Both the Courts below who have upheld the plaintiffs' right to redeem have held that the revenue sale was brought about fraudulently by defendants 1 to 4 who were able as well as bound to pay the land revenue due to Government, that in spite of that sale the suit property had continued to remain all along in the possession of defendants 1 to 4 and was never in the possession of defendant 5 or his father; that only nominally the property had been got knocked down in the name of defendant 5's father benami for defendants 1 to 4 and for their benefit and that the plaintiffs' suit was not premature and was maintainable.

(3) Mr. Muddappa, learned counsel who appears for the appellant, has urged that the suit is barred under S. 106 Cl. 4 of the Coorg Land Revenue Act. That section is meant to bar a suit against a real purchaser in a revenue sale, where a certificate has been issued to him and he has been put in possession, for a declaration that the sale is benami; and cannot be invoked to assist a person like defendant 5 or his father, who has been a party to the fraud with the mortgagees and has sought to assist the mortgagee to commit breach of a constructive trust as defined under S. 90 of the Indian Trust Act. He was in reality merely an agent of defendants 1 to 4 and what they could not gain if they had purchased the property themselves personally cannot be permitted to be achieved if they bought it through an agent. See — 'Deo Nandan Prashad v. Janki Singh', AIR 1916 P.C. 227 (A) which was a similar case of a benami purchase. S. 106(4) is designed to prevent fraudulent claims and to use it in the way now sought as against the plaintiffs would be to use it as a machinery to effect and perpetuate a fraud.

In — 'Nuzar Ally Khan v. Ojoodhyaram Khan', 10 Moo Ind. App. 540 (B) which was also a similar case of benami purchase in revenue auction to defraud a mortgagee their Lordships of the Privy Council held that as the sale was a fraudulent one brought about by the mortgagee's representative in possession, the Act under which it was held did not apply so as to defeat the mortgagor's equity of redemption. The sale was to be considered as nothing more than a private sale and impressed a trust on the estate which passed under it. There had been a fraudulent agreement between the mortgagee's representative in possession and the purchaser at the Government sale and so both were estopped as against the mortgagor from relying upon the sale. Even S. 145 of the Coorg Land Revenue Act provides for a revenue sale being set aside by a Civil Court when such a sale is vitiated by fraud. In view of the concurrent findings of the Courts below that the revenue sale was fraudulently brought about by defendants 1 to 4, mortgagees, that the purchase by defendant 5's father was really by them alone and was for their benefit though nominally the bid was knocked down in the name of defendant 5's father, neither S. 106(4) nor S. 145 of the Coorg Land Revenue Act can operate as a bar to the plaintiff's present suit for redemption and possession of the mortgaged property which has been really in the possession of the mortgagees.

(4) He has next urged that the plaintiffs should have brought a suit within one year of the sale for setting aside of the revenue sale under Art. 12 of the Limitation Act and that not having done so their suit is barred by time. This is not a case where the plaintiff has brought a suit against the Government or against the person who has purchased the property in a revenue auction complaining of irregularity or fraud committed in the conduct of the sale or its earlier proclamation or later confirmation.

After the sale the plaintiffs applied to the revenue authorities for the same being set aside, but the revenue authorities saw no reason to do so apparently as the sale had been properly conducted and that is all they were then concerned with; they were not concerned to see whether defendant 5's father had purchased the property for himself or fraudulently as benamidar of defendants 1 to 4. If defendant 5's father is merely a benamidar or name-lender for defendants 1 to 4 it is as though defendants 1 to 4 themselves have purchased the property. The finding of the Courts below is that defendant 5's father was living with defendants 1 to 4 and their father, and that the former or defendant 5 never paid kandayam for the suit lands except in 1945-46 and that the same

was done by defendants 1 to 4 who have continued to remain in possession all along. There was therefore no need at all for the plaintiffs to sue for setting aside the revenue sale because they could ignore it as, in spite of the revenue sale, the property continued to remain with the mortgagees, who held it subject to the mortgage and the plaintiffs are entitled to redeem it. See — '10 Moo Ind. App. 540 at 543 (PC) (B).

(5) It has next been urged that the plaintiffs' suit is premature. That plea is not raised in the written statement of the 5th defendant and I do not see how he could be allowed to raise such a plea. He is not the mortgagee and does not admit that he is liable to be redeemed in 1951. He claims that he is the owner of the property and if, as has been viewed by the Courts below, he is not clothed with any independent title but is merely a name-lender or alias for defendants 1 to 4, he cannot resist the suit for redemption when they themselves had put forward that plea in the Courts below and have failed. Defendants 1 to 4 have not appealed to this Court and the judgment of the Courts below that the suit is not premature and that they are liable to be redeemed and to deliver up possession with mesne profits has now become final.

(6) However, as it has been urged before me that the plaintiffs' suit is premature, I may consider that plea also. The learned Munsiff, on a reading of the document, has held that the period of 50 years must be counted from the date of the mortgage. On the other hand the learned District Judge has observed that 50 years may have to be counted after the expiry of 7 years during which period the property had already been mortgaged with possession to one Derappa whose rights had been assigned in favour of the mortgagees earlier to the date of Ex. A. I have gone through the document and I think that the learned Munsiff's interpretation of the document may be preferred to that of the learned District Judge. (His Lordship then referred to the document and after quoting a portion of the text of the document in Kannada, proceeded:)

The learned District Judge has, in spite of his observation, agreed with the learned Munsiff in holding that the suit is not premature and in allowing redemption. The ground on which that has been done by both the Courts is that the mortgagee, having failed to perform the duty cast on him to pay the land revenue assessment and having allowed the property to be sold for arrears of land revenue, cannot insist on the mortgagor keeping to one of the terms of the mortgage, namely, the period of 50 years. Such a plea is also unreasonable and self contradictory. If the mortgagors like the plaintiffs simply kept quiet and waited for the period of mortgage to run, they might later on be met by plea of limitation or adverse possession as has been put forward by defendant 5 in this case.

(7) There is no doubt that when a mortgagee, who is liable to pay arrears of land revenue either as an usufructuary mortgagee under S. 76(c) of the Transfer of Property Act or under an agreement with the mortgagor, fails to so pay the land revenue and allows the mortgaged property to be sold and purchases it himself, he holds it as trustee and for the benefit of the mortgagor. See S. 90 of the Indian Trusts Act — Illustration A.

(8) It has been held in — 'Narasimha Rao v. Immani Seshayya', AIR 1925 Mad 825 (C) that when a term is fixed in a usufructuary mortgage deed and possession is given to the mortgagee, it is the duty of both the parties to adhere to the terms of the mortgage, and that if the mortgagee committed breach of any of the terms it is equitable that he should not be allowed to insist upon one of the terms of the mortgage deed being given effect to when he himself has given a go by to the other terms of the deed.

(9) Similarly in — 'Chhatku Rai v. Baldeo Shukul', 34 All 659 (D) redemption was allowed before the expiration of the period fixed on the ground that it was equitable to do so as the defendants had not performed the contract so far as they were concerned. In — 'Rashik Lal v. Ram Narain', 34 All 273 (E) referred to for the Appellant the distinction between a contract and a conveyance is pointed out and it has been held that the mere fact that a part of the mortgage money is not paid does not render the mortgage itself invalid. That case has no bearing on the question which has arisen in this case.

(10) In — '1 Mys LJ 30 (F) where a mortgaged property which was sold for arrears of land revenue owing partly to the default of the mortgagee & purchased by a stranger was subsequently purchased by the mortgagee himself, the mortgage, it was held, was revived and could be redeemed by the mortgagor or his heirs; and it was immaterial that the default of the mortgagee was not the sole cause of the sale or that it was not intentional, the reason being that no man was to be allowed to take advantage of his own wrong, a principle embodied in S. 90 of the Indian Trusts Act. — '10 Moo. Ind. App. 540 (B)'; — Kalappa v. Shivaya', 20 Bom 492 (G); — 'Sanagapally Lakshmayya v. Intoory Bolla Reddy', 26 Mad 385 (H) and other cases have been relied on in that decision.

(11) Mr. V. Krishnamurthy, learned Counsel for the respondents has also referred to Jones on Mortgages 8th Edn. page 714 where it is said:

> "when the payment of the taxes is a duty on the part of the mortgagee he is like a trustee and cannot affect the right of the mortgagor by purchasing the property at a sale for such taxes ..... if the mortgagee has bought the tax title for the benefit of the mortgagor as well as for his own benefit he cannot afterwards set it up against the mortgagor to defeat redemption by him."

(12) In the result, I find there are no grounds to interfere with the judgments and decrees of the Courts below. This appeal is accordingly dismissed with costs of plaintiffs 1 to 5.

K.S.B. Appeal dismissed.

A.I.R. 1954 MYSORE 189 (Vol. 41, C.N. 82)

VASUDEVAMURTHY J. (23-2-1954)

M. P. Basappa, Petitioner v. Padasale Channappagowda and others, Respondents.

Civil Revn. Petn. No. 458 of 1952-53, against order of Dist. J., Shimoga, D/- 9-7-1952.

(a) Provincial Insolvency Act (1920), S. 9(1)(c) — "Within three months".

For an application by a creditor under S. 9, where the act of insolvency alleged against the debtor is the execution of a sale deed or other alienation which requires registration, the period of three months for presenting the petition for adjudication should be computed from the date of registration of the sale deed and not from the date of its execution. If it is held that the period of three months provided under S. 9 begins to run from the date of execution and not from the date of registration of a sale deed, that section can be easily rendered nugatory by the insolvent or the alienee merely deferring presentation of the document for registration till the last day of the four months within which the document may normally be registered or to the eight months available under some special circumstances referred to in S. 24 of the Registration Act. Case law discussed. (Paras 3, 5)

Anno: Pro. I. Act, S. 9 N. 4.

(b) Provincial Insolvency Act (1920), S. 17 — Adjudication order after death.

Section 17 authorizes the Court by necessary implication to pass an adjudication order even after the death of the debtor. AIR 1944 Cal 370, Rel. on. (Para 8)

Anno: Pro. I. Act, S. 17 N. 1.

(c) Provincial Insolvency Act (1920), S. 25 — Ability to pay debts.

Held that the finding of the Courts below that the debtor might have had slightly more assets than liabilities was not only not correct but was not even a very relevant circumstance to be taken into account while deciding whether the debtor was able to pay his debts. (Para 7)

Anno: Pro. I. Act, S. 25 N. 1.

CASES REFERRED: Paras

(A) (V25) AIR 1938 Cal 417: ILR (1938) 2 Cal 275 3, 4
(B) (V20) AIR 1933 Lah 821: 149 Ind Cas 853 3, 4
(C) (V21) AIR 1934 Mad 637 (2): 58 Mad 166 4
(D) (V20) AIR 1933 Mad 185: 141 Ind Cas 101 4
(E) (V25) AIR 1938 Mad 801: 179 Ind Cas 240 4
(F) (V21) AIR 1934 Nag 171: 150 Ind Cas 834 4
(G) (V24) AIR 1937 Nag 197: ILR (1937) Nag 403 4
(H) (V34) AIR 1947 All 383: ILR (1947) All 623 4, 5
(I) (V22) AIR 1935 Lah 565: 16 Lah 735 (FB) 4
(J) (V31) AIR 1944 Cal 370: ILR (1945) 1 Cal 522 4, 8
(K) (V21) AIR 1934 Rang 216: ILR (1934) 12 Rang 263 4
(L) (V24) AIR 1937 Rang 446: 1937 Rang LR 375 (FB) 4
(M) (V24) AIR 1937 Nag 127: 169 Ind Cas 846 6
(N) (V26) AIR 1939 Lah 349: ILR (1939) Lah 408 6
(O) (V17) AIR 1930 Lah 192: 124 Ind Cas 673 6
(P) (V20) AIR 1933 Cal 417: 60 Cal 345 6
(Q) (V23) AIR 1936 Mad 275: 161 Ind Cas 348 6
(R) (V15) AIR 1928 Mad 480: 51 Mad 495 8
(S) (V17) AIR 1930 Cal 590: 34 Cal WN 445 8

D. Puttaswamy and E. Kanakasabapathi, for Petitioner; K. V. Subba Rao, for Respondents.

ORDER: The petitioner applied under S. 9 of the Mysore Insolvency Act to have one Padasale Channappagowda, now deceased, and who will hereafter be referred to as the respondent declared or adjudged an insolvent. He has since died on 25-5-1953 leaving behind him respondents 1(a), 1(b) and 1(c), his sons as his heirs and legal representatives. The application was made on 1-4-1950. The petitioner alleged that the respondent owed him Rs. 1500/- and interest on a pronote dated 1-2-48 and that in order to defraud him and other creditors he had purported to execute a nominal and fraudulent sale deed for Rs. 2000/- on 10-12-49 of almost all his immoveable properties in favour of his friend and relation, one Sivalingappa. The petitioner wanted that transfer to be annulled among all his creditors.

The respondent pleaded that the pronote was unsupported by consideration and was obtained from him by fraud, his signature being taken to some blank papers and that he was therefore not liable to pay anything to the petitioner. He denied that the sale referred to in the application was nominal, collusive or fraudulent and pleaded that he had conveyed the properties to Sivalingappa as they really belonged to him. In his evidence he has stated that he sold them back to Sivalingapppa for Rs. 2000/- in pursuance of some earlier promise made to reconvey it in favour of Sivalingappa's father. He pleaded that he had other assets and was able to pay his creditors and that the petition was belated having been filed more than 3 months after the date of the alienation though within three months of the date of registration of the sale deed.

(2) The Subordinate Judge before whom the application was made, and the District Judge who heard the appeal against his order, have both found that the pronote in favour of the petitioner is supported by consideration and that the amount evidenced by it is due and owing to the plaintiff. They have not believed the story of the respondent that the pronote was taken from him under the circumstances pleaded or that the plaintiff is liable to pay any part of the debts due by the quandom firm of the petitioner and the respondent, and that under the terms of the agreement Ex. D dated 1-12-1948 the respondent alone was responsible to discharge these debts.

They have also found that the sale, under Ex. C, of 5 acres 17 guntas of garden land and 19 acres and 5 guntas of dry land which was worth considerably very much more, viz., Rs. 25,000/- to Sivalingappa could not be a real transaction and that the reason given by the respondent for effecting the sale of such valuable properties for a low figure has not been made out. These findings cannot be challenged before me and have not been seriously questioned either.

(3) The Courts below have however dismissed the application on two grounds, viz., that the same is barred by time having been filed beyond 3 months of the impugned sale deed, and that the respondent had sufficient assets to pay his debts. As regards the first point the Courts below have referred to and followed the cases reported in — 'Ramananda Paul v. Pankaj Kumar', AIR 1938 Cal 417 (A) and — 'Ratan Chand v. Smail', AIR 1933 Lah 821 (B). The learned District Judge before whom

it was urged for the petitioner that the former rulings applied to cases of alienations which were sought to be set aside as being a fraudulent preference under S. 54 of the Insolvency Act has referred to S. 47 of the Registration Act which declares that the title of a person under a registered document operates, not from the date of registration, but from the date from which it would have commenced to operate if no registration thereof was required or made; and he was of the opinion that as the title of the alienee under Ex. C would date back to its date of execution and not the date of its registration the period of three months referred to in S. 9 would begin to run from that date.

There is no decided case in Mysore on the point. But the preponderence of opinion among the other High Courts is that for an application by a creditor under S. 9 of the Insolvency Act, where the act of insolvency alleged against the debtor is the execution of a sale deed or other alienation which requires registration, the period of three months for presenting the petition for adjudication should be computed from the date of registration of the sale deed and not from the date of its execution.

(4) The Madras High Court has held so in — 'Sarvathada v. Kurubasubbanna', AIR 1934 Mad 637 (2) (C) and — 'Muthiah Chettiar v. Official Receiver, Tinnevelly', AIR 1933 Mad 185 (D) and has followed the same principle in — 'Venkadari Somappa v. Official Receiver, Bellary', AIR 1938 Mad 801 (E) with reference to S. 54 of the Provincial Insolvency Act. To the same effect are the decisions in — 'Kanhaiya Lal v. Sadashiv Rao', AIR 1934 Nag 171 (F) and — 'G. W. Godbole v. Marotisa Balusa', AIR 1937 Nag 197 (G) and — 'District Board, Bijnor v. Md. Abdul Salam', AIR 1947 All 383 (H). The Lahore High Court had taken the opposite view in — 'AIR 1933 Lah 821 (B)', to which reference has been made by the District Judge. The Transfer of Property Act was not in force in Punjab at the time and the decision is mainly based on the circumstance that the vendor had there, then, the option either to effect a sale orally or in writing.

Even the learned Judge who decided that case has observed that the point was not free from difficulty while coming to his conclusion. But that case has since been overruled by a Full Bench of the Lahore High Court in — 'Lakhmi Chand v. Kesho Ram', AIR 1935 Lah 565 (I), where it was held that when a petition is presented alleging that a debtor has committed an act of insolvency by a deed registered, the period of limitation prescribed by S. 9 of the Act runs from the date of its registration and not from the date of its execution; and it is somewhat surprising that while the lower Court has noticed — 'AIR 1933 Lah 821 (B)', it has not referred to this later case. Even the Calcutta High Court has held in — 'Indo Burma Trader's Bank v. Basada Charan', AIR 1944 Cal 370 (J) that for purposes of S. 9 of the Provincial Insolvency Act time has to be reckoned from the date of registration of the deed of transfer where the Transfer of Property Act requires a registered instrument for a transfer, which is alleged to constitute the act of insolvency. They have distinguished the earlier Calcutta case in — 'AIR 1938 Cal 417 (A)' on the ground that it was concerned with S. 54 and not with Ss. 9 and 6 of the Provincial Insolvency Act.

In — U Ba Sein v. Maung San', AIR 1934 Rang 216 (K), which was a case dealing with S. 54 of the Provincial Insolvency Act the same view as the other High Courts referred to above had been taken. But that decision was overruled in — 'U On Maung v. Maung Shwe Hpaung', AIR 1937 Rang 446 (FB) (L). Mr. Justice Baguley who was one of the Judges constituting the Full Bench has expressed the view that different considerations may arise in considering limitation with regard to S. 9 of the Provincial Insolvency Act.

(5) It seems to me that if it is held that the period of three months provided under S. 9 begins to run from the date of execution and not from the date of registration of a sale deed, that section can be easily rendered nugatory by the insolvent or the alienee merely deferring presentation of the document for registration till the last day of the four months within which the document may normally be registered or to the eight months available under some special circumstances referred to in S. 24 of the Registration Act. The petitioning creditor can only base his application on a transfer which is brought to his notice or which may be deemed to have been brought to his notice by the fact of registration. If the registration of the document is absolutely necessary to validate it, and if without registration there can be really no effective transfer at all the act of insolvency, i.e., the transfer contemplated under S. 6 and on which the petition is grounded under S. 9(1)(c) may well be said to have occurred on the date of registration.

Section 47 which provides that the transaction operates or takes effect retrospectively from the date of execution of the deed and not its registration is not really germane to this question. As pointed out in AIR 1947 All 383 (H) at 386

> "Care has to be taken to keep the question of the operation of the deed distinct from the question of the point of time when the event which gives it legal effect takes place. Section 47 of the Registration Act is designed to avoid fraud of one kind, viz., to avoid a document executed on a later date to steal a march or prevail as against a document executed earlier and affect legal rights and interests created thereby already, by merely registering it earlier. It would be somewhat strange if that section is to be used to help a fraud by a person making a fraudulent alienation. In the above view the application of the petitioner must be held to be within time."

(6) The Courts below have dismissed the application also on the ground that the assets of the respondent are more than his liabilities. The trial Court has very briefly discussed the value of the assets and has found that though the evidence is inconclusive the value of the assets of the respondent, other than those he has sold under Ex. C, may be just enough to discharge his debts including those of the petitioner. The learned Subordinate Judge has also found that the value of the assets has been exaggerated, but they may be sufficient to meet the liabilities and he appears to base his decision more on the question of limitation. It is urged before me by Mr. Puttaswamy, learned Counsel for the petitioner, that what is required under S. 25(1) of the Act is that the debtor must

satisfy the Court that he is able to pay his debts and that the burden of proof is therefore on the debtor to establish that he was able to pay his debts; see — 'Gadi v. Govindrao Bapuji', AIR 1937 Nag 127 (M).

He has referred to the evidence and has rightly urged that the immoveable properties now remaining not liquidated are easily available assets and are neither so considerable nor so valuable as the trial Court has thought and that the respondent has given absolutely no evidence of any attempt on his part to raise funds by either sale or mortgage of them in order to discharge his debts. In this connection he has relied on a case reported in — 'Bhagwan Das v. Md. Nawaz Shah', AIR 1939 Lah 349 (N) where it has been held that the

> "Mere presence of unliquidated assets does not necessarily prove that they are capable of being liquidated. Unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in, praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term."

Their Lordships have pointed out in that case that the mere fact that the value of the immoveable properties owned by him is in excess of his liabilities is not sufficient to prove a debtor's ability to pay his debts and that it must be shown by him that he has such realizable assets as can within a reasonable time be made available to meet all his liabilities and that from the circumstance that no effort has been made to pay off the creditors though the debts have been due for a considerable time can be presumed that he is unable to pay his debts within the meaning of S. 25. See also — 'Tota v. Badri Pershad', AIR 1930 Lah 192 (O); AIR 1937 Nag 127 (M); — 'Pratapmal v. Chuni Lal', AIR 1933 Cal 417 (P) and — 'Chidambaram Chettiar v. Daivani Achi', AIR 1936 Mad 275 (Q) where it has been pointed out that the debtor must satisfy the Court that he has present ability to pay creditors and not that he will be able to do so in a more or less distant future.

(7) The respondent had a number of minor sons when the application was made and was disputing the creditor's debt itself by pleas which have now been found to be false. The debt due to the petitioner is on a pronote and when the respondent was alive it may not have been easy for him to raise money on the security of the family properties to discharge the petitioner's debt in the light of the law as it stood in Mysore. Far from saying that he was either able or willing to discharge the other debts the respondent was trying to make out that it was the petitioner that should discharge either the whole or part of those debts and that he himself was not liable; and this has been found to be false, and contrary to what he has expressly agreed under Ex. D. Though the insolvency petition has been pending for nearly four years it has not been even suggested that he has discharged any of those debts and the effect of dismissing the creditor's application at this stage would mean that the creditors would have probably no remedy to recover their just dues.

The finding that the alienation effected by the respondent was not bona fide but was nominal and collusive and that it covers a most valuable portion of his property is a further circumstance by which it can reasonably be inferred that he was unable to pay his debts. The petitioner has also sworn that the respondent has, subsequent to his petition, transferred some of his shares and realizable assets without discharging either his debt or the debts of other creditors. The finding therefore of the Courts below that he may have had slightly more assets than liabilities is not only not correct but is not even a very relevant circumstance to be taken into account while deciding whether the debtor is able to pay his debts.

(8) The respondent is now dead but under S. 17 the proceedings must be continued so far as may be necessary for the realization and distribution of the property of the debtor. Section 17 authorizes the Court by "necessary implication" to pass an adjudication order even after the death of the debtor. It has been so held in AIR 1944 Cal 370 (J) where it has been pointed out that the matter of realization and distribution of the property of the debtor cannot be conducted unless there is a person in whom the property is vested and the property of the debtor will vest in the Receiver only on adjudication following — 'Ramathai Anni v. Kanniappa Mudaliar', AIR 1928 Mad 480 (R) and — 'Ramesh Chandra v. Charu Chandra', AIR 1930 Cal 590 (S).

(9) In the result this revision petition is allowed and the orders of the Courts below are set aside. The respondent is adjudged an insolvent as prayed for in the petitioner's application and the learned Subordinate Judge is directed to dispose of the case in accordance with law in the light of the observations made above. The petitioner will get his costs throughout from the respondent's estate.

D.H.Z. Revision allowed.

END

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NAGPUR HIGH COURT
1954

CHIEF JUSTICE

The Hon'ble Mr. Justice Bhuvaneshwar Prasad Sinha, B.A. (HONS.) M.A., B.L. (upto 1-12-1954).
" " " M. Hidayatullah, B.A. *(Cantab)*, Bar-at-law.

PUISNE JUDGES :

The Hon'ble Mr. Justice M. Hidayatullah, B.A. *(Cantab)*, Bar-at-law.
" " " K. T. Mangalmurti, B.SC., LL.B., I.C.S.
" " " R. Kaushalendra Rao, M.A. (Mad.), B.SC. *(London.)*, Bar-at-law.
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Nagpur High Court

A.I.R. 1954 NAGPUR 1 (Vol. 41, C. N. 1)

FULL BENCH

HIDAYATULLAH, V. R. SEN AND DEO JJ.

Messrs. Sriram Gulabdas, Applicants v. The Board of Revenue (M. P.), Nagpur and another, Non-Applicants.

Misc. Civil Application No. 148 of 1952, D/- 16-4-1953, for leave to appeal to Supreme Court against the decision of Hidayatullah and Choudhury JJ., D/- 25-4-1952.

(a) Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 23 — Proceedings under — Nature of — Applicability of Letters Patent (Nagpur), Cl. 29 and Constitution, Art. 133 — (Constitution of India, Art. 133) — (Letters Patent (Nagpur), Cl. 29).

The proceedings under S. 23 deal with matters pertaining to liability and assessment of sales tax and can properly be regarded as revenue proceedings. They are not civil proceedings. Clause 29 of the Letters Patent and Art. 133 of the Constitution have therefore no application. (Para 26)

(b) Constitution of India, Art. 132 (1) — "Other proceedings" — Meaning — Include revenue proceedings.

The words "other proceedings" in Art. 132 should not be construed 'ejusdem generis' with what precedes. Those are words of wide amplitude and include all proceedings other than civil or criminal proceedings and thus include revenue proceedings. AIR 1950 SC 169, Ref. (Para 28)

Substantial constitutional questions arise not only in civil and criminal proceedings but in other proceedings as well. The Supreme Court is the final authority on constitutional matters. It cannot, therefore, be the intention to exclude the right of appeal from the revenue proceedings even though substantial questions of law as to the interpretation of the Constitution arise in such proceedings. AIR 1952 Nag 330; AIR 1953 Nag 89 and AIR 1953 SC 210, Ref. (Para 37)

(c) Constitution of India, Art. 132 (1) — one of — (Government of India Act (1935), 205 (1)).

Per Deo and Sen JJ. (Hidayatullah J. contra): The language of Art. 132 is materially different from that of sub-s. (1) of S. 205, Government of India Act, 1935. The change in language in Art. 132 (1) is deliberate and that it was intended by the makers of the Constitution to confer a right of appeal from a judgment, decree or final order not only in civil and criminal proceedings but from a judgment or final order in other proceedings as well, provided a substantial question of law as to the interpretation of the Constitution was involved. The insertion of the words "or other proceeding" has widened the range of decisions which can be the subject of appeal to the Supreme Court. Case law discussed.

No narrow interpretation should be applied to the interpretation of the words "judgment in other proceeding" occurring in the Article. AIR 1939 FC 43, Rel. on. (Para 53)

(d) Constitution of India, Art. 132 (1) — 'Judgment' — Meaning — Decision of High Court in reference under S. 23 (5), C. P. and Berar Sales Tax Act, 1947 — Appeal to Supreme Court — (Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 23 (5)) — (Income-tax Act (1922), S. 66 (5)) — (Letters Patent (Nagpur), Cl. 29).

Per Deo and Sen JJ. (Hidayatullah J. dissenting): The term "judgment" is used in Art. 132 (1) in the wider sense to include any decision given by the High Court on a question or questions at issue between the parties to any proceeding properly before the Court which finally determines the rights of parties so far as the Court is concerned. In this sense a decision under S. 23 (5), C. P. and Berar Sales Tax Act, or under S. 66(5), Income-tax Act, is clearly a "judgment". It finally determines the rights of the parties so far as the High Court is concerned though the Tribunal may have to reopen the assessment proceedings and make or order further enquiry to give effect to the decision of the High Court.

The decision under S. 23 (5), C. P. and Berar Sales Tax Act, being thus a "judgment" in revenue proceedings, the applicant is entitled to a certificate under Art. 132 (1) of the Constitution. (Paras 54, 55)

Per Hidayatullah J.: The jurisdiction exercised by the High Court, whether it be under the Income-tax Act or the Sales Tax

Act, is merely advisory and consultative and the opinion given on the questions mooted neither ranks as a "final order" nor even as a "judgment". The order does not decide the controversies but merely gives expression to an opinion for the guidance of the referring authority. The opinion, though binding on the Board of Revenue, is not on an "issue" and is not "sufficient for the final disposal of the case". Such decisions did not fall either within the expression "judgment, decree or final order" as used in the Letters Patent of the High Courts or in the Constitution Act in force before the present Constitution. The use of the words "civil, criminal or other proceeding" does not make Art. 132 wider than S. 205. Government of India Act, 1935. The use of the same expression, namely, "judgment, decree or final order" once again in Art. 132 clearly imports the decisions under S. 205 for the interpretation of that phrase. The addition of the words "other proceeding" does not enlarge the ambit of the section beyond what was included in S. 205 of the earlier Constitution and it is not open to the Courts to depart from the view so consistently taken.

(Paras 18, 19, 20)

The explanation widens the ambit of Art. 132 beyond that of S. 205 but the advisory opinion is not generally an order 'sufficient' for the final disposal of the case.

(Para 19)

R. S. Dabir and R. M. Hajarnavis, for Applicants; T. P. Naik and W. K. Sheorey, for Non-Applicants.

CASES REFERRED TO :

(A) ('51) AIR 1951 Pat 29: 30 Pat 174 (FB)
(B) ('52) AIR 1952 Punj 299: 1952-21 ITR 523
(C) ('50) AIR 1950 SC 169: 51 Cri LJ 1270 (SC)
(D) ('50) AIR 1950 FC 77: 1950 SCJ 139 (FC)
(E) ('49) AIR 1949 FC 1: 1947 FCR 180: 49 Cri LJ 625 (FC)
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(P) ('52) AIR 1952 Nag 357: ILR (1952) Nag 471 (FB)
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(Z2) (1882) 46 LT 749: 9 QBD 621
(Z3) (1903) 72 LJKB 271: 1903-1 KB 547
(Z4) ('23) AIR 1923 PC 138: 47 Bom 742 (PC)
(Z5) ('33) AIR 1933 PC 108: 1933-1 ITR 94 (PC)
(Z6) ('46) AIR 1946 Nag 397: ILR (1946) Nag 594
(Z7) ('48) AIR 1948 Nag 228: ILR (1947) Nag 425
(Z8) ('40) AIR 1940 PC 158: 1940-8 ITR 495 (PC)
(Z9) ('53) AIR 1953 SC 118: 1953 SCR 463 (SC)
(Z10) ('39) AIR 1939 FC 43: 1939 FCR 159: 40 Cri LJ 468 (FC)
(Z11) ('53) AIR 1953 SC 198: 1953 SCJ 300 (SC)
(Z12) ('51) AIR 1951 Mad 590: 1949-17 ITR 353

ORDER OF REFERENCE.

HIDAYATULLAH AND CHOUDHURI JJ.: This is an application for leave to appeal to the Supreme Court. This application arises out of our judgment in Miscellaneous Civil Case No. 258 of 1951 decided on 25-4-1952 and since reported in 1952 N L J 373 : (AIR 1952 Nag 378).

(2) The matter concerns the assessment of sales tax for the quarter ending with 12-11-1947. The applicants had applied under S. 23, C. P. and Berar Sales Tax Act, 1947, requesting the Board of Revenue to refer certain questions of law for decision by this Court. That application was rejected. The applicants then applied to this Court and the Chief Justice directed the Board of Revenue to refer certain questions for decision by this Court.

(3) The questions were referred to this Court and by our judgment we answered those questions. The present application is made for leave to appeal to the Supreme Court. The question is whether our decision amounts to 'a judgment, decree or final order' within Arts. 132 and 133 of the Constitution. There have been some decisions which lay down that appeal does not lie in such matters and the decision is not a 'judgment decree or final order'. See — 'Tobacco Manufacturers (India) Ltd. v. The State', AIR 1951 Pat 29 (A), per Sarjoo Prasad and Rai JJ.; Shearer J. 'Contra and — Pahlad Rai & Co. v. Commissioner of Income tax', AIR 1952 Punj 299 (B). Since the matter is important we think that this question should be authoritatively settled by a Full Bench. Let the papers be laid before my Lord the Chief Justice with a recommendation that a Full Bench be constituted to decide this application.

OPINION OF THE FULL BENCH.

HIDAYATULLAH J.: This is an application for leave to appeal to the Supreme Court against the decision of Choudhuri J. and myself in Miscellaneous Civil Case No. 258 of 1951, decided on 25-4-1952, on a reference from the Board of Revenue, Madhya Pradesh. The decision of the Division Bench has since been reported in 1952 N. L. J 373 : (AIR 1952 Nag 378).

(2) The reference was occasioned in a case arising out of sales tax proceedings. The learned Chief Justice directed the Board on the application of the assessee to state a case and to refer certain questions for the decision of the High Court. Those questions were answered by the Division Bench and it is against that judgment that the applicant proposes to file an appeal before the Supreme Court. The case was at first before a Division Bench consisting of Choudhuri J. and myself, but on a reference by the Bench that the point involved was important, it has been referred to this Full Bench for decision.

(3) The question that arises is :

"Does an appeal lie against the judgment of the High Court on a reference by the Board of Revenue under the Central Provinces and Berar Sales Tax Act, 1947?"

(4) Section 23 of the Act, 'inter alia', provides as follows:

"5. The High Court upon the hearing of a reference under this section shall decide the question of law raised thereby and shall deliver judgment thereon containing the grounds of decision and shall send to the Tribunal a copy of the judgment under the seal of the Court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly."

(5) It is contended that the judgment of the High Court is appealable under Art. 133(1)(a) or (c) of the Constitution of India because it is a civil proceeding and involves an amount exceeding Rs. 20,000/- or is otherwise fit for appeal under cl. (1)(c) 'ibid', and, alternatively, that even if it were not a civil proceeding, it is 'other proceeding' and falls within Art. 132(1) 'ibid', inasmuch as it involves a substantial question of law as to the interpretation of the Constitution.

(6) On the first point I have no doubt that this is not a civil proceeding at all. These proceedings arise out of collection of revenue and are before this Court merely for the purpose of advice which the Board of Revenue seeks or which this Court enjoins upon the Board, upon certain points of law. The essence of the proceedings is the collection of revenue and not the decision of any dispute of a civil nature in the strict sense. Further, even if it be held that the proceedings are civil proceedings, the decision of the High Court cannot fall within the expression "judgment, decree or final order" for reasons to be given hereafter. In my opinion, the argument of the applicant that the appeal lies under Art. 133 is not sound.

(7) Indeed, the learned counsel for the applicant did not choose to state his case on this ground too strongly but relied rather upon the applicability of Art. 132(1) of the Constitution. That Article reads:

"(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution."

* *

"'Explanation'.—For the purposes of this article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case."

(8) The first clause of the Article as reproduced above does seem to suggest as if it was intended that the Supreme Court should entertain appeals against all decisions and in all matters, whether civil, criminal or other, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Constitution. The learned counsel for the applicant contended that "other proceeding" is not 'ejusdem generis' with what precedes and that in — 'Pritam Singh v. The State', AIR 1950 SC 169 (C), their Lordships of the Supreme Court held that income-tax cases came within Art. 133 and the same reasoning applies to Art. 132. Granting that revenue proceedings are included in the expression "other proceeding", the question that arises for our consideration is whether the "judgment" of the High Court under consideration can be said to fall within the phrase "judgment, decree or final order" as used in Art. 132(1) of the Constitution. Those words are the 'sine qua non' of the application of the Article.

(9) In — 'Mohammad Amin Brothers, Ltd. v. Dominion of India', AIR 1950 FC 77 at p. 78 (D), it was pointed out that if the order did not amount to a final order, judgment or decree the certificate granted by the Court under S. 205, Government of India Act, was ineffectual. Unless we can say that the "judgment" falls within the above description, it cannot be held that an appeal lies to the Supreme Court under Art. 132(1). Whether an appeal would lie under Art. 136 now or when the matter is decided finally by the Revenue Board in accordance with the decision of the High Court is no more relevant than whether the Privy Council granted special leave in any particular case in the exercise of the prerogative of His Majesty.

(10) That the "judgment" of the High Court on a reference is not a decree, whether in the sense in which it is used in the Civil Procedure Code or in its generic meaning as understood by the profession, does not admit of any doubt. It is not a decree in either sense. Therefore, the present question can only be resolved in favour of the applicant if the "judgment" of the High Court falls within the other two expressions used, that is to say, "judgment" or "final order".

(11) The interpretation of these expressions is not before the Court for the first time and numerous rulings exist dealing with the Letters Patent, the Civil Procedure Code and the Government of India Act, 1935. The expression "final order" was considered by the Federal Court in — 'AIR 1950 FC 77 at p. 78 (D)', where the Federal Court was dealing with the meaning of a similar collocation of words in S. 205, Government of India Act, 1935. It was then observed by their Lordships that:

"If the order appealed from does not amount to a final order, judgment or decree, a certificate given by the High Court is ineffectual by itself to attract the operation of S. 205(1), Government of India Act.

The expression 'final order' has been used in contra-distinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in — 'S. Kuppuswami Rao v. The King', AIR 1949 FC 1 (E), and the law on the point, so far as this Court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee in — 'Firm Ramchand Manjimal v. Firm Goverdhandas Vishindas Ra'anchand', AIR 1920 PC 86 (F) and — 'Abdul Rahman v. D. K. Cassim & Sons', AIR 1933 PC 58 (G), and the authorities of the English Courts upon which these pronouncements were based, it has been held by this Court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in — 'AIR 1933 PC 58 (G)':

'the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it.'

The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order.

Judged by the test, the order appealed from in the present case cannot certainly rank as a 'final order'."

(12) To the same effect are the observations in — 'AIR 1949 FC 1 (E)' and in — 'Prem Chand v. The State of Bihar', AIR 1951 SC 14 (H). The latter was a case in which an order of the High Court declining to call upon the Board of Revenue to state a case under S. 21, Bihar Sales Tax Act, 1944, was not considered as a final order passed either in exercise of original or appellate jurisdiction. In dealing with the case their Lordships also referred to the case of — 'Tata Iron and Steel Co., Ltd. v. Chief Revenue Authority of Bombay', AIR 1923 PC 148 (I) and quoted from — 'In re Knight and the Tabernacle Permanent Building Society', (1892) 2 QB 613 at p. 617 (J). Their Lordships, on the authority of that case as also other English cases, held that since the jurisdiction of the High Court was only consultative, the fact that the taxing authority would deal with the case in the light of the opinion of the High Court did not render the order a "final order" because the High Court's order did not of its own force bind or affect the rights of the parties.

(13) It is no doubt true that the explanation now added to Art. 132 gives a modified meaning to the word "final" and renders these earlier rulings inapplicable to the facts contemplated by the explanation. Now an order deciding an "issue", which, "if decided in favour of the appellant" is "sufficient" for "the final disposal of the case", is a "final order". This explanation is intended to bring in the earlier rulings in — 'Rahimbhoy Habibbhoy v. C. A. Turner', 15 Bom 155 (K) and — 'Saiyid Muzhar Hossein v. Mt. Bodha Bibi', 17 All 112 (PC) (L). But the word "sufficient" shows that the order must still 'in its extent', if not of its own force, be sufficient to dispose of the whole case finally. The appellant in each case must show that the order, if in his favour, would finally dispose of the case and that the order involves a substantial question of law as to the interpretation of the Constitution. A certain measure of finality, short of decision of the case, is contemplated even under the explanation.

(14) When the Board of Revenue asks for advice on certain points, the opinion of the High Court is binding on the Board but the sufficiency of the High Court's opinion for the final disposal of the case depends upon a variety of circumstances which it is impossible to generalise. The question may be a side issue and may not cover the whole case. Similarly, when the High Court orders the Board to state a case on a certain point or points, the decision of the High Court on that point or points may not be 'sufficient' for the disposal of the case. I am, therefore, of the opinion that the decisions referred to by me still govern the interpretation of the term "final order". The explanation which gives an added right of appeal in certain circumstances by treating an order as final, though it is not, can be applied in other contexts more easily than in the context of advisory or consultative judgments given under S. 23(5), Central Provinces and Berar Sales Tax Act, 1947. In that jurisdiction the order binds the taxing authority but whether the opinion of the High Court is sufficient to dispose of the whole case is not for the High Court to say.

(15) It remains to consider whether the "judgment" of the High Court is a 'judgment' within the meaning of the term as used in Art. 132. In the Letters Patent the words were "final judgment". In S. 205, Government of India Act, 1935, the qualifying word "final" was dropped. The only difference between that section and Art. 132 is that while the former spoke of "a judgment, decree or final order of a High Court", the latter speaks of "a judgment, decree or final order..... whether in a civil, criminal or other proceeding". The questions that arise are whether the omission of the qualifying word "final" in both these provisions and the addition of the words "other proceeding" in the present Constitution render the earlier acceptance of the term "judgment" inapplicable.

(16) The leading case on the meaning of the term "judgment" is — 'Tata Iron & Steel Co., Ltd. v. Chief Revenue Authority of Bombay', (I) (cit. sup.). In that case their Lordships were concerned with the interpretation of cl. 39 of the Letters Patent of the Bombay High Court which contained the expression "final judgment". No doubt, their Lordships said that a consultative opinion rendered by the High Court was not a "final judgment" but they gave as their reasons that it was not a judgment and much less final. From page 150 of the report the discussion begins and at page 154 their Lordships begin discussing the term "judgment" in all its implications and they observe:

"It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal and proper sense.

It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the Judges who heard the case, together with a statement of the grounds upon which those opinions are based. 'It amounts only to a ruling' that a certain deduction claimed by a taxpayer to be allowed from the sum for which he has been already assessed to income-tax is not permissible. (Underlined by me (here in ' ')).."

(17) It is impossible to say these observations were dependent upon the presence of the word "final" qualifying the word "judgment". It is true that the existence of that qualification was held by their Lordships to be an additional circumstance tending to the result that there was no appeal against that "judgment". But the force of their Lordships' dictum quoted by me is not spent when the word "final" is not to be found. Indeed, such an argument was advanced and not accepted by the Federal Court in — 'S. Kuppuswami Rao v. The King', (E) (cit. sup.). In — 'AIR 1950 FC 77 (D)' and — 'AIR 1951 SC 14 (H)', the meaning of the term "judgment" as laid down by the Judicial Committee has been accepted without reserve. The same is the view of the Patna High Court, though it was expressed in relation to Art. 133 of the Constitution: See — 'AIR 1951 Pat 29 (FB) (A)'. These authorities are certainly more relevant and nearer the point than several others like — 'C. T. Cogstad & Co. v. Newsum, Sons & Co.', (1921) 2 AC 528 (M) or — 'In re a debtor', (1912) 3 KB 242 (N).

(18) These cases clearly establish that the jurisdiction exercised by the High Court, whether it be under the Income-tax Act or the Sales Tax Act, is merely advisory and consultative and the opinion given on the questions mooted neither ranks as a "final order" nor even as a "judgment". The order does not decide the controversies but merely gives expression to an opinion for the guidance of the referring authority. The opinion, though binding on the Board of Revenue, is not on an "issue" and is not "sufficient for the final disposal of the case". There might be a dozen questions in the case and the reference might be of one question only. Evidence might be required in the light of the interpretation of the law and

that might lead to other questions which might have to be referred again. How can it be assumed that only arithmetical calculations are left? In my opinion, the explanation cannot cover the present case and hence is not of assistance.

(19) The accepted view in the Privy Council, the Federal Court and the Supreme Court has been that such decisions do not fall either within the expression "judgment, decree or final order" as used in the Letters Patent of the High Courts or in the Constitution Act in force before the present Constitution. The use of the words "civil, criminal or other proceeding" does not make the present article wider than S. 205, Government of India Act, 1935. The phrase "judgment, decree or final order of a High Court" 'is certainly not less general' than the corresponding phrase "judgment, decree or final order of a High Court in a civil, criminal or other proceeding" now used. If the ambit of S. 205, Government of India Act, was not less, the rulings must govern our interpretation of Art. 132 of the Constitution. The explanation widens the ambit of Art. 132 beyond that of S. 205 but the advisory opinion is not generally an order 'sufficient' for the final disposal of the case, and certainly not in this case.

(20) In my opinion, the use of the same expression, namely, "judgment, decree or final order" once again in Art. 132 clearly imports the decisions above referred to for the interpretation of that phrase. The addition of the words "other proceeding" does not enlarge the ambit of the section beyond what was included in S. 205 of the earlier Constitution. It is not open to me to depart from the view so consistently taken. The addition of the words "other proceeding" does not change the meaning of the phrase "judgment, decree or final order" which are still the crucial words. The explanation does render certain orders final even though they are not, but it sets its own limitations. The decision in — 'Election Commission v. Venkata Rao', AIR 1953 SC 210 (C), must be read in the light of its own facts. There the position under Arts. 133 and 132 is contrasted and the observation merely points out that there is a vital difference between the two Articles. Their Lordships' observations do not infringe on the meaning of the crucial words, nor do they contain a full exposition of the explanation to Art. 132 applicable to these facts. We have to see if the order would be sufficient to dispose of the case finally because it is on an "issue" vital to the case. Frankly speaking, I do not understand what is meant by liberal construction in this context. Either there is a right of appeal in such cases or there is not. We cannot by a liberal construction confer a right of appeal on a Court superior to this Court unless we can say that the words of the Constitution warrant this. This constitutional point in this case concerns only extra-territoriality and is not of sufficient width to lead to a decision of the whole case. Considered in this light, I am of opinion that no leave can be granted in the present case.

(21) It may be pointed out that in the Income-tax Act a special section (S. 66A) had to be added to obviate the difficulty of taking appeals to the Privy Council (now the Supreme Court) from such decisions. No such enactment has been made in the Sales Tax Act and it would be advisable to add such a provision in view of the large amounts involved.

(22) The application shall be dismissed with costs. Counsel's fee Rs. 100/- is certified.

(23) DEO J.: This application for a certificate of fitness purporting to be under Art. 135 of the Constitution, read with O. 45, R. 2, Civil P. C., was referred to this Full Bench as an important question of the interpretation of the term 'judgment, decree or final order' in Arts. 132 and 133 with reference to a decision under S. 23(5), Central Provinces and Berar Sales Tax Act, 1947, hereinafter referred to as the Act, was involved. In the order of reference mention was made of the decisions reported in — 'AIR 1951 Pat 29 (FB) (A)' — per Sarjoo Prosad and Rai JJ., Shearer J. contra — and — 'AIR 1952 Punj 299 (B)', bearing on the interpretation of the term. At the hearing, the learned Counsel for the applicant did not seriously rely on either Art. 135 or Art. 133. He pressed for a certificate under Art. 132(1).

(24) Section 23(5) of the Act is similar in terms to S. 66(5), Income-tax Act, 1922. These sections enjoin the High Court to do three things: to decide the questions of law raised by the reference, deliver a judgment containing the grounds of decision, and to send a copy of the judgment to the Tribunal. Thereafter the case has to be disposed of by the Tribunal in accordance with the judgment of the High Court.

(25) The controversy before the High Court in the instant case was whether the transactions in question were sales within the State and whether the provisions of the Act with regard to these sales in question were 'intra vires'. As these questions were decided against the applicant, nothing further remained to be done by the Tribunal. Had they been decided in favour of the applicant, all that the Tribunal would have had to do was to exclude the amounts of such sales, which are already determined, from the computation of the turnover and to calculate the tax payable by the applicant. All this is consequential arithmetical calculation and does not involve any adjudication by the Tribunal.

(26) Unlike S. 66A(2), Income-tax Act, there is no provision in the Act for a regular appeal to the Supreme Court. In the absence of such provision the right of appeal must be traced to cl. 29 of the Letters Patent or to the Constitution. It cannot be disputed that the judgment was not passed on appeal or in the exercise of original jurisdiction of this Court, or that the proceedings are not civil or criminal proceedings. It is not urged that the judgment amounts to a decree. The proceedings under S. 23 deal with matters pertaining to liability and assessment of tax and can properly be regarded as revenue proceedings. They are not civil proceedings. Clause 29 of the Letters Patent and Art. 133 of the Constitution have, therefore, no application.

(27) On a perusal of the grounds of appeal and of the judgment of the Division Bench from which an appeal is sought to be taken to the Supreme Court, there can be no manner of doubt that the case involves a substantial question of law as to the interpretation of the Constitution. The only question for decision, therefore, is

> "Whether the judgment under S. 23(5), Sales Tax Act is 'a judgment or final order in other proceedings' within the meaning of Art. 132(1) of the Constitution."

(28) The contention of the learned Counsel for the non-applicant that the words "other proceeding" in this Article should be construed 'ejusdem generis' with what precedes is not acceptable. The decision in — 'AIR 1950 SC 169 (C)', on which he relies does not support this submission. The words "other proceedings" are words of wide amplitude and include all proceedings other than civil or criminal proceedings. They thus include revenue proceedings.

(29) Relying on the observations of the Supreme Court in — 'AIR 1951 SC 14 (H)', it was held in — 'Pahlad Rai and Co. v. Income-tax Commissioner', (B) (cit. sup.) that an appeal to the Supreme Court against the order of a High Court under S. 66(2), Income-tax Act, is incompetent. A certificate was sought under Art. 133(1)(c) of the Constitution which has no application unless the order is passed in civil proceedings. In — Prem Chand v. State of Bihar', (H) their Lordships were considering the right of appeal under cl. 31 of the Letters Patent of the Patna High Court (which corresponds to cl. 39 of the Letters Patent of the Bombay High Court and to cl. 29 of that of this Court) against the order passed before the Constitution came into force, under S. 21(3), Bihar Sales Tax Act, declining to require the Board of Revenue to State a case. Clause 31 refers to decisions in civil proceedings in the exercise of appellate or original jurisdiction. Since the proceedings in the High Court under the Income-tax Act or the Sales Tax Act are not civil proceedings and the order is not passed in the exercise of the appellate or original jurisdiction, cl. 31 had no application. Having so held, it was not necessary to decide if the order was a final order within the meaning of that clause. The test of finality as laid down by their Lordships is that the order must "by its own force bind or affect the rights of parties." Their Lordships relied on — 'AIR 1923 PC 143' (I) and — '(1892) 2 QB 613 at p. 617' (J). It is not necessary to decide in the instant case the nature of the order passed under S. 23(3), Sales Tax Act (corresponding to S. 21(3) of the Bihar Act) or S. 66(2), Income-tax Act.

(30) In — 'Tobacco Manufacturers (India) Ltd. v. The State', (A) (supra) their Lordships were considering the right of appeal against an order under S. 21(3), Bihar Sales Tax Act, under S. 109 and S. 110, Civil P. C., clause 31 of the Letters Patent and Art. 133 of the Constitution. None of these has any application unless the decision of the High Court is in a civil proceeding. The majority view of the Full Bench is that it is not a civil proceeding. That being so, the discussion about judgment and final order is obiter. Sarjoo Prosad J. with whom Rai J. concurred, observed:

> ".....the use of the term 'judgment' or 'final judgment' in the eye of law does not bear any different significance and the use of the word 'final' as qualifying 'judgment' is merely 'ex cautela'. It is in this orthodox and juristic sense that the term 'judgment' appears to have been used in Ss. 205 and 206, Government of India Act, 1935, or for the matter of that in Arts. 132, 133 and 134 of the present Constitution of India."

This statement of law is not borne out by the decision of the Judicial Committee in — 'Tata Iron and Steel Company's case (I)' or by English decisions relied on by the Judicial Committee. It was examined by one of us (Hidayatullah J.) in — 'Manohar v. Baliram', AIR 1952 Nag 357 (FB) (P). He remarked at page 368:

> "With all due respect to the learned Judge, this is not borne out by the dictum of their Lordships to which he has referred, because their Lordships throughout the ruling were considering the merit of a final judgment and the tenor of their Lordships' discussion clearly establishes that there is a distinction between a final and an interlocutory judgment."

(31) The learned Counsel for the non-applicant further relies on the decision in — 'AIR 1950 FC 77 (D) which follows — 'AIR 1949 FC 1 (E)', — 'AIR 1920 PC 86 (F)' and — 'AIR 1933 PC 58 (G)'. In — 'AIR 1920 PC 86 (F)', it was held that an order refusing stay of suit under the Arbitration Act is not a final order within the meaning of S. 109, Civil P. C., because it does not finally dispose of the rights of the parties on merits but leaves them to be determined by the Courts in the ordinary way. In — 'Abdul Rahman's case (G)', it was held that an order of remand under O. 41, R. 23, is not a final order within the meaning of S. 109 of the Code. 'Ram Chand Manjimal's case (F)' was relied on and — '15 Bom 155 (PC) (K)' and — '17 All 112 (PC) (L)', were distinguished. The order of remand did not decide the rights of the parties on merits but set aside the order of dismissal of the suit under O. 22, R. 8(2), Civil P. C., on the ground that the claim for damages in suit did not vest in the Official Assignee and directed the lower Court to proceed with the suit. Their Lordships had not considered the case of remand after adjudication of certain rights of the parties on merits. Following these decisions it was held in — 'S. Kuppuswami Rao v. The King', (E) (cit. sup.) that a preliminary or interlocutory order in a criminal case is not a judgment or final order. The words 'final order' were used in contrast with 'interlocutory order'.

(32) In — 'Rahimbhoy Habibbhoy's case (K)', it was held that a preliminary decree for rendition of accounts is final under S. 595 (109 of the present Code) though it does not finally determine the liability of the defendant because the liability to account which the defendant disputed was finally determined and could not be disputed again. In — 'Saiyid Muzhar Hossein's case', (L) it was held that a remand order which finally decides the title of the plaintiff is a final order of the High Court notwithstanding that subordinate enquiries remained to be made by the first Court on remand.

(33) Their Lordships distinguished these cases on the ground that they were decided with reference to the Code of Civil Procedure of 1882 in which the wording of the relevant sections materially differed from that of the Code of 1908. The right of appeal rested on cl. 39 and was elaborated in Ss. 595 and 596 of the Code of 1882 and now in Ss. 109 and 110 of the Code of 1908. There was no change in cl. 39 of the Letters Patent. The words "final decree" and "decree" in Ss. 595 and 596 were substituted by "decree or final order" and "decree or order" respectively in Ss. 109 and 110, Civil P. C. The word "final" was omitted in view of the extended definition of "decree" in the new Act. Under the old definition, which had to be considered in — 'Rahimbhoy Habibbhoy's case (K)', an adjudication, in order to constitute a decree, must have decided the suit or appeal.

As defined in the Code of Civil Procedure, 1908, "decree" is the formal expression of an adjudication of the rights of parties which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy. It is, therefore, final; but it does not in all cases end the 'lis'. The amended definition expressly includes a preliminary decree and certain decisions which are not decrees in the strict sense of the term. The amendment thus gives an extended meaning to the term. Clause 39 of the Letters Patent of the Bombay High Court and S. 595 of the Code of 1882 provided for an appeal against a final decree. Though a preliminary decree for rendition of accounts is not a final decree, it was held to be so in — 'Rahimbhoy's case (K)', because it finally determined the rights of the parties though the precise liability on further enquiry remained to be determined. The definition of "decree" must have been amended to give effect to this decision.

If I may say so, with all respect, the decisions are not distinguishable.

(34) Section 109, cls. (a) and (b), Civil P. C., provide for an appeal as of right, while the right of appeal under cl. (c) is in the discretion of the Court. 'Radhakisan v. Shridhar', AIR 1950 Nag 177 (FB) (Q). In the latter case it is not necessary that an order, in order to be appealable, must be a final order.

(35) "Orders" are final or interlocutory. The test of finality is stated in — 'Saiyid Muzhar Hossein's case (L)', (supra). On a literal reading of Ss. 595 and 596 of the Code of 1882 even final orders were not appealable. It must, therefore, have been thought necessary to amend the wording of these sections. As their Lordships of the Judicial Committee have stated in the above case, the finality must be as to the rights of the parties on merits and not as to the proceedings. In the instant case the decision of the High Court under S. 23(5), Sales Tax Act, either way finally decides the rights of the parties and the decision is final so far as the Court and the parties are concerned, though consequential order may have to be passed to give effect to the decision and give relief to the parties. If the applicant succeeds in the Supreme Court, all that the Tribunal would be required to do is to make certain calculations.

(36) In — 'Mohammad Amin Brothers v. Dominion of India (D)', (cit. sup.) the High Court on the Appellate Side set aside the winding-up order of a Single Judge on the Original Side and directed the proceedings to be kept pending till the liability of the debtor to the creditor was determined in separate proceedings which were then pending. This order was held not to be a final order within the meaning of S. 205(1), Government of India Act, though an important constitutional issue was decided. In delivering the judgment of the Court Mukherjea J. stated:

> "The order of the trial Judge did dispose of the rights of the parties that were in controversy in the proceedings but the appellate Judge left the entire case undecided."

(37) Substantial constitutional questions arise not only in civil and criminal proceedings but in other proceedings as well. The Supreme Court is the final authority on constitutional matters. It cannot, therefore, be the intention to exclude the right of appeal even though substantial questions of law as to the interpretation of the Constitution arise in revenue proceedings.

> "Though the interpretation of the Constitution is subject to the ordinary principles applicable to the construction of statutes, it cannot be forgotten that we have to construe an organic instrument which must be interpreted not in any narrow and pedantic sense but in a broad and liberal spirit." ('G. D. Karkare v. T. L. Shevde', AIR 1952 Nag 330 at p. 334 (R) and — 'Bhailal v. Additional Deputy Commissioner', AIR 1953 Nag 89 at p. 113 (S)).

Their Lordships of the Supreme Court have stated in — 'AIR 1953 SC 210 at p. 212 (O)':

> "The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions."

With these observations their Lordships overruled the objection that an appeal does not lie under Art. 132 from a decision of a Single Judge of a High Court. The words of Art. 132(1) are very general and confer a right of appeal from "any judgment, decree, or final order". In the Government of India Act, 1915, there was no provision corresponding to this Article or to S. 205(1), Government of India Act, 1935. The right of appeal rested on the Letters Patent in the absence of a specific provision in the relevant Act. The change of language in S. 205(1) and in Art. 132(1) is not without significance. The omission of the word "final" as qualifying "judgment" or "decree" is deliberate and has extended the right of appeal when substantial questions regarding interpretation of the Constitution are involved. There is no warrant for the view that the relevant English Acts and the Letters Patents used the word "final" without any significance. The scope of final order has been enlarged by the Explanation to that Article which was designed to supersede the decision of the Federal Court in — 'S. Kuppuswami Rao v. The King', (E) (cit. sup.).

> "The object of Art. 132 is to secure a speedy determination of Constitutional issues going to the root of a case." 'Election Commission v. Venkata Rao (O)', (cit. sup.).

The decisions in — 'AIR 1950 FC 77 (D)' and — 'S. Kuppuswami's case (E)', are of little assistance in view of this pronouncement of the Supreme Court.

(38) In — 'Tata Iron and Steel Company's case (I)', their Lordships were considering cl. 39 of the Letters Patent which gives the right of appeal to the Privy Council against a "final judgment, decree or order" in the exercise of appellate or original jurisdiction in civil proceedings. To attract that clause the decision must be either a final judgment, final decree, or final order. In the view that the proceedings before the High Court in income-tax matters are not civil proceedings and the High Court does not exercise its appellate or criminal jurisdiction, there cannot be a right of appeal under cl. 39. It was, therefore, not necessary for their Lordships to consider whether the decision of the High Court under S. 51(1), Income-tax Act, 1918, was a final judgment. Their Lordships, however, proceeded to consider what a final judgment is as understood in English decisions and referred to the following: — 'Standard Discount Co. v. Otard De La Grange', (1877-78) 3 C P D 67 (T), — 'Ex parte Chinery', (1884) 12 QBD 342 (U); — 'Ex parte Moore; In re Faithful', (1884) 14 QBD 627 (V); — 'Onslow v. Commissioner of Inland Revenue', (1890) 25 QBD 465 (W); — 'Ex parte County Council of Kent and Council of Dover', (1891) 1 QBD 725 (X) and — '(1892) 2 QB 613 (J).

(39) In — 'Standard Discount Company's case (T)', Cotton L. J. stated:

> "Without using an exhaustive definition it may be laid down that an order is interlocutory which directs how an action is to proceed; and the order before us is exactly of that kind."

Bramwell L. J. stated:

> ".....it is not the final order of the Court in the cause, because in order to entitle the plaintiffs to levy execution there must be a subsequent direction by the Court."

Their Lordships were interpreting R. 1 of O. 14 of the Supreme Court Rules of England which allows a plaintiff, as soon as the defendant has appeared to a specially indorsed writ, to apply to a Master or a Judge and to obtain an order, which will prevent the action from going through its ordinary course, and will give the plaintiff liberty

at once to sign judgment without taking the usual steps. As Cotton L. J. stated:

"the order, however, relates to the procedure and therefore is only interlocutory."

(40) In — 'Ex parte Chinery (U)', it was held that a garnishee order absolute is not a "final judgment" against the garnishee within sub-s. 1 (g) of S. 4 of the Bankruptcy Act, 1883, and the judgment-creditor who has the order cannot issue a bankruptcy notice against the garnishee in respect of it. Garnishee is a person who is garnished or warned. A garnishee order is the order of the Court warning a debtor to pay his debt not to his immediate creditor but to a person who has obtained a final judgment against such creditor and attached the debt. In passing this order, there is no adjudication between the debtor and his creditor. The attaching judgment-creditor cannot proceed to execute his decree against the garnishee. — 'Pannalal v. Mt. Bhagirathibai', AIR 1924 Nag 98 (Y)'. He has to get the right of his judgment-debtor to recover the debt sold in execution; and the execution purchaser has to institute a suit to enforce the debt and obtain "final judgment" and to execute it. This "final judgment" is known as decree in this country. It is in this context that in interpreting the words "final judgment" in the aforesaid section of the Bankruptcy Act that Cotton L. J. stated that the words have the restricted meaning, that is,

"a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established unless there is something to show an intention to use the words in a more extended sense."

The distinction between "judgment" and "final judgment" was not lost sight of. An action, according to the English law is a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court.

(41) The judgment in — 'Ex parte Chinery (U)' was explained in — '(1884) 14 QBD 627 (V)', where Lord Chancellor Earl of Selborne observed:

"To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits."

In an action in the Chancery Division for injunction, damages, dissolution of partnership and accounts, an 'ex parte' decision granting injunction, dissolution of partnership and an enquiry about damages and accounts was passed with costs on 17-11-1883. The defendant was ordered to pay damages when ascertained and certified within 14 days thereof. The costs were taxed on 23-1-84. Thereafter the plaintiff served on the defendant a bankruptcy notice stating in it that the unpaid costs were due on the final judgment dated 17-11-83. The contention that it was not a final judgment because further enquiries were to be made and the 'lis' had not come to an end was not accepted. Brett, M. R. stated:

"The question is whether in the Chancery Division there cannot be a 'final judgment' when everything which has to be done by the Court itself is finished. Is that a final judgment which directs certain things to be done and certain inquiries to be made, and certain other things to be done on those inquiries being answered? If the Court ordered the result of the inquiries to be reported to itself before the judgment was given, it would not be a final judgment. But, if the Court orders something to be done according to the answer to the inquiries, without any further reference to itself, the judgment is final, and an order for the payment of costs when taxed, which is part of the judgment, is a final judgment for the costs."

The Judicial Committee had taken this view in — 'Rahimbhoy Habibbhoy v. C. A. Turner (K)' (supra). According to the law of this country, the decision dated 17-11-1883 was a preliminary decree and the ground for that decision was judgment in an action. That judgment must be held to be a final judgment according to the nomenclature in England and in clause 29 of the Letters Patent of this Court.

(42) In — (1890) 25 QBD 465 (W)', the Court of Appeal was considering whether the decision of the Exchequer Court under S. 19, Stamp Act of 1870 was judgment or order within the meaning of O. 58, Rr. 3 and 15 of the Supreme Court Rules. Determination of this question was necessary for the purpose of limitation and not for deciding the right of appeal. In interpreting these rules in the light of R. 9 of that Order Lord Esher M. R. stated:

"A 'judgment' therefore is a decision obtained in an action, and every other decision is an order."

The judgment so defined is equivalent to a decree under the Civil Procedure Code, 1908. Unless we restrict the meaning of 'judgment' to that defined in the Civil Procedure Code, that is, statement given by the judge of the grounds of a decree or order, 'judgment' must have a wider meaning and must include decisions other than those in suits. In — 'Sevak Jeranchod Bhogilal v. Dakore Temple Committee', AIR 1925 PC 155 (Z), the Judicial Committee held that the term 'judgment' in the Letters Patent of the Bombay High Court means in civil cases a decree and not a judgment in the ordinary sense. In a recent Full Bench of this Court — 'Manohar v. Baliram (P)', (supra) this restrictive definition of 'judgment' was not accepted by my brother Hidayatullah J. He says "I do not agree also with the opinion that the word 'judgment' means 'any final order, decree or judgment'." (p. 376). Their Lordships of the Judicial Committee had in view the expression "final judgment" in cl. 39 of the Letters Patent which alone gave a right of appeal to His Majesty in Council and used the word "judgment" in the sense of "final judgment". Clause 15 of the Letters Patent which provides for an appeal from the decision of a Single Judge to a Division Court, uses the word "judgment".

(43) In — 'Salaman v. Warner', (1891) 1 QB 734 (Z1), the Court of Appeal was interpreting rules 3 and 15 of O. 58, Rules of the Supreme Court, which provided different periods of appeals and notices of appeal from judgments or orders, whether final or interlocutory, in actions or other matters. It was held that an order dismissing an action made at the hearing upon a point of law raised by pleadings before the trial under rules 2 and 3 of O. 25 was not a final order within the meaning of these rules. Lord Esher stated:

"If the decision of the Division Court, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The earlier decision to the contrary in — 'Shubrook v. Tufnell', (1882) 9 QBD 621 (Z2), was not followed.

(44) In — 'Bozson v. Altrincham Urban District Council', (1903) 1 KB 547 (Z3), the decision in

— 'Shubrook v. Tufnell (Z2)' was followed and the decision in — '(1891) 1 QB 734 (Z1)', on which the decision in — 'AIR 1920 PC 86 (F)' was founded, was not followed. Lord Alverstone C. J. laid down the following test:

"Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In that case the Court passed an order that the question of liability and breach of contract only would be tried and the rest of the case, if any, would go to the official referee. At the trial the learned Judge made an order dismissing the action holding that there was no binding contract between the parties, upon which order, judgment was subsequently entered for the defendants. The question was whether this judgment was a final order, and it was answered in the affirmative. In — Shubrook v. Tufnell (Z2)', the order of reference required the arbitrator to state the case for the opinion of the Court and further provided that if the opinion of the Court be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant with costs. The Court decided in favour of the plaintiff and referred the case back to the arbitrator. The Court of Appeal, consisting of Jessel M. R. and Lindley L. J., held that this order was a final order upon the view that where the decision of the Court on the point submitted could not in any event necessitate the entering of final judgment for either party the decision was interlocutory, but that if it could enter final judgment in the event of coming to a different conclusion then the order passed, whichever way it went, was final.

(45) Order 14, R. 2, Civil P. C., 1908, corresponds to O. 25, R. 2 of the Supreme Court Rules of England which enables a Court to dispose of a suit on issues of law. If the suit is so disposed of at the stage of issues or under O. 15, R. 3, at any subsequent stage, the decision is a decree under the Civil Procedure Code, and grounds for decision a judgment, though if the decision is the other way the suit proceeds on the remaining issues. To apply the rule stated in — '(1891) 1 QB 734 (Z1)' is to hold that the decision is interlocutory and unappealable.

(46) In — '(1912) 3 K B 242 (N)', the plaintiff seller obtained a judgment for specific performance against the defendant purchaser under which the latter had to pay £2400 as price. It directed that the conveyance would be settled by the Judge in chambers and the date by which the purchase money was to be paid would be fixed. The defendant did not pay the amount on the date fixed. Plaintiff thereafter served a bankruptcy notice calling upon the defendant to pay within the time specified in the notice the sum of £2400 due on a final judgment or order obtained by him. In repelling the contention that there was no final judgment, it was stated by the Master of the Rolls:

"If this is not a final judgment, I cannot conceive anything that is. There is nothing more to be obtained in this matter. It was a final adjudication of the rights of the parties result of which was that on a date thereafter named and special conditions which had to be fulfilled, and which in fact have been fulfilled, the sum of £2400 became payable.....Whether it is technically called a judgment or an order seems to me to be really of no moment at all. The real essence of the case is that is it or is it not a 'final adjudication of the rights of the parties' to use the language of Lord Selborne in — '(1884) 14 QBD 627 (V)'."

(47) This controversy about final order loses its force in view of the Explanation to Art. 132(1) of the Constitution.

(48) In — 'Ex parte County Council of Kent and Council of Dover (X)', (cit. sup.) it was held that the jurisdiction of the High Court upon questions submitted to it under S. 29, Local Government Act, 1888, was purely consultative and not judicial because

(a) the question was which set of authorities should be charged with particular portions of administration;

(b) the question had not arisen and could be decided in the sense of expression of opinion how it ought to be decided when it does arise;

(c) the question could be submitted only on the application of the authority specified which may be charged with the administration;

(d) there was no obligation on the High Court to hear anybody who might be interested in the decision of the question;

(e) the Legislature did not contemplate an actual determination of an existing dispute in which a private right was involved and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a Court of law; and

(f) the decision was without prejudice to any other mode of settling it.

The opinion of the High Court was called decision. That really did not make any difference. The jurisdiction is similar to the jurisdiction of the Supreme Court under Art. 143 of the Constitution on a reference by the President. The opinion is not a judgment and has no binding effect than the opinion of the Law Officers of the Union or State concerned. This is not the nature of a 'judgment' under S. 23(5) of the Sales Tax Act with which we are concerned.

(49) The decision in — '(1892) 2 QB 613 (J)' was based on the words of S. 19, Arbitration Act of 1889 which ran thus:

"Any referee, arbitrator or umpire may at any stage of proceedings under a reference, and shall if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

In agreeing with the opinion of Lord Esher M. R., Bowen L. J. stated:

"The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact."

It was also held that if the umpire did not retain any control or conduct over the arbitration proceedings after the issue of the reference, the decision of the Court is a final order but if he retained any control then it was an interlocutory order. This statement of the law was accepted in subsequent cases. There is no legal obligation on the arbitrator to decide the case in conformity with the opinion of the High Court. It is not a decision or determination of the rights of the parties. Although a case may be stated at any stage of proceedings, it cannot be stated after an award is made. '(1921) 2 A C 528 at p. 536 (M).

(50) The decision in — 'Tata Iron and Steel Company's case (I)' has to be understood in the light of the statement of law in — 'In re Knight's case (J)'. Section 51, Income-tax Act, 1918, so far as it is material was:

"(1). If in the course of any assessment under this Act or any proceeding in connection therewith.....a question has arisen with reference to the interpretation of any provision of this Act or of any rule thereunder, the Chief Revenue Authority may either on its own motion or on reference from any Revenue Officer subordinate to it, draw up a statement of the case and refer it with its own opinion thereon to the High Court and shall so refer any such question on the application of the assessee unless it is satisfied that the application is frivolous or that the reference is unnecessary."

"(3). The High Court upon the hearing of any such case shall decide the questions raised thereby and shall deliver a judgment thereon containing the grounds on which the decision is founded and shall send to the Revenue Authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar and the Revenue Authority shall dispose of the case accordingly or if the case arose on reference from any Revenue Officer subordinate to it shall forward a copy of such judgment to such officer who shall dispose of the case conformably to such judgment."

It will be noticed that a reference could only be made during the course of any assessment or proceeding in connection therewith and not after the proceedings come to an end. The Revenue Authority retained seizin and control over the case. It might, therefore, be said that the High Court exercised advisory jurisdiction under S. 51(3). Under the present Income-tax Act the assessment case or proceeding is finally decided by the Appellate Tribunal. Thereafter an assessee or the Revenue Authority, if aggrieved by such decision, has a right to require the Tribunal to state the case and refer the questions of law arising out of its decision for the decision of the High Court. There is no provision to enable the Appellate Tribunal to seek the advice of the High Court during the course of proceedings before it or before any authority judicially subordinate to it. If the Tribunal refuses to discharge this legal duty, the High Court has power to issue a writ of mandamus ('Alcock Ashdown and Co. Ltd. v. Chief Revenue Authority of Bombay', AIR 1923 PC 138 (Z4)), or now an order under S. 66(2) to require the Tribunal to do what it should have done in the first instance. The provisions of the Sales Tax Act are identical. The Board of Revenue in the latter case does not retain seizin over the case and does not make any reference during the course of any assessment proceeding. It cannot, therefore, be said that it is seeking guidance and assistance from the High Court in deciding the case before it. The question of reference arises after the case is finally decided. In — 'Commissioner of Income-tax B & O v. Kameshwarsing', AIR 1933 PC 108 at p. 117 (Z5), their Lordships of the Judicial Committee observed:

"Their Lordships have also been embarrassed in disposing of the appeal by the absence of the formal decree by the High Court following upon their judgment of....."

Their Lordships thus regard the judgment of the High Court as adjudication of the rights of parties which is final so far as that Court is concerned. The observations in — 'In re Knight' (J) as to the nature of the jurisdiction of the High Court under S. 19, Arbitration Act of 1889 are inapplicable to the judgments under S. 66(5), Income-tax Act, or under S. 23(5), Sales Tax Act.

(51) No doubt, it was held in this Court that the function of the High Court under S. 66(5) is to decide the questions referred to it and that it cannot decide questions not stated though arising out of the facts of the case. 'Income-tax Appellate Tribunal, Bombay v. Managing Trustee, Shri Radha Madho Trust, Saugor', AIR 1946 Nag 397 at p. 400 (Z6) and — 'Beohar Raghubir Singh v. Commissioner of Income-tax, U. P., C. P. and Berar', AIR 1948 Nag 228 (Z7). These decisions are based on — 'Rajendra Narayan v. Commissioner of Income-tax, B & O', AIR 1940 PC 158 (Z8), where the assessee sought to raise before their Lordships a question of law which was not referred for decision and which was not raised in the Court below. It is in this sense that the jurisdiction may be said to be advisory.

(52) 'The Tata Iron and Steel Company's case (I)', is thus distinguishable on two grounds; that cl. 39 of the Letters Patent has no application to a revenue proceeding and that S. 51(1), Income-tax Act, 1918, is dissimilar to S. 23(1), Sales Tax Act. Three months after this decision the Judicial Committee entertained an appeal against the order of the High Court affirming that of the Revenue Authority declining to state a case under S. 51 of the Act. ('Alcock Ashdown and Company's case (Z4)). It seems anomalous that such an order should be appealable while the final decision of a High Court on a reference should not be appealable. It is no doubt true that the question whether an appeal lies was not raised and decided in the latter case, but that should make no difference since their Lordships allowed the appeal on merits. In — 'Income-tax Commissioner v. Arunachalam Chettiar', AIR 1953 SC 118 (Z9), the appealability of an order of a High Court refusing to decide a reference under S. 66(1) of the Act was not considered; and leave was granted under Art. 136 of the Constitution.

(53) The final decision in a common law action was called a judgment while in a Chancery Court it was called a decree. Judgment and decree were thus synonymous terms. The English Appellate Jurisdiction Act, 1876, provided that an appeal shall lie to the House of Lords from any judgment or order. The decision which is not a judgment in the strict sense is classed as order. It will thus be seen that "final judgment" as it is termed in — '(1884) 12 QBD 342 (U)' is not different from a decree as we understand in this country. By using the expression 'judgment, decree, or final order' in S. 205(1), Government of India Act, 1935, the right of appeal is extended to cases where the decisions are not what are called 'final judgments'. Finality is required only in case of orders. The change of language is significant. The section apparently conferred on the Privy Council a wider jurisdiction than that conferred by the Letters Patent. The language of Art. 132 is materially different. The words 'civil, criminal, or other proceeding' are not to be found in sub-s. (1) of S. 205. I consider that the change in language in Art. 132(1) is deliberate and that it was intended by the makers of the Constitution to confer a right of appeal from a judgment, decree, or final order not only in civil and criminal proceedings but from a judgment or final order in other proceedings as well, provided a substantial question of law as to the interpretation of the Constitution is involved. The insertion of the words "or other proceeding" has widened the range of decisions which can be the subject of appeal to the Supreme

Court. The principle enunciated by Gwyer C. J. in — 'Hori Ram Singh v. Emperor', AIR 1939 FC 43 (Z10), that the words 'judgment, decree, or final order' should receive no narrow interpretation should be applied to the interpretation of the words "judgment in other proceeding' occurring in Art. 132(1). His Lordship observed:

"I have no doubt that this Court has jurisdiction in criminal as well as civil cases. It would indeed be very surprising if it were otherwise, since it has been in the criminal courts that many of the great constitutional questions of the past have been determined."

The word "judgment" has been interpreted differently in dealing with appealability under the Civil Procedure Code, Letters Patent, and the Government of India Act, 1935. There is considerable divergence of judicial opinion as to the meaning of "judgment" in cl. 10 of the Letters Patent, as noticed in — 'Asrumati Debi v. Rupendra Deb', AIR 1953 SC 198 (Z11). The minority judgment of Sulaiman J. in Hori Ram's case (Z10) is not, therefore, a safe guide to interpret "judgment" in Art. 132(1). The observations were obiter and were not concurred in by Gwyer C. J. and Varadachariar J. who did not accept his narrow interpretation of "judgment". In view of the difference in language the decision of the Judicial Committee in — 'Tata Iron and Steel Co.'s case (I)', is inapplicable to the instant case. The discussion in — 'P. A. Raju Chettiar v. Commissioner of Income-tax', AIR 1951 Mad 590 (Z12), is instructive.

(54) The term "judgment" is in my view used in Art. 132(1) in the wider sense to include any decision given by the High Court on a question or questions at issue between the parties to any proceeding properly before the Court which finally determines the rights of parties so far as the Court is concerned. In this sense a decision under S. 23(5), Sales Tax Act, or under S. 66(5), Income-tax Act, is clearly a "judgment". It finally determines the rights of the parties so far as the High Court is concerned though the Tribunal may have to reopen the assessment proceedings and make or order further enquiry to give effect to the decision of the High Court. The Letters Patent makes a distinction between "judgment" and "final judgment". 'AIR 1952 Nag 357 (P)'. As my brother Hidayatullah J. stated in that case at page 375:

"If the intention was that the term 'judgment' should mean only a final judgment, it would have been very easy to qualify the word 'judgment' with the word 'final' as has been done in the clause dealing with appeals to His Majesty in Council."

(55) I, therefore, hold that the decision under S. 23(5), Sales Tax Act, is a "judgment" in revenue proceedings. Consequently the applicant is entitled to a certificate under Art. 132(1) of the Constitution. In this view I would allow the application with costs. Counsel's fee Rs. 100/- if certified.

(56) V. R. SEN J.: I agree with my brother Deo J. and have nothing more to add.

A/D.R.R. Application allowed.

A. I. R. 1954 NAGPUR 11 (Vol. 41, C. N. 2)

MANGALMURTI AND
R. KAUSHALENDRA RAO JJ.

Vinayak Wamanrao Thakre and others, Defendants-Appellants v. Mahammad Hanif and another, Plaintiffs-Respondents.

First Appeal No. 10 of 1944, D/- 26-12-1950, from decree of Addl. Dist. Judge, Wardha, D/- 9-11-1943.

(a) Transfer of Property Act (1882), S. 3 — Attestation — Presence of executant — Executant need not see witnesses sign instrument.

The definition of "attested" given in S. 3 requires so far as signatures of attesting witnesses are concerned that they must be made in the presence of the executant. It does not insist that the executant must have seen the attesting witnesses sign the instrument. (Para 7)

Where the executant of a mortgage deed, a lady who did not observe strict 'pardah', was inside the room while the attesting witnesses and others were outside in the adjoining veranda and there was no curtain in the door of the room and the witnesses signed the instrument in the veranda:

Held that the attesting witnesses must be held to have signed the instrument in the presence of the executant. (Para 8)

Anno: T. P. Act, S. 3 N. 14 Pt. 4.

(b) Hindu Law — Widow — Alienation — Suit against widow for recovery of debt incurred by her husband — Suit decreed — Widow mortgaging property inherited by her from her husband to satisfy decree — Suit to enforce mortgage — Judgment in previous suit held could be used to ascertain whether decree was passed against widow as representing estate and also to ascertain nature of suit — (Evidence Act (1872), S. 43). (Para 10)

Anno: Evidence Act, S. 43, N. 2.

(c) Hindu Law — Widow — Alienation — Power to alienate estate for payment of husband's debts.

A widow can alienate the property inherited by her from her husband for payment of his debts as that is a religious act of an essential and obligatory nature (nitya karma) and not merely pious act which is not indispensable or obligatory (kamya Karma) . To justify an alienation for a religious or charitable purpose, it is not necessary to show any "benefit to the estate" or to prove any "pressure on the estate" such as is necessary in the case of an alienation for other purposes. (Para 12)

(d) Pardanashin lady — Kunbi woman examined on commission in suit — Sub Registrar taken to petition writer's house to register mortgage deed executed by woman — Woman communicating only with her father and her sister's husband — Woman held was pardanashin. (Para 16)

(e) Evidence Act (1872), Ss. 101 to 103 — Transactions with 'pardanashin' lady — Burden of proof — (Contract Act (1872), S. 16).

Where a deed is executed by a 'pardanashin' lady, the burden of proof rests not with those who attack but, with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. (Para 17)

Anno: Evidence Act, Ss. 101 to 103 N. 46; Contract Act, S. 16 N. 16.

(f) Contract Act (1872), S. 16 — 'Pardanashin' lady — Independent legal advice.

only on her but on the reversioners of Manikrao also.

(12) The widow could alienate the property inherited by her from her husband for payment of his debts as that is a religious act of an essential and obligatory nature '(nitya karma)' and not merely pious act which is not indispensable or obligatory '(kamya karma)'. In — 'Sardar Singh v. Kunj Bihari Lal', AIR 1922 PC 261 (F), their Lordships of the Privy Council said at page 264:

"There can be no doubt upon a review of the Hindu law, taken in conjunction with the decided cases, that the Hindu system recognizes two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose which, although optional, is spiritually beneficial to the deceased.

With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purposes he may have in view."

It has been held in — 'Ashutosh Sikdar x. Chidam Mondal', AIR 1930 Cal 531 (G), that the payment of a deceased husband's debt by his widow who has received assets from him falls within the first class of religious acts enunciated by the Privy Council in — 'AIR 1922 PC 261 (F)', and is an essential duty on her part for which she may alienate the property inherited from her husband. In that case — 'AIR 1930 Cal 351 (G)', there are the following observations at page 351:

"With regard to the proposition that there was no danger to the husband's estate at the time for the dues upon the bond on which the learned Munsif has relied, he was evidently in error. The payment of husband's debt, although barred, has been held to be a pious duty on the part of the widow, and it is not necessary that there should be any danger to the estate in order to entitle the widow to incur debts or to alienate the property of her husband in order to pay off such barred debts."

To justify an alienation for a religious or charitable purpose, it is not necessary to show any "benefit to the estate" or to prove any "pressure on the estate" such as is necessary in the case of an alienation for other purposes: — 'The Collector of Masulipatam v. Gavely Vancata Narrainapah', 8 Moo Ind App 529 at p. 551 (PC) (H) and — 'Ramsurat Mahton v. Hitanandan Jha', AIR 1931 Pat 330 (I). In — 'Jagannadham v. Vighneswarudu', AIR 1932 Mad 177 (J), their Lordships of the Madras High Court remarked at pages 178 to 180:

"It is settled law that a widow or other limited heir has absolute power of disposal over the income of the property inherited by her. She is not bound to make any savings and may spend the whole income just as she likes." x x x x

She takes the estate subject to payment of debts. The interest on those debts is an expense properly debitable to the income. A limited owner is thus bound to pay off the interest on the debt where there is a sufficient surplus, but it is equally clear that it is not incumbent on her to apply any part of the income to the payment of the corpus. x x x

If the alienation was made in the exercise of a reasonable discretion and could be justified as the act of a prudent manager, the objection that there was no compulsion from without and that the necessity was not imminent should not be allowed to prevail. The question then reduces itself to this: the purpose of the sale being the payment of a binding debt, was it effected in good faith and in the exercise of proper discretion; in other words, could it be justified as the act of a prudent manager?"

In the present case not only was the mortgage an act of a prudent manager but it was even justified by legal necessity which gives power to a widow to alienate the estate inherited by her for purposes other than religious or charitable. As the discussion of the question of legal necessity would necessarily cover the discussion of the question that the mortgage was an act of prudent manager we would not discuss the latter question separately.

(13) There was actual pressure on the estate when the property was mortgaged. (Their Lordships referred to the evidence of pressure and proceeded:)

(14) It is, however, contended on behalf of the appellants that instead of mortgaging the whole estate Mst. Chandrabhagabai ought to have sold some of that property to clear off the debts and saved the rest. The law on the point has been given by Mulla in his Principles of Hindu Law, Edn. 10 (1946) at page 188 (Article 181D) in the following words:

"Where a case of necessity exists, the widow or other limited heir is not bound to raise money on her personal security. She may sell the property or mortgage it. She is not bound to mortgage it, if a mortgage would be more prejudicial to her than a sale by reducing her income to a greater extent; — 'Singam Setti Sanjivi Kondaya v. Draupadi Bayamma', 31 Mad 153 (K); — 'Bal Krishna v. Hira Lal', AIR 1919 All 406 at p. 409 (L). Even if a mortgage would have been more beneficial than a sale, still if she and the purchaser are both acting honestly, the sale cannot be set aside on the ground solely that she ought to have mortgaged and not sold: — 'Phool Chand v. Rughoobuns', 9 W R 103 (M); —'Nabakumar Haldar v. Bhabasundari Debi', 3 Beng L R AC 375 (N).

If the property has been mortgaged but the income of the property is not sufficient to pay the interest on the mortgage debt, she may sell the property even before the debt is due, if in the circumstances this is a proper, though not a necessary, course to take. 'A widow, like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided, she acts fairly to her expectant heirs: — 'Venkaji Shridhar v. Vishnu Babaji', 13 Bom 534 (O)'."

As to the exercise of this power by the manager their Lordships of the Privy Council observed in

— 'Niamat Rai v. Din Dayal', AIR 1927 PC 121 at p. 123 (P):

"The learned Judges of the High Court were of opinion that, as in this case the business had recently resulted in loss, the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of by sale. As regards the latter question it is not clear that borrowing, probably at a high rate of interest, would have been more beneficial than sale. In any case, this was a question for the manager to decide."

We may also say that in the circumstances Mst. Chandrabhagabai's act of mortgaging the whole property to raise the money required to pay off the creditors who had attached the property was more reasonable than selling a part of it because it would have been necessary to sell a very large part of the property its price at that time being Rs. 50,000 only according to Shrikisandas (2D. W. 3). On the other hand, Mst. Chandrabhagabai had by the mortgage secured the advantage of paying the whole amount within a period of 16 years by annual instalments of Rs. 2,000 each. By careful management of the estate it would have been possible under ordinary circumstances to pay off the instalments and save the estate. Thus we find that there was legal necessity for the mortgage.

(15) The next point that was urged by the learned counsel for the appellants was that Mst. Chandrabhagabai was a 'pardanashin' woman and she did not know the contents of the document and did not understand the nature of the transaction. Both the sides also argued the question whether the rule regarding a transaction by a 'pardanashin' woman is equally applicable to a transaction by an illiterate and ignorant woman though not 'pardanashin', but there is no necessity of discussing the law on that point as the trial Court has found that Mst. Chandrabhagabai was a 'pardanashin' woman and we are also of the same opinion. We would, however, like to reproduce the observations on that point of their Lordships of the Privy Council in — 'Hodges v. Delhi & London Bank, Ltd.', 23 All 137 (PC) (Q):

"It is abundantly clear that Mrs. Hodges was not a 'pardanashin'. Then term 'quasi pardanashin' seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the 'pardanashin' class is yet so close to them in kinship and habits and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to 'pardanashin' must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to certain well known and easily ascertained class of women, well known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute."

(16) As we have said Mst. Chandrabhagabai was a 'pardanashin' woman and we would give here our reasons for that finding. Mst. Chandrabhagabai was examined on commission in Civil Suit No. 7 of 1923. The Sub Registrar was taken to the house of Khankhoje petition writer to get the mortgage deed registered. Thus she would not appear before the public or any public officer. The evidence shows that the only persons she communicated with were her father and her sister's husband by name Bhuraji (P. W. 9). This witness Bhuraji admits that Mst. Chandrabhagabai was a 'pardanashin'. We may also mention that she was illiterate as she had made her thumbmark on the mortgage deed Exhibit P-22.

(17) The law as to burden of proof in respect of transactions with 'pardanashin' women is summarized by their Lordships of the Privy Council in — 'Kali Baksh v. Ram Gopal Singh', 36 All 81 at page 89 (PC) (R) in the following words:

"In the first place, the lady was a 'pardanashin' lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack but, with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."

About legal advice their Lordships of the Privy Council observed in — 'Farid-Un-Nissa v. Mukhtar Ahamd', AIR 1925 PC 204 at 209 (S):

"Independent legal advice is not in itself essential; — '36 All 81 (PC) (R)'. After all, advice, if given, might have been bad advice, or the settler might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it."

This was followed in — 'Ramanamma v. Viranna', AIR 1931 PC 100 (T). The law has been summarized in — 'Nathusa v. Mohammad Siddique', AIR 1939 Nag 159 at p. 160 (U) in the following words:

"It has been over and over again stated that in dealing with 'pardanashin' ladies it is necessary to make it clear or to have it made clear to them what it is that they are doing. It is true that it is not necessary that that explanation should be proved to have occurred at the time when she executed the document. It will do if she knew what the transaction was about before: — 'Thirathman Jha v. Mt. Gunjeswari Kuer', AIR 1926 Pat 529 (V). It is also true that the mere fact that she pretends not to know is neither here nor there; — 'Suresh Chandra v. Marani Dassi', AIR 1936 Cal 378 (W). What is to be made clear is that what she is doing when she executes is not merely a mechanical act but a conscious act. We shall come to that again in a moment.

At the present it is sufficient to say that she must have independent advice, and even though she has independent advice the Courts, in these cases, will scrutinize the transaction very closely to see that it is a fair one — 'Nibaran v. Nirupama', AIR 1921 Cal 131 (X), and if it comes to the conclusion that the transaction is not a fair one the Court will not make it a fair one by altering some of its terms, for that would be making the contract for the parties: — 'Tara Kumari v. Chandra Mouleshwar Prasad Singh', AIR 1931 PC 303 (Y). It has been pointed out in a variety of cases which we referred to, — 'AIR 1921 Cal 131' (X), & — 'Krishna v. Nagen-

drabala', AIR 1921 Cal 435 (Z), what sort of tests should be applied.

In the former of those two cases a Bench of the Calcutta High Court, presided over by a very distinguished Judge, held that 'the Court, when called upon to deal with a deed executed by a 'pardanashin' lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do: secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter'.

Whether that last requisite in all cases is necessary we somewhat doubt. But certainly where it appears that she had no disinterested advice, where it appears that the only persons that have in any way explained the matter to her are either the other side or persons who would endeavour to take advantage of her position, then one must most critically examine all the various steps that have been taken and must be satisfied that she has executed the instrument and that the instrument has been duly attested so as to comply with the provisions of the Transfer of Property Act. In considering whether she has executed, one must not be satisfied with mere proof that she has put her hand to the paper but must also be satisfied that she has put her mind to the transaction."

In the present case she had the independent advice of her father and also of Bhuraji (P. W. 9) who is the husband of her sister and who acted as her agent. Both these persons were interested in guarding her interest. Bhuraji P. W. 9 says:

"We arranged this mortgage in the best interest of the lady. The lady and her father both were explained everything, and both of them agreed, so this mortgage transaction was entered into.

x x x x

Draft of the mortgage deed was got prepared at the hands of Mr. Bakre pleader. I did not show it to any of our pleaders in the case. I read out the draft to the lady and her father. They approved of the same and it was handed over to Khankhoje to scribe the fair mortgage deed. I explained everything to her father, and not to her. He also consulted Mr. Bakre and the latter advised that it was alright (all right). The lady was present all along when all this took place. The mortgage deed dated 21-10-1926 Ex. P-22 was scribed at the house of Khankhoje. I got her thumbmark on this after I told her the principal terms in it, since the draft was explained to her in full already before. This was because it was getting late. The fair mortgage deed was prepared just like the draft. There was some slip in the total of the area of the fields so that was amended later on. The lady did not raise any objection to the mortgage deed and attesting witnesses attested it. I did not know them but they did attest in my presence. They could hear what I talked to her, and that she admitted the contents."

This clearly shows that she had independent and disinterested advice of her father and sister's husband in the matter that the deed was actually executed by her with a full understanding of what she was about to do and that she had full knowledge of the nature and effect of the transaction into which she entered. The transaction itself was as we have shown above a very fair transaction.

(18) The last contention of the learned counsel for the appellants was that the sanction of the Revenue Officer (the Deputy Commissioner) was obtained by the deceased Mst. Chandrabhagabai on the basis of false allegations in her application therefor. We reproduce the pleadings on the point:

Para 3 of the plaint—

"The mortgaged property includes 'sir' fields and sanction of the Revenue Officer has been duly taken for transfer of the same by mortgage without reservation of the rights of occupancy therein."

Para 2 of the written statement of defendant 1 dated 12-7-1943—

"As to para 3 of the plaint'.

(a) This defendant denies the allegations of the plaintiffs in this para.

(b) Even if it be proved by the plaintiffs that the Revenue Officer concerned had, in fact, given the sanction as alleged, this defendant submits that the same had been obtained by the deceased Mst. Chandrabhagabai on the basis of false allegations in her application for the purpose and that the Revenue Officer also had given the same without any proper and sufficient enquiry in that respect. The alleged sanction was against the provisions of the prevailing law also. Even if proved, it would not at all amount to a valid and legal sanction for the purpose.

(c) The mortgage deed, admitted to registration by the Registering Officer on the basis of the aforesaid invalid and illegal sanction, cannot at all be deemed to be a registered document and hence it cannot operate as a mortgage deed. Not only is the same incapable of affecting the property in suit but it is also inadmissible in evidence."

It will be clear from the above pleadings that the defendant Gangubai did not specifically mention what those false allegations in the application were. The learned counsel for the appellants, however, brought to our notice Ex. P-29 dated 12-7-1926 which is the application for permission to transfer 'sir' without reservation of the rights of occupancy, Ex. P-12, dated 2-9-26 which is the report of the Sub Divisional Officer and the order of the Deputy Commissioner dated 3-9-1926 sanctioning the transfer. The application Ex. P-29 mentions that the applicant Mst. Chandrabhagabai is not going to mortgage her 'malguzari' village Kalora and her house property there. That is also mentioned in Ex. P-12 which is the report of the Sub Divisional Officer made to the Deputy Commissioner.

It is contended by the appellant's learned counsel that this statement that Mst. Chandrabhagabai was not going to mortgage her 'malguzari' village Kalora and her house property there was made in that application in order to mislead the Revenue Officers and thereby obtain the sanction to transfer 'sir' without reservation of the rights of occupancy. The proprietary profits of this village Kalora are Rs. 42/4/- and the profits from the 'khudkasht' are Rs. 50/-. Thus total income from that village is Rs. 92/4/- and there is no 'sir' land therein. Nobody can believe that she could maintain herself on Rs. 92/4/- a year. The reasons which led the Deputy Commissioner to sanction the transfer are given in paras. 3, 4 and 5 of Ex. P-12 dated 2-9-1926 the report made by the

Sub-Divisional Officer, Arvi, to the Deputy Commissioner. In that report he (the Sub-Divisional Officer) says:

"The terms offered by the mortgagee seem to be liberal considering the financial stringency prevailing in the market this year. The gross income of the applicant for the 3 villages is about Rs. 8,000 out of which she will have to pay first year Rs. 5,840. Her personal and other expenses amount to Rs. 800 p.a. and if the property is well managed and the applicant cares to pay the instalments regularly there is every chance of her redeeming the debt and keeping the property intact.

In case the application be not granted there is every chance of the 'malguzari' shares being auctioned and the applicant will only be the occupancy tenant of the 'sir' land, which can be surrendered to the 'malguzar' at the sweet will of the tenant.

Looking to all these circumstances, it is in the interest of the applicant that the property-transfer may be sanctioned."

(19) It is clear from this report Ex. P-12 that the Revenue Officers did not think that Mst. Chandrabhagabai would be able to maintain herself only on the annual income of the village Kalora which was Rs. 92-4-0 as the Sub-Divisional Officer estimated her personal and other expenses to be Rs. 800/- per annum. The Revenue Officers' idea was that by proper management of the whole property and specially the two big villages Jamgaon and Lakhanwada, which were not being sold but were being only mortgaged, it would be possible for her to pay off the debt and save the whole property. Their sanction was not, moreover, required for transfer of the village Kalora any time subsequently as it has no 'sir' land. It is, therefore, not possible to say that the statement by Mst. Chandrabhagabai that she was not going to mortgage the village Kalora influenced the decision of the Revenue Officers to any appreciable extent. The points which seem to have influenced them were the nature of the transfer and the annual income of Rs. 8000 from the property.

(20) The point which is more important than the one given above is that the circumstances of the case and the material on record do not justify an inference that when Mst. Chandrabhagabai made that statement in the application Ex. P-29 she had decided or intended to mortgage the village Kalora also, i.e., that the statement in Ex. P-29 that she was not going to mortgage the village Kalora was false. When she made that application she had negotiated with Ainuddin to mortgage the property to him. That is why his name was mentioned in that application (Ex. P-29) as the intending mortgagee. After the sanction was obtained Ainuddin, however, backed out. That would be clear from the evidence of Bhuraji P. W. 9. There is nothing on record to show that up to this stage Mst. Chandrabhagabai had thought of transferring the village Kalora. P. W. 9 Bhuraji says that as Ainuddin backed out he had to approach the decree-holder Abdul Gani to ask him to take the mortgage in his own name.

Abdul Gani, however, proposed to take it in the name of his sons, the present respondents. Mohammad Hanif P. W. 7 says that Mst. Chandrabhagabai, her father Govindrao, her agent Bhuraji and Ainuddin went to him 2 or 3 weeks before this mortgage & Ainuddin said that though he intended to advance money to the lady he had no money at that time and so he (Mohammad Hanif) should advance money and take mortgage of the property from her. Mohammad Hanif stated that her entire immovable property was to be mortgaged including 'sir' land. It thus seems likely that after Ainuddin backed out there was some talk between Abdul Gani and Bhuraji (P. W. 9) and as a result of that talk it was decided that the entire immoveable property should be mortgaged including the sir land.

No doubt neither Bhuraji P. W. 9 nor Mohammad Hanif P. W. 7 says so, but the burden of proof being on the defendant-appellant it was her duty to question them about this matter. She having failed to question them cannot now ask this Court to draw an inference in her favour as to the falsity of the statement in Ex. P-29 from the mere fact that the village Kalora has also been included in the mortgage deed. When Mohammad Hanif P. W. 7 agreed to the proposal another application was made to the Deputy Commissioner which is Ex. P-31 dated 21-10-1926.

Mst. Chandrabhagabai mentioned in that application that as Ainuddin had no money to advance on the mortgage and as she had to deposit the money in Court on 23-10-1926, i.e., she had only two days time to deposit the money in Court, she was mortgaging the property to Mohammad Hanif, and requested the Deputy Commissioner to endorse the certificate of sanction to transfer the 'sir' land without reservation of the rights of occupancy on the mortgage deed which she had executed in favour of Mohammad Hanif and presented with the application Ex. P-31. What the Deputy Commissioner has to do when such a document is produced is given in R. 8 of the Rules framed by the Financial Commissioner in exercise of the powers conferred on him by S. 109, sub-s. (2), cl. (g) and with reference to Ss. 49 and 50, C. P. Tenancy Act, 1920 (1 of 1920). (Notification No. 20-T, dated 16-6-1920, as amended by Notification No. 441-350-XII, dated 27-2-1924). That rule says:

"When a transfer of 'sir' land without reservation of the right of occupancy x x x x x x x has been sanctioned and a party to the transfer or x x x produce a duly executed document giving effect thereto, and applies for the endorsement of sanction referred to in S. 49, sub-s. (2), the Revenue Officer shall first cause the document to be compared with the sanction; and if he is satisfied that the 'sir' land which the document transfers without reservation of the right of occupancy, x x x x is identical with the 'sir' land for the transfer of which sanction has been accorded by a competent authority, he shall endorse upon the document with his full signature and under the official seal the following certificate:

"I certify that the transfer without reservation of the right of occupancy of x x x acres of 'sir' land situated in 'mauza' — which is effected by this document has been duly sanctioned." "

Such a certificate is endorsed on the mortgage deed Ex. P-22 and it can be presumed under S. 114, Evidence Act that this official act had been regularly performed i.e. that the Revenue Officer caused the document to be compared with the sanction before he endorsed the certificate. It can be presumed that the comparison brought to his notice the inclusion of the village Kalora in the mortgage deed and yet he endorsed the sanction. It can thus be inferred from the circumstances that the Deputy Commissioner knew about the inclusion

of Kalora village in the mortgage deed before he endorsed the sanction and that it was not obtained on any false allegation. This is undoubtedly an inference from circumstances and even if one is not prepared to draw it from those circumstances this much is certain that in view of those circumstances one cannot infer that the sanction was obtained on any false allegation in the application Ex. P 29, dated 12-7-1926.

(21) The learned counsel for the appellants did not press the ground of accretions and did not argue any other point. The result, therefore, is that the appeal fails and is dismissed with costs.

B/V.R.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 18 (Vol. 41, C. N. 3)

HEMEON J.

The State v. Sidney Rodrigues and another, Accused and Complainant.

Criminal Revn. No. 488 of 1952, D/- 20-3-1953, from the order of Addl. Dist. Magistrate, Bilaspur, D/- 28-8-1952.

Penal Code (1860), Ss. 441 and 456 — Intent to annoy.

Where the accused visited the complainant's house at night in response to an invitation from the latter's daughter and in view of the strained relations between the complainant and the accused the latter had not the slightest intention of annoying the former and was keenly desirous of not having his visit discovered by him:

Held that the charge under S. 456 could not be sustained. AIR 1919 All 249; AIR 1938 Lah 534 and AIR 1941 Pesh 79, Rel. on. (Paras 10, 11)

Anno: Penal Code, S. 441 N. 4.

P. Lobo, (for No. 1) and S. P. Kotval (for No. 2), for Non-Applicants.

CASES REFERRED TO:

(A) ('19) AIR 1919 All 249: 40 All 221
(B) ('38) AIR 1938 Lah 534: 39 Cri LJ 756 (FB)
(C) ('41) AIR 1941 Pesh 79: 43 Cri LJ 96

ORDER: S. Rodrigues, who was prosecuted under S. 456, Penal Code at the instance of B. V. Hoogwerf, engine driver Bilaspur, was charged under that section by the Second Class Magistrate, Bilaspur; and the Additional District Magistrate, Bilaspur, has now reported the case under S. 438, Criminal P. C. with a recommendation that the charge be quashed.

(2) B. V. Hoogwerf's case was, briefly stated, as follows: Prior to March 1950, the relationship between S. Rodrigues, 20 years, and him was good, but he then objected to his friendship with his daughter Edith, at the time about 18 years of age. This led to bad feeling between them, and on the night of 2-7-1950 when B. V. Hoogwerf, who is an engine driver, was going on duty, S. Rodriuges pushed him on the platform of the Bilaspur railway-station. Hoogwerf reported this to the police and to the D.L.S., Bilaspur.

(3) On the night of 18-8-1950, Hoogwerf's uncle woke him up and told him that someone had entered the house through the back door in the direction of his daughter's room. He then went to the back of the house and met his brother who told him that S. Rodrigues had entered the house. He was seen standing in the verandah near a pillar wearing rubber shoes, blue shorts & a light blue undervest, and carrying a torch in his hand. The matter was reported to the police; and he (B. V. Hoogwerf) filed a complaint under S. 456 Penal Code on 1-12-1950.

(4) S. Rodrigues in examination admitted that he had gone to the room of B. V. Hoogwerf's daughter on the night of 18-8-1950 and that he had entered the house from the back door, but he claimed that it had been opened for him and that he had gone to the room in pursuance of letter which B. V. Hoogwerf's daughter Miss Edith had sent him on the same day. He denied that B. V. Hoogwerf objected to the friendship between him and his daughter or that he was aware that B. V. Hoogwerf would be annoyed if he entered his house.

(5) The letter in question is Ex. D-3, is dated 18-8-1950 and is in the following terms:

"Dear Sidney,

Please come over to-night to my place as I want to talk to you about certain things. Please dont' fail to call over.

Edith (Hoogwerf)."

This letter pointed to the friendship which existed between S. Rodrigues and Miss Edith Hoogwerf; and this was borne out by the photographs Exs. D-1 and D-2 which show them together. The witness Hichens (P. W. 7) also declared that Miss Edith Hoogwerf was in love with S. Rodrigues. It was in the circumstances clear that the latter's visit on the relevant night was in pursuance of the invitation extended to him by Edith Hoogwerf with whom he was on very friendly terms; and there is no reason to disbelieve his assertion that she opened the door for him.

(6) There had been, it appears, a social function at the railway institute in July 1950; and when Rodrigues and Edith Hoogwerf were talking to Miss Hichens (P. W. 7), the complainant arrived, apologised to Miss Hichens and took his daughter away with the comment that he did not want them to be in the company of Rodrigues. During the same month, there was on the railway station platform between Hoogwerf and Rodrigues the incident to which advertence has already been made. It is, therefore, evident that these two persons were not on good terms and that Hoogwerf would not have approved of the younger man's visit to his daughter on the night in question.

(7) This did not, however, 'per se' connote that Rodrigues had entered the house with intent to intimidate, insult or annoy Hoogwerf; and in — 'Emperor v. Chhotelal', AIR 1919 All 249 (A), a Division Bench held that if an accused succeeds in showing that his presence in the house was in consequence of an invitation from or by the connivance of a female living in it with whom he was carrying on an intrigue and that he desired that his presence there should not be known to the person in possession, he cannot be convicted of house trespass. The learned Judges also pointed out, however, that if it were shown that the person in possession of the house had expressly prohibited the accused from coming to the house, an intent to annoy could be legitimately inferred.

(8) The fact that Hoogwerf did not approve of his daughter's association with Rodrigues did not postulate that Rodrigues went to his house with intent to annoy him; and he had, as indicated, gone there in pursuance of Edith Hoogwerf's written invitation to him. It may have occurred to him that her father would not approve of the visit, but this did not signify that he intended to annoy him by accepting the invitation. There was, moreover, nothing to show that Hoogwerf had expressly forbidden him to go to the house; and he himself admitted that he had no witness to corroborate

his assertion that he had objected to Rodrigues visiting his house. Nor was there anything even to show that he had told his daughter that she was not to receive him there; and he, significantly enough, did not examine her as a prosecution witness.

(9) In — 'Abdul Majid v. Emperor', AIR 1938 Lah 534 (FB) (B), a Full Bench recorded the view that it must depend on the facts of each case as to whether an intent to annoy the person in possession of the property entered upon can, in the circumstances, be reasonably inferred and that where an accused enters at night the complainant's house with intent to have intercourse with the unmarried daughter of the complainant by invitation, the accused cannot be said to have the primary or even the subsidiary or secondary intent to annoy the person in possession from whom he had taken all possible precautions to keep his entry secret. The mere fact that he knew or ought to have known that, if discovered, his presence in the house might cause annoyance to the owner or other inmates of the house is by itself not sufficient to bring his case within S. 441, Penal Code.

(10) This view was followed in — 'Emperor v. Takbirullah', AIR 1941 Pesh 79 (C), by a Division Bench of which Almond, J. C. made the following observations:

> "We are unable to agree with the reasoning given in '58 J. R.,' for it appears to us obvious that if a man enters the house of another person with the intention of committing clandestine adultery with an unmarried woman, not only does he not intend to insult or annoy any other person in the house, but he desires above all things that his presence should not be known to the other occupants."

Having regard to these authorities, with which I am in respectful agreement, the reference made by the learned Additional District Magistrate, Bilaspur, was proper; and it would appear that S. Rodrigues was wrongly charged for the commission of an offence under S. 456, Penal Code. All that he had done was to visit Hoogwerf's house in response to an invitation from his daughter Edith; and, in view of the relations which existed between Hoogwerf and Rodrigues, the latter had not the slightest intention of annoying the former and must have been keenly desirous of not having his visit discovered by him.

(11) The charge under S. 456, Penal Code against S. Rodrigues is accordingly quashed.

B/V.R.B. Charge quashed.

A.I.R. 1954 NAGPUR 19 (Vol. 41, C. N. 4)

DEO J.

Nilkanthrao Amrutrao, Decree-holder, Appellant v. Mahadeo Vishwanath, Judgment-debtor, Respondent.

Misc. Second Appeal No. 186 of 1952, D/- 9-1-1953, from order of Dist. J., Wardha, D/- 14-8-1952.

Debt Laws — C. P. and Berar Debt Conciliation Act (2 of 1933), Ss. 8, 9(1) and 2(e) — Interest on decretal amount granted by subsequent order if distinct debt.

Where a decree for money does not allow interest but by a subsequent order of the Court the decretal amount is to carry interest, the liability under the decree and the liability under the subsequent order are two distinct debts. The liability for interest cannot be a particular of the decretal debt as contemplated by S. 9 (1) as it was not in existence when the decree was passed. Hence the failure of the decree-holder to submit a statement of the interest under S. 8 (1) of the Act will attract S. 8 (2) of the Act under which that liability must be deemed to be discharged. (Paras 5, 6)

G. J. Ghate, for Appellant; G. B. Badkas, for Respondent.

CASES REFERRED TO :

(A) ('49) AIR 1949 Nag 111: ILR (1948) Nag 441

(B) ('36) AIR 1936 Nag 145: ILR (1937) Nag 76

JUDGMENT: This appeal by the decree-holder raises an interesting point under the Central Provinces and Berar Debt Conciliation Act.

(2) The appellant obtained a decree for money against the respondent on 15-7-1933. By a subsequent order dated 23-3-1934 time was granted to the judgment-debtor on condition that the decree will carry interest at 9 per cent per annum and that attachment will continue. Later on, the respondent applied to the Debt Conciliation Board for settlement of his debts. In response to the notice under S. 8(1) of the Act, the decree-holder filed a statement of his debts on 31-8-1935 on the basis of the decree and did not include therein the claim for interest to which he was entitled under the subsequent order. There was a repayment of Rs. 45/- after the date of this order and it was shown, the amount of Rs. 910/6/6 claimed by him does not include any interest. A certificate under S. 15(1) was granted against him on the ground that the decree-holder declined to accept a reasonable offer, but it appears that the certificate was not actually issued.

(3) After the agreement ceased to subsist, the decree-holder applied for execution of the decree & claimed the amount of Rs. 910/6/6 and interest granted by the subsequent order. The judgment-debtor opposed this application on the ground that the liability for interest was discharged under S. 8(2) of the Act. This contention was overruled by the trial Court but was accepted in appeal.

(4) By the notice under S. 8(1) of the Act the creditor is called upon to submit "a statement of debts" owed to him by the debtor. If there are more than one debt owed to him, he is not required to submit separate statements but one statement showing the debts separately. Under S. 9(1), every creditor so submitting a statement of the debts has to furnish along with such statement full particulars of all such debts and has, at the same time, to produce all documents, including entries in books of account, on which he relies in support of his claim. The Board has to ascertain all the liabilities with a view to effect an amicable settlement between the debtor and his creditors. It has, therefore, power to call upon the debtor and each creditor respectively to explain his case regarding each debt. A creditor who does not submit a statement of the debt or debts owed to him within the time allowed by S. 8(1), is penalised by automatic discharge of his debt for all purposes.

Section 8(2) runs thus:

> "Every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and on all occasions to have been duly discharged."

To escape this penalty it is manifest that a creditor must disclose the total amount he claims for all the debts owed to him, together with all

particulars and documentary evidence. If any document which is in the possession or under the control of the creditor is not produced by him, as required by S. 9(1), the document shall not be admissible in evidence in the Central Provinces against the debtor and in Berar against the debtor or his heirs in any suit brought by the creditor or by any person claiming under him. There is no penalty prescribed for neglect to furnish a statement of full particulars of such debts.

(5) The learned counsel for the decree-holder, therefore, submits that the claim for interest is a particular of the debt due on the decree and consequently, failure to furnish the particular could not attract S. 8(2) of the Act. 'Mt. Sunderbai v. Pooransao', AIR 1949 Nag 111 (A). The question for consideration, therefore, is whether the claim under the decree and the claim under the subsequent order are two different debts or amount to one debt. Section 2(e) of the Act defines 'debt' to include all liabilities whether payable under a decree or order of a civil Court or otherwise, whether due or not due, except those which are expressly excluded by this section. This definition is very wide and does not exclude any liabilities of the debtor other than those specifically excluded in the definition — 'Pannalal v. Baijnath', AIR 1936 Nag 145 (B). The liability under the decree and the liability under the subsequent order are two debts owed by the debtor to the decree-holder. The liability for interest did not come into existence when the decree was passed and cannot be a particular of that debt. The full particulars required by S. 9(1) would be the original advances in cash, all repayments and all transactions leading to the figure of the debt claimed by the creditor. If a statement of debt had to be submitted before 23-3-1934, the interest would not have been included therein because the liability did not then exist.

(6) I, therefore, agree with the lower appellate Court that they are two distinct debts and failure to submit a statement of the interest under S. 8(1) of the Act attracted S. 8(2) and that debt or liability must be deemed to be discharged under S. 8(2) of the Act.

(7) The appeal, therefore, fails and is dismissed with costs. Counsel's fee Rs. 25/-.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 20 (Vol. 41, C. N. 5)

SINHA C. J. AND HIDAYATULLAH J.

Vishwasrao Amritrao, Appellant v. Bhagwant Shivaji and another, Respondents.

Second Appeal No. 169 of 1947, D/- 27-11-1951, from appellate decree of 1st Addl. Dist. J., Amravati, D/- 3-2-1947.

(a) Berar Patels and Patwaris Law (1900), Ss. 6, 9 and 20 — Patelki inam — Resumption — Berar Land Revenue Code (1928), Ss. 190 and 192 — Transfer of Property Act (1882), S. 105.

Grant of lands by Jagirdars to their Patels as remuneration for future services — Grant subsequently converted into inam by Government of India — Some of the lands not found in possession and enjoyment of rotatory Patel in office — Government held, could resume and regrant such lands again to rotatory working Patel.

(Paras 25, 26, 31, 33, 34, 39, 40, 41)

Anno: T. P. Act, S. 105, N. 69.

(b) Berar Land Revenue Code (1928), S. 190 (1) — Scope.

The purpose and intent of the section must be deduced from its own words. The words as they stand do not limit the operation of the section. The section was not intended to apply only to land granted for religious or charitable purposes. AIR 1920 PC 56, Foll. (Para 39)

D. T. Mangalmurti, for Appellant; V. L. Prabhune (for No. 1), and W. B. Pendharkar (for No. 2), for Respondents.

CASES REFERRED TO:

(A) ('66) Beng LR Sup Vol 559: 6 WR 199 (FB)
(B) ('04) 6 Bom LR 364: 28 Bom 305
(C) ('18) AIR 1918 Bom 115: 43 Bom 37
(D) ('22) AIR 1922 PC 96: 48 Ind App 244 (PC)
(E) ('31) AIR 1931 PC 157: 132 Ind Cas 736 (PC)
(F) ('80) 7 Ind App 162: 4 Bom 494 (PC)
(G) ('03) 30 Ind App 77: 27 Bom 353 (PC)
(H) ('33) AIR 1933 PC 171: 29 Nag LR 210 (PC)
(I) ('49) AIR 1949 PC 9: ILR (1949) Nag 1 (PC)
(J) ('20) AIR 1920 PC 56: 43 Mad 550 (PC)
(K) ('47) AIR 1947 Bom 340: 49 Bom LR 370 (FB)

JUDGMENT : This is an appeal by defendant 2 Vishwasrao, son of Amritrao Patil, who along with the plaintiff Bhagwant Shiwaji Patil (who is his uncle) belongs to one of the Patil families in Nawabag jagir in the Achalpur taluq. Along with the plaintiff (now respondent 1) is joined the Government of Madhya Pradesh as respondent 2. In the suit itself the State Government was defendant 1.

(2) The genealogy of the family appears below:

SHIWAJI (D. 2-3-1886)

Amrit (d. 1920) — Bhagwant

Vishwasrao.

The Patil family is an ancient one and has been working in that manner for nearly 200 years. There is rotation between this branch and another, each branch working for a decade. At the present moment the other branch, with which we are not concerned, is working, and the family of Shiwaji will get its turn in the year 1956. As nothing turns on this rotation we need not refer to it hereafter.

(3) In the year 1771 the Jagirdars of Nawabag conferred on their patels some lands in lieu of remuneration for the services performed by them. That document is described as a kararnama, and shows that there were 4 patel families working in Nawabag to whom 1½ bighas of inam patelki lands were granted per each 'netan' of land, a 'netan' being equal to 9 bighas. In this agreement it is stated there was an inquiry by an officer appointed by the Nizam of Hyderabad and that the lands were granted as 'mukaddami' inam. It appears that the term 'mukaddam' fell into desuetude & subsequently the term 'patel' was introduced and the lands thus granted were regarded as 'patelki inam huq'. As a result, 262 acres of land were held by the 4 patel families. The patel family with which we are concerned is

known as the family of Rokde Patels, and the grant to them consists of 11 survey numbers.

(4) From the year 1771 to the year 1866 there is no document on record which would show that there was any change. In the year 1866 there was an inam inquiry instituted by the British Government after the management of Berar was handed over by the Nizam. It was then recorded that the jagir inam was of class III and was an old one and was for the personal maintenance of the jagirdars. Ex. P-1 is the Inam Enquiry and mentions that 262 acres of land were allowed to the Patels. There is no evidence to show the devolution of the property in the family. Till 1886, when Shiwaji died, there appears to have been no dispute in the family, and it would appear from the admission of the parties before us that Shiwaji was the patel and held the lands granted to his branch.

(5) After the death of Shiwaji the devolution was in favour of both Amrit and Bhagwant, the two sons of Shiwaji. Before this, however, there was a dispute between the jagirdars on the one hand and the watandars on the other, and in revenue case No. 21/VI/1908-09 Amrit made a statement (Ex. 1-D-9 dated 18-8-1917) that he was willing to take as emoluments for his office land measuring 4 acres 17 gunthas from field survey No. 27 in the village. At that time, however, he stated that he was holding six survey numbers in lieu of patelki emoluments and survey No. 39 on lease from the inamdar. About the same time there were proceedings for the resumption of the jagir inasmuch as the jagirdars had alienated certain portions of their property to strangers. When the resumption was ordered not only the jagir and all the lands which were with the jagir inamdars were resumed but also the lands which by the agreement aforesaid had been made over by the jagirdars to the patelki watandars.

(6) Later, however, on 15-4-1918 Mr. Standen, Commissioner, recommended (Vide Ex. 1-D-13) that all the lands in khels Nawabag were not part of the inam jagir but some of those lands belonged to the patel families, and that these lands should therefore be left out from the resumption and re-grant of the jagir. This recommendation went before the Financial Commissioner, and by Exh. 1-D-11 dated 7-8-1918, the Financial Commissioner accepted the recommendation of the Commissioner and ordered that the patel huq inam lands should be excluded from the resumption inasmuch as those lands were granted to the patels at the suggestion of the Government of His Exalted Highness the Nizam many years ago.

An inquiry was therefore held, and Mr. Turner, Commissioner, Berar, found that 5 survey numbers measuring 25 acres and 15 gunthas were held by the Rokde family in the khalsa portion of the jagir while 24 acres and 30 gunthas consisting of six survey numbers were held by the patels in the jagir portion. It may be mentioned that when the resumption and regrant took place it was ordered that only half the jagir lands should be resumed and regranted as khalsa with the result that the jagir got split into two parts, one part comprising the inam lands and the other part comprising the khalsa lands. This divarication in the jagir itself led inevitably to the division of patelki huq inam lands into jagir and khalsa.

(7) When the Commissioner made the above inquiry he made a reference to the local Government by Exh. 1-D-12, in which he recommended that these patelki inam lands both in the jagir and khalsa portions should be designated as patelki huq inam lands and should be recorded in the name of Amrit Shiwaji. It appears that before this the lands were enjoyed jointly by Amrit and Bhagwant though there is no record that Bhagwant's title was recognized as such or was recorded in the record-of-right.

(8) As a result of this recommendation, which was approved by Government (vide Exh. P-3, copy of Letter No. 2227/1409-XII dated 28-8-1922), the lands held by Amrit Shiwaji Patel as Patelki huq inam lands in the khalsa and jagir portions of Nawabag jagir were excluded from the lands regranted to the jagirdar and were granted instead to the patelki family with Amrit as the patel. After this the matter remained undisputed though Exh. P-6, which is the land revenue receipt book of 'mauza' Nawabag jagir, shows that up to the year 1923-24 Bhagwant and his nephew Vishwasrao were both working as patels. In 1935 a special officer was appointed by Government to hold an inquiry and as a result cerain orders were passed which have led to this suit.

(9) On 27-4-1936 the Deputy Commissioner, Amravati, ordered an inquiry, because, as appears from Exh. 1-D-1 (his order in this behalf), of the 11 fields which were granted to the Rodke family six fields were not in the possession and enjoyment of the rotatory patel in office. After inquiry the Deputy Commissioner ordered the eviction of Bhagwant Shiwaji from the six fields in his possession which were to be resumed and regranted to Vishwasrao, the rotatory working patel. An appeal and a revision filed by Bhagwantrao failed. The Financial Commissioner founding himself on the letter of the Local Government (Exh. P-3) held that when the 11 fields were excluded from the resumption of the Nawabag jagir it had been definitely ordered by Government that they should be recorded in the name of Amrit Shiwaji Patil as patelki huq inam lands and were therefore meant as emoluments for the patelki work done. He accepted the recommendation of the Commissioner that if, Bhagwant, who was to be evicted, refused to surrender the lands, no action should be taken till Government had passed orders resuming the lands and regranting them to the working patel.

(10) When the matter went before the revenue authorities once again for eviction of Bhagwant the Deputy Commissioner (Mr. Layard) on 23-5-1940, held that in view of the history of the lands and in view of the refusal of Bhagwant, resumption of all the lands should be ordered and these lands should be regranted to the patel working as such.

(11) When an appeal was taken to the Commissioner (Mr. T. C. S. Jayaratnam) he declined to accept the order of the Deputy Commissioner and stated that unless the watan itself was forfeited resumption could not take place. He pointed out that the lands were

granted to the watandar family and Government was not concerned with any arrangement made by the family for the enjoyment of the fields. However, if the holder of the office wanted he was quite free to enter into possession of all the lands disregarding any arrangement which might have been made by his predecessor (Amrit) with his brother Bhagwant.

(12) The matter then went before the Revenue Tribunal, Central Provinces and Berar, and the Financial Commissioner on 19-12-1941 declined to accept the recommendation of the Commissioner that the 'status quo' should be maintained pending the orders of the Local Government on the whole case. He held that the action taken by the Deputy Commissioner under S. 190 of the Berar Land Revenue Code was justified. According to him, it was the consistent policy of revenue officers to refuse to admit any claims to shares in the patelki emoluments. He referred to the rules framed under S. 21 of the Berar Patels and Patwaris Law and observed that even a substitute patel was entitled to all the emoluments and it was therefore inconceivable that the working patel should be deprived of the lands representing his emoluments and someone else, though belonging to the watan family, should be allowed to enjoy them.

It was as a result of this that Bhagwant, the plaintiff, was dispossessed and the present suit was brought by the plaintiff Bhagwant for a declaration that Government had no jurisdiction or authority to resume and regrant the six fields in his possession and that the orders of the revenue officers and the Revenue Tribunal were 'ultra vires'. He also sued for possession of these lands as also for mesne profits for the years 1940-41 and 1941-42 amounting to Rs. 600 in the aggregate.

(13) This case was filed after serving a notice as required by S. 80, Civil P. C. upon the Deputy Commissioner, Amravati, and alongside Vishwasrao (the patel) the Provincial Government, Central Provinces and Berar, was also made a party.

(14) These facts, which are not disputed because they could not be, formed the foundation of the cause of action, and Bhagwant's claim is that the order of the Revenue authorities resuming and regranting the lands to Vishwasrao was not correct and that he was entitled by virtue of the agreement in the family to continue in possession of the six fields. It may be mentioned that immediately after the orders of Government in 1922 Amrit and Bhagwant partitioned the lands between themselves in 1923, Amrit keeping 5 of the fields and the suit fields going to Bhagwant. Bhagwant's contention was that the family arrangement had nothing to do with the Government and if the working patel was in possession of emoluments equal to those given in R. 6 of the Berar Inam Rules, Government was not concerned with the rest of the fields.

He adverted to the statement of Amrit in the year 1917 where he had undertaken to work as a patel if he was granted 4 acres and 17 gunthas of land as emoluments of his office. He stated that Vishwasrao, the working patel, was in possession of considerably more land, and consistently with the spirit underlying the Berar Inam Law and also the nature of the grant, Government could not and ought not to have interfered with the family arrangement.

(15) The trial Court held all the points against the plaintiff and came to the conclusion that the suit was barred under S. 192(b) of the Berar Land Revenue Code inasmuch as, the action taken under S. 190 of the Code was properly taken in this case. The learned Judge accordingly ordered the dismissal of the suit with costs.

(16) On appeal the learned Additional District Judge reversed the decision of the Court of first instance and decreed the plaintiff's claim, ordering that the plaintiff be placed in possession of the six fields in dispute and the second defendant should pay to the plaintiff the mesne profits, viz., Rs. 600/-, claimed by the former. It is against this decision that the present second appeal has been field.

(17) The points that arise for decision in the present appeal are not many. We have to determine in this appeal what is the nature of the lands granted to the Patel as patelki huq inam and further whether the Patel family could by an agreement 'inter se' arrange for the enjoyment of the lands. We have also to determine whether the revenue authorities could, when such an agreement was in force, dispossess the plaintiff of such lands as were in his possession and regrant them to the Patel in office. Of course, if the matter fell within S. 190 of the Berar Land Revenue Code, it is conceded that the case would be outside the jurisdiction of the Civil Courts by virtue of the provisions of section 192 'ibid'.

It is, however, contested by the respondent that the matter was exclusively within the cognizance of the revenue authorities and that Bhagwant could not bring a suit to challenge the order of the revenue authorities passed under section 190 of the Berar Land Revenue Code.

(19) Obviously in this case the right of Government to resume the lands in the hands of Bhagwant and to regrant them to Vishwasrao must depend upon the tenure enjoyed by the 'watan' family and the terms of the grant, if any. It is clear that there is no grant to which we could address our attention. The agreement of 1771 which recites the grant of these lands to the Patel families also states that the grantees were working as Patels even earlier. There is thus no record of any grant nor any evidence of previous devolution of the property. All that we know is that the grant is to the officiator and that there is but one such at a time.

(19-A) When the Jagir was resumed, these lands were resumed also. Later this was rectified by ordering that the 'patelki huq inam' lands should be left out. The result of this was to separate from the Jagir Inam, the special grant to the watandar families and to confer the watan lands as emoluments of the officiators.

(20) Now this grant can only be one of two broad categories. As early as — 'Baboo Koolodeep Narain Singh v. Mahadeo Singh', 6 WR 199 at p 209 (FB) (A), Jackson J., while dealing with a case under the Ghatwalee tenure, divided such grants into two cate-

gories. The learned Judge observed as follows :

"It appears to me that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties is remunerated by the use of certain lands."

(21) This classification has been approved by their Lordships of the Privy Council and though in — 'Lakhamgauda v. Keshav Annaji', 28 Bom 305 (B), there was an attempt to sub-divide the first category still further into two, Beaman J. has, if I may say so respectfully correctly pointed out in — 'Chandrappa v. Bhima Dassappa', AIR 1918 Bom 115 (C), that those two sub-divisions really fall under one head.

(22) Now in the present case, if one goes by the agreement of 1771, the only conclusion possible is that this grant belongs to the second category. The services were being performed and the inquiry by the Nizam Sahib was to determine the emoluments. Thus the grant was not made as a reward 'pro servitiis impensis et impendendis' or, in other words, for past services as well as future, but as remuneration for future services. This has a material effect on the question of resumption, as shall be shown later.

(23) At the Inam Enquiry, the Inams in favour of watandar families were not separately recognized. Indeed it was then assumed as if these were interests carved out of the lands granted to the jagirdar. Later, however, these were recognized as separate Inams and the order of Mr. F. Sly (later Sir Frank Sly), Commissioner, Amravati, (Ex. 1-D-28 dated 2-4-1908) shows that even then it was held that the 'patelki' was a watan independent of the jagir. This position was reaffirmed when these lands were left out of the proceedings for the resumption of the jagir and culminated in the order Ex. P-3 of 28-8-1922. It was then ruled by Government that these lands were emoluments of the working Patel and were to be recorded in the name of Amrit Shiwaji Patel as his 'patelki huq inam' land.

(24) There can be no doubt that at least after 1922 there was no interdependence between the rights of the Patels and those of the Jagirdar. The very fact that at the resumption of the jagir the lands of the Patels were left out shows that Government recognized the position of the Patels independently. It is true that under section 6 of the Berar Patel and Patwaris Law, 1900, the Jagirdar was bound to nominate a patel. That contingency however did not arise as hereditary patels already existed. But the recognition of the patels would be subject to the above law all the same.

(25) Now the question is whether the patel was entitled to all the lands or was only entitled to such lands as represented a fair income to the patel for the work done. Shri Prabhune who appeared for Bhagwant (respondent 1) contended that the Jagir Inam was a class III Inam and as such this Inam was also class III being carved out of the jagir. This would be so if the matter was between the Jagirdar and the grantor. But when the jagir was resumed and regranted these lands were left out and thus all links between the Jagirdar and the lands of the patel were destroyed. Further the grant to the patels cannot be described as "personal or subsistence grant" and the grant to the patel would fall, if it fell at all, within class IV. Stricty speaking, we find it difficult to hold that this Inam can be classed under that head.

(26) For this reason we are of opinion that the application of R. VI of the Berar Inam Rules, whether actually or by analogy, to patels and their lands, which was pressed upon us by Shri Prabhune cannot be sustained. Even if the Rule did apply the determination of what portion of the Inam should be considered necessary for the efficient performance of the duties of the officiator is a matter for Revenue authorities.

(27) Shri Prabhune cited to us a number of authorities of the Privy Council two in cases from the Bombay Presidency and two from Berar. We drew his attention to — 'Venkata Jagannadha v. Veerabhadrayya', AIR 1922 PC 96 (D), which was a case from the Madras Presidency. We shall now consider these rulings and see if they have any bearing upon this matter.

(28) In — 'Venkata Jangannadha v. Veerabhadrayya (D) (supra)', the question was whether the 'karnam' service lands enfranchised to a 'karnam' a village accountant, in Madras, were subject to any claim to partition by other members of the family. Though the office of the 'karnam' was not hereditary, the choice of succeeding karnams was made from the same family. The genealogy of the family in that case given at page 97 of the report shows the close resemblance of the facts at any rate in so far as the relationship of the plaintiff and the defendant in the cited and the present cases are concerned.

(29) Their Lordships laid down in that case that the lands must be taken to be attached to the office of Karnam as such and were emoluments of a 'karnam'. Their Lordships further observed :

"It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible."

The judgment and decree of the High Court upholding the partibility of such lands was reversed and their Lordships observed as follows :

"To quote and to adopt the judgment of 25-8-1902 of Mr. Galletti, Acting Sub-Collector, in this case : "This is a suit for recovery of the Karnam service Inam Lands of Pandalaka. Plaintiff is admittedly karnam. The land is admitted Karnam's inam. Judgment for plaintiff with costs."

(30) It was argued by Shri Prabhune that this case is dependent upon the special law in force in Madras and he points to several passages where their Lordships refer to the law in Madras. Even so, bearing in mind the classification by Jackson J. quoted above, and the fact that in the present case also the admitted facts are that the appellant is the Patel and the lands are 'patelki lands', the case, though not binding upon us, has consi-

derable value in defining the approach to such questions.

(31) It would follow from the Madras case that if the lands form the appanage of an office, they are ordinarily not alienable and partible & must pass to the person appointed to the office. And if these lands are alienated or partitioned, they are liable to be resumed. The distinction drawn by Jackson J., to which a reference has been made above, plays an important part in the determination of the question whether a particular grant is resumable or not.

(32) In — 'Lakhamgouda v. Baswantrao', AIR 1931 PC 157 (E), their Lordships adverted to this distinction and observed as follows:

"The distinction to be borne in mind is between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. In the former case the land will prima facie be resumable; in the latter case prima facie it will not: but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition."

The distinction between grant for service of a public nature and one for services, private and personal to the grantor, is not of consequence in the present case. The grant here, though it originally emanated from the Jagirdars, was converted into an 'inam' by the Government of India on behalf of the Nizam and it has thus become a grant by the Government to the 'watan' family.

(33) Having determined the nature of the grant and also the fact that it was resumable at the pleasure of the grantor, it does not need much argument to establish that if the appointee is a fit person properly appointed, he is entitled to all his emoluments. Since the 11 fields represented the remuneration for the work to be done, they were liable to be resumed at any time at the pleasure of Government. They were not grants made burdened with services, in which case onus would be on Government to establish that the grant was resumable. As the lands were remuneration for services, the onus, on the other hand, was on the grantee to establish that the grant was not resumable by Government. In our judgment, the grantee has been unable to prove that the grant was irresumable.

(34) Shri Prabhune tried to meet the case by citing — 'Adrishappa v. Gurushidappa', 4 Bom 494 (PC) (F). The facts of the case are accurately summarised in the head-note, which is as follows:

"In a suit for the partition of part of a 'deshghat vatan', brought by the younger brothers of a joint Hindu family against their eldest brother, the desai, the defence was that the 'vatan' was held by him as an impartible inheritance, subject to a right by custom, that a brother should receive maintenance out of the income derived from it :

Held, that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the desai, to show, that the 'vatan' had, contrary to the general Hindu Law, been inherited by him alone.

It was for the desai to show, by evidence of the nature of the tenure of the 'vatan', that it was impartible, or to show, by evidence of family custom or of district, i.e. local custom, that impartibility attached to it such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu Law."

In that case also, the pedigree which was produced threw no light upon the question in dispute. Their Lordships also rejected the evidence of allowances to the younger members on the ground that such allowances existed prior to the regrant. The case was decided on the general presumption of partibility of a grant. Their Lordships observed as follows at p. 501 :

"A pedigree has been put in, whereby it appears that, as far back as the year 1780, the 'vatan', which had been resumed at that time by the Native Government, was conferred on or restored to one Gurushidappa, but, inasmuch as Gurushidappa appears to have been an only son, that devolution of the property throws no light upon the question in dispute. From Gurushidappa it appears to have been devolved, in 1814, upon his only son Gadiappa. Subsequently, in 1836, the desaiship devolved upon Adrishappa, the present defendant. It would appear that his family, consisting of himself and his two brothers, remained joint until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little light upon the controversy ....."

It is significant that their Lordships added a rider that the emoluments of the holder of office should not be interfered with. Their Lordships observed at p. 503 on this part of the case as follows :

"Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force."

In the present case, the revenue authorities, who alone can determine what is the right remuneration for the services, have finally determined that the entire fields should be taken to be the remuneration of the 'watandar' patel. It is not open to the Civil Court to determine the extent of the remuneration.

(35) Similarly, in — 'Vinayak Waman v. Gopal Hari', 27 Bom 353 (PC) (G), the village Ahire

"was granted in 1762-63 by the Peishwa to six brothers, who were Brahmins, in consideration of their devotion to religious worship, and the arduous services performed by the youngest brother, Chinto Vithal".

The grant did not declare the property to be impartible, nor did it say anything about the management of their share of the income. Chinto acted as a manager and paid his

brothers their share of the income. In 1800 there was an attachment, which was however removed and the Peishwa regranted the 'inam' to Chinto's son. When the holder denied the right of the other brothers, the Peishwa ordered an inquiry and an order was made that the brothers should receive equal shares. In the suit the defendant contended that the village was impartible and he had acquired a right to the perpetual management thereof.

Their Lordships observed at p. 356 as follows :

"The argument on behalf of the appellant rested on no solid foundation. It could not be contended that the original grant or any document emanating from the ruling power, showed that it was intended that the 'inam' should be impartible. The argument rather was to this effect: that, although the original grant fell short of proving that the property was impartible, yet there was, so to speak, a savour of religious endowment about the Peishwa's grant, and that this, taken in conjunction with the conduct of the family, the fact that although the brothers separated, there was never any claim for the partition of this property until quite recently, and the fact that, although there were on more than one occasion disputes or complaints of mismanagement, Chinto's branch held their position, justified the inference that, either according to the true intent of the grant properly understood, or by family custom gradually developed the 'Inam' was or had become impartible.

Their Lordships agree with the conclusion arrived at by the High Court that 'neither ..... by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family ..... acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition."

It may be worthwhile to refer to a case — '7 Ind App 162 (PC) (F)', the head-note of which is that 'Deshghat Watan' or property held as appertaining to the office of Desai is not to be assumed 'prima facie' to be impartible. The burden of proving impartibility lies upon the Desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies".

(36) In — 'Sahebrao v. Jaiwantrao', AIR 1933 PC 171 (H), the Privy Council was concerned with an 'inam' certificate issued to the claimant, the head of the senior branch of a family of 'deshmukhi watandars' in Berar. That grant was for personal maintenance to the claimant, his descendants and co-sharers. It was held that the grant could not be construed as if it were to the claimant and his descendants subject only to the obligation to maintain the co-sharers, and that a co-sharer was entitled to possession of his share as stated in the 'inam' certificate. The case is easily distinguishable because the cosharers were entitled to the 'inam' dues, though only to the extent of their shares. In the present case, the grant is to the service holder and not to any other person. The analogy of the case cited cannot therefore avail the plaintiff.

(37) In — 'Shrinivasrao v. Vinayakrao', AIR 1949 PC 9 (I), this question did not arise. The case was decided on the terms of the grant and the Inam Rules, and it was held that neither the grant nor the Inam Rules suggested that primogeniture was to be the order of descent or that the estate was to be held as impartible. That was not a case of a service grant, and no question arose either in that case or the one cited from Nagpur Law Report of any resumption of a service grant. That case also, therefore, does not cover the present controversy.

(38) Under the Berar Patels and Patwaris Law, 1900, which consolidated the rules relating to the office of Patels and Patwaris in Berar, it is provided as follows:

"S. 9 (1) — The emoluments appertaining to the office of Patel or Patwari shall be enjoyed solely by the person for the time being holding the office".

and

"S. 20 — A Civil Court shall not exercise jurisdiction with respect to any claim by any person to the office of Patel or Patwari, or to any emolument appertaining to the office, or on account of any injury caused by exclusion from the office".

(The proviso is not material).

Patels nominated by the Jagirdars are 'prima facie' governed by the law and the sections quoted above. It would thus appear that the position in this State is different from the one existing in the Bombay Presidency.

(39) It would thus appear that the Berar Patels and Patwaris Law, read with section 190 of the Berar Land Revenue Code, would entitle the revenue authorities to resume the lands granted to the Patel family. Sub-sections (1) and (2) of S. 190 of the Berar Land Revenue Code, 1928, read as follows:

"(1) If alienated land has been granted on condition that the holder shall render certain services or incur expenditure for the benefit of the community or any section thereof, and the holder fails to render such services or to incur such expenditure to the satisfaction of the Deputy Commissioner, or, if the holder transfers the land in such a manner that in the opinion of the Deputy Commissioner the purpose of the grant is likely to be defeated, the Deputy Commissioner may declare such land to be forfeited.

(2) Land forfeited under this section shall vest in the Crown for the purposes of the Province free of all encumbrances and shall be regranted on the original conditions in accordance with rules made under this law".

Shri Prabhune attempted to limit the first sub-section in its application by adverting to the Statement of Objects and Reasons appended to the new Code. His contention was that the section was intended to apply to land granted for religious or charitable purposes. That, however, is not permissible and, in our judgment, the purpose and intent of the section of the Berar Land Revenue Code must be deduced from its own words. As Viscount Finlay observed in

—'Krishna Ayyangar v. Nallaperumal Pillai'. AIR 1920 PC 56 (J)

"No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words."

The words as they stand do not limit the operation of the section.

(40) It was argued that the reasons given by Government in making the resumption were wrong because the service was continued to be performed by the holder of the office & it was no concern of Government how the remuneration for the service was enjoyed. In our judgment, that is not a cogent argument. As was observed in — 'Daulatrao v. Province of Bombay'. AIR 1947 Bom 340 at p. 342 (K)

"But because Government gives a wrong reason for something it does, the wrong reason does not operate to abrogate the operative part of the resolution, since it is not necessary for Government to give any reason at all."

The resumption of the 'patelki huq inam' lands lay in the pleasure of Government and it was not open to anyone to contend that Government in making the resumption gave a reason which was not valid.

(41) We have already referred to section 20 of the Berar Patels and Patwaris Law, 1900, and that section has also been quoted. Clauses (a), (b) and (n) of sub-s. (1) of S. 192 of the Berar Land Revenue Code reads as follows:

"192 (1). Except as otherwise provided in this Law, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which, the Governor in Council or any Revenue officer is, by this Law, empowered to determine, decide or dispose of; and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters:

(a) any claim against the Crown relating to lands held under treaty, or to lands granted, or held on political tenure;

(b) any claim against the Crown to lands referred to in S. 190 or relating to the assessment, forfeiture or re-grant of such lands;

(n) any claim against the Crown relating to any property or emoluments appertaining to the office of any hereditary officer or servant."

If the resumption in this case lay in the pleasure of Government and the lands having been resumed were granted to Amritrao and came to be recorded after Amritrao's death in the name of Vishwasrao, the appellant, it is futile to argue that Government could not resume the grant because it was being enjoyed not by the officiator but by a person who was not the working Patel. A suit thus would not lie and would be barred by the operation of the sections above quoted.

(42) The decision of the Court of the first instance was, therefore, correct. We set aside the decree of the lower appellate Court and in its place substitute the decree of the trial Court. The plaintiff's claim shall stand dismissed with costs in all the three Courts.

C/D.H. Appeal allowed.

A.I.R. 1954 NAGPUR 26 (Vol. 41, C. N. 6)

MANGALMURTI AND DEO JJ.

Mahadeo Murlidhar, Petitioner v. Jwalaprasad Mishra and others, Respondents.

Misc. Petn. No. 70 of 1953, D/- 27-4-1953, to quash order of Election Tribunal, Rajnandgaon, D/- 30-1-1953.

Representation of the People Act (1951), Ss. 84, 85, 90 — Power of Election Tribunal to allow amendments.

A petition cannot be dismissed either under S. 85 or under S. 90, sub-s. (4) for contravening S. 84. The inference is, therefore, inevitable that the petition can be brought in order by permitting the petitioner to make appropriate amendments by withdrawing the declaration which the petitioner does not seek to enforce. (1880) 5 AC 214; AIR 1953 Bom 293, Rel. on. (Para 13)

M. N. Phadke and B. L. Gupta, for Petitioner; M. R. Bobde and K. G. Chendke, for Non-applicant No. 1.

CASES REFERRED TO:

(A) ('36) AIR 1936 Nag 157: ILR (1936) Nag 73

(B) ('49) AIR 1949 PC 239: 76 Ind App 139 (PC)

(C) (1880) 49 LJ QB 577: 5 AC 214

(D) ('53) AIR 1953 Bom 293: 55 Bom LR 334

ORDER: This petition, purporting to be one under Arts. 226 and 227 of the Constitution for issue of a writ of 'certiorari' and directions to quash the final order of the Election Tribunal, Rajnandgaon in Election Petition 292 of 1952, decided on 30-1-1953, is made by Shri Mahadeo Paliwal whose election was set aside by the Tribunal. It was held that he was disqualified for being chosen as a member of the State Legislature in view of S. 7(d), Representation of the People Act, 1951 (43 of 1951), hereinafter called the Act, and that consequently acceptance of his nomination paper was illegal and invalid. The Tribunal further held that the acceptance materially affected the result of the election.

(2) It may be stated at the outset that this finding was not challenged before us during the course of arguments though we pointedly brought it to the notice of the learned Counsel for the applicant & asked him why the Court should interfere in his favour under the extraordinary jurisdiction under Art. 226. Setting aside the order of the Tribunal means to permit the petitioner to exercise his rights as member of the Legislature when he is disqualified to do so. All that the learned Counsel submitted was that the Tribunal having acted without jurisdiction this finding is not binding on the applicant must be ignored.

(3) Non-applicant 1 Dr. Jwala Prasad Mishra presented an election petition by post to the Election Commission, which was received by it on 22-5-1952. By the notice dated 8-7-1952 the attention of the non-applicant was directed by the Election Commission to the provisions of S. 81 of the Act and R. 119(b) made thereunder and he was asked to show cause why the petition should not be dismissed under S. 85 for non-compliance with the provisions of S. 81 inasmuch as the petition which contained a prayer for a declaration that the election to the said double-member constituency was wholly void was presented beyond the limitation prescribed by R. 119 (b). It was further stated that this notice was without prejudice to the provisions of the law applicable to the case.

In showing cause non-applicant 1 stated that he could claim alternative reliefs without making

separate applications and separate deposits as security for costs and that this was sufficient cause within the meaning of the proviso to S. 85 to condone the delay under that proviso. He requested that the delay be condoned. It was further submitted that even if relief for one declaration was barred by time, it could not entail the dismissal of the petition as a whole and that the reliefs which were within limitation were bound to be considered on merits by the Election Tribunal, and that in view of the law points involved the questions raised by the Election Commission should better be left to be decided by the Election Tribunal which would be the proper forum for deciding them. He prayed for a hearing if the matter was to be decided by the Election Commission. The Election Commission did not pass any order under S. 85 but constituted the Election Tribunal under S. 86 for the trial of the petition. That petition was duly published by the Election Tribunal in the official gazette.

(4) In his written statement the applicant pleaded that the petition was liable to be dismissed 'in limine' for non-compliance with the mandatory provisions of Ss. 81 and 83 of the Act and as barred by time under R. 119(b). It was further pleaded that the constitution of the Tribunal was 'ultra vires' the Election Commission as the petition did not comply with the provisions of S. 83 of the Act. The applicant prayed that these contentions be tried as preliminary issues.

(5) On 7-11-1952 non-applicant 1 made an application praying for leave to withdraw the relief that the election was wholly void and also to delete paras. 5 to 10 of the petition. On 14-11-1952 the Tribunal allowed the petitioner to delete paras 5 to 10 in spite of opposition, and asked the applicant to make consequential amendments in the written statement which was done. The case was adjourned for hearing arguments on the question whether non-applicant 1 could be allowed to withdraw the alternative relief clause. At the adjourned hearing the applicant again raised the objection that it was not permissible for the Tribunal to allow withdrawal of the allegations in paras. 5 to 10. On hearing arguments the Tribunal stated that the decision on the objection would be given in the final order.

(6) The applicant then presented Miscellaneous Petition No. 16 of 1953 to this Court for directing the Election Tribunal to decide the election petition as made to the Election Commission without any amendment and to decide first the preliminary objections raised by the applicant. That petition was dismissed on 6-4-1953 as no security deposit was made.

(7) The applicant contends that the Election Tribunal had no jurisdiction to permit withdrawal of the allegations in paras. 5 to 10 and should have dismissed the petition as barred by time since the delay was not condoned and the Election Tribunal had no jurisdiction to condone the delay. It was further contended that the petition did not conform to the provisions of Ss. 81 and 83 of the Act and was not made within the time prescribed by R. 119(b) and that the Tribunal had no alternative but to dismiss the petition in view of the mandatory provisions of S. 90, sub-s. (4). The applicant also disputed the finding that he was disqualified for standing for the election; but, as we have stated, this ground was not pressed at the hearing. The learned Counsel for the applicant further contends that the applicant having been duly elected a member had a right to be a member of the State Legislature and his election could be called in question only by an election petition presented in the manner provided by the Act.

(8) The learned Counsel for the contesting non-applicant contends that this Court has no jurisdiction to question the decision of the Election Tribunal because it is constituted by the Election Commission which is not amenable to the jurisdiction of this Court and because it is not required by law to have its sittings within its territorial jurisdiction. It was further contended that the jurisdiction of this Court was excluded by Ss. 105 and 170 of the Act read with Art. 329(b) of the Constitution.

(9) The prayers in the election petition are:

(a) It be declared that the election of respondent 1 is void and that the petitioner who had secured the next higher number of votes for the general constituency from the aforesaid constituency has been duly elected,

(b) or, in the alternative, that the election for the Jangjir-Pamgarh constituency is wholly void,

(c) or, in the alternative, the election of respondent 1 is void.

(10) Section 83(1) of the Act requires the election petition to state concisely all material facts on which the petitioner relies and to be signed by him and verified in the manner laid down in the Code of Civil Procedure for verification of pleadings. Sub-section (2) requires the petition to be accompanied by a list duly signed and verified in like manner, setting forth full particulars of the corrupt or illegal practice alleged by the petitioner etc. Section 84 enables the petitioner to claim any one of the following declarations:

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected;

(c) that the election is wholly void.

Section 81 provides that an election petition calling in question any election may be presented on one or more of the grounds specified in subss. (1) and (2) of S. 100 and S. 101 in such form and within such time as may be prescribed. Section 100 gives the grounds for declaring the election to be void. Section 101 refers to the grounds on which a candidate other than the returned candidate may be declared to have been elected. Rule 119 prescribes the time within which the election petition shall be presented. Sub-rule (a) provides for limitation where the election petition is against a returned candidate. Sub-rule (b) provides for limitation where there are more returned candidates than one at an election and the election petition calls in question the election as a whole. Thus the limitation for reliefs (a) and (c) is to be computed in accordance with R. 119(a) and that for the relief (b) in accordance with R. 119(b).

(11) It is conceded that the petition in so far as it seeks the declaration that the election is wholly void is beyond time, but it is contended that the petition for a declaration that the election of the returned candidate, i.e., the applicant, is void is within limitation and the Tribunal was bound to decide the case for this declaration on merits and that the whole petition could not be dismissed as barred by time. It is also contended that the Tribunal had power to allow non-applicant 1 to withdraw the allegations in paras. 5 to 10 and abandon the relief that the election is wholly void and that the decision of the question whether a particular application or relief is barred by limitation does not affect the

jurisdiction of the Tribunal to entertain the petition.

The Tribunal was created by the Election Commission under S. 86 of the Act and S. 90, sub-s. (4) of the Act empowered the Tribunal to decide whether the election petition complied with the provisions of Ss. 81, 83, or S. 117. A tribunal is required to decide whether an application for relief before it is within limitation. Reliance was placed on — 'Devidas v. Nilkanthrao', AIR 1936 Nag 157 (A), where it has been held that jurisdiction is entirely independent of the manner of its exercise; the former involves the power to act at all and is independent of the decision reached in the exercise of that power; and the latter is confined to the authority to act in the particular way in which the Court does act. It is argued that a tribunal does not act illegally or with material irregularity when it decides wrongly the matter within its competence because it has jurisdiction to decide wrongly as well as rightly. It is conceded that if an erroneous decision results in the tribunal exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested, the decision is revisable as was held in — 'Joy Chand v. Kamalaksha', AIR 1949 PC 239 (B).

(12) According to the learned Counsel for the applicant the Tribunal was bound to decide the preliminary objection that the petition was liable to be dismissed for non-compliance with the mandatory provisions of Ss. 81 and 83(2) of the Act and R. 119(b) and unless it found that the petition complied with these provisions it had no jurisdiction to decide the case on merits and hold of the Act. Reliance was placed on Art. 329(b) of the Constitution which provides that no election shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The learned Counsel therefore submits that unless the election petition strictly conformed to these provisions, his election could not be challenged.

(13) As already stated, S. 84 enables a petitioner to claim any one of the declarations specified in that section whereas the petitioner (non-applicant 1) claimed all the three declarations. It may be that a separate deposit is required for each declaration on the ground that it forms a separate petition; but we express no opinion thereon as it was not raised or argued before us. It is however clear that a petition cannot be dismissed either under S. 85 or under S. 90, sub-s. (4) for contravening S. 84. The inference is therefore inevitable that the petition can be brought in order by permitting the petitioner to make appropriate amendments by withdrawing the declaration which the petitioner does not seek to enforce. The petition in the instant case, if so amended, would be a petition in accordance with Ss. 81, 83 and 117 of the Act. This power of amendment is conferred not only by S. 90, sub-s. (2) but by sub-s. (4) as well. That subsection reads thus:

> "Notwithstanding anything contained in S. 85, the Tribunal 'may' dismiss an election petition which does not comply with the provisions of S. 81, S. 83 or S. 117."

Even if the Election Commission fails to consider the defects in the election petition or does not dismiss the petition under S. 85, it shall be lawful for the Election Tribunal to dismiss the petition for the various defects unless it allows appropriate amendments. The use of the word "may" is very significant. No doubt, it does not empower the Court to act contrary to law; but it is a permissive or enabling expression. It always means "may" and does not mean "must". There are however cases in which for certain reasons where a person is by statute entrusted with a power it becomes his duty to exercise it and the expression "may" has in that case to be interpreted as "shall".

As stated by Earl Cairns in — 'Julius v. Bishop of Oxford', (1880) 5 AC 214 (C):

> "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described in a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a 'mandamus'. And the words 'it shall be lawful', being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

Such conditions do not exist in the instant case. On the contrary, the deliberate use of the word "may" in S. 90, sub-s. (4), as opposed to "shall" in S. 85, is significant. While it is not open to the Election Commission to allow amendments, the Election Tribunal is empowered to do so not only by the use of the expression "may" in S. 90, sub-s. (4) but also by the provisions of sub-s. (2) of the section and S. 92 which confer on the Election Tribunal the power possessed by a civil Court in the trial of suits. We cannot accept the argument of the learned Counsel for the applicant that the trial begins with the hearing of evidence. That is not the sense in which the word "trial" has been used in S. 90, sub-s. (2), which is as under:

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act 5 of 1908), to the trial of suits."

On receipt of the election petition the Tribunal causes a copy of it together with a copy of the list of particulars to be served on each respondent and publishes it in the official gazette as required by the rules. The trial thus commences when the Tribunal proceeds to deal with the petition. The Tribunal therefore possesses the power to allow amendment of the petition or abandonment of the relief for a declaration. It is a power exercised by a civil Court during the trial of a suit.

(14) The same view has been expressed in — 'Sitaram Hirachand Birla v. Yograjsingh', AIR 1953 Bom 293 (D), wherein it has been observed that when in the same statute with regard to the same subject-matter the expression "shall" is used in one section and "may" in another, it is not possible to hold that these two expressions were used with the same meaning & connotation. It has been further held therein that an Election Tribunal has power in proper cases to permit amendment of an election petition under S. 90, sub-s. (2) of the Act, and to allow the applicant to bring it in conformity with S. 83. We respectfully agree with this view.

(15) We are therefore of the opinion that the Election Tribunal did not act without jurisdiction or contrary to law in allowing non-applicant 1 to withdraw the allegations in paras. 5 to 10 of the petition and in proceeding only with the trial of the other declaration whether the election of the applicant was void.

(16) In this view, it is not necessary for us to examine in this case the various other contentions raised by the parties before us.

(17) The application therefore fails and is dismissed with costs. Counsel's fee Rs. 100/- if certified.

B/D.H.Z. Application dismissed.

A.I.R. 1954 NAGPUR 29 (Vol. 41, C. N. 7)

MUDHOLKAR J.

The G. I. P. Railway Senior Institute, Ajni, Nagpur and another, Defendants-Applicants v. Mohit Kumar Barat, Plaintiff-Non-applicant.

Civil Revn. Case No. 365 of 1952, D/- 17-4-1953, to revise order of Addl. Judge to 1st civil Judge 2nd class, Nagpur, D/- 28-1-1952.

(a) Civil P. C. (1908), O. 29, R. 1 — Unregistered club — Juridical person — Suit against — (Club—Suit against).

An unregistered and non-proprietary club is not a juridical person and as such cannot sue or be sued. Where it has to be made liable, the proper course is to sue individually the members thereof or to sue only those persons who have rendered themselves personally liable in respect of a contract or tort as the case may be. AIR 1945 Bom 465, Distinguished. (Para 8)

Anno: Civil P. C., O. 29, R. 1 N. 3, Pt. 1.

(b) Civil P. C. (1908), O. 1, Rr. 8 and 10(2) — Applicability to club — (Club — Suit against).

Order 1, R. 8 would apply only where there is a properly constituted suit before the Court. Where a suit is brought against an unregistered and non-proprietary club it is not a proper suit at all and therefore to such a suit the provisions of O. 1, R. 8, cannot be applied. Order 1, R. 10 (2) also cannot be applied as even this provision envisages a proper suit. (Para 10)

Anno: Civil P. C., O. 1, R. 8 N. 4; O. 1, R. 10 N. 10.

K. V. Tambay, for Applicant; V. B. Mandpe, for Non-applicant.

CASES REFERRED TO:

(A) ('98) 1898 All W N 138: 20 All 497
(B) ('91) 14 Mad 362
(C) ('25) AIR 1925 Sind 244: 88 Ind Cas 784
(D) ('27) AIR 1927 All 789: 103 Ind Cas 45
(E) ('45) AIR 1945 Bom 465: 47 Bom LR 465

ORDER: This is an application for revision by the G.I.P. Railway, Senior Institute, Ajni, and Shri Y. P. Kulkarni, Divisional Transportation Superintendent, G.I.P. Railway Nagpur, who are defendants to a suit instituted by the plaintiff-non-applicant.

(2) The plaintiff has claimed in his suit refund of a sum of Rs. 500/- alleged to have been deposited by him with the Railway Institute by way of security together with interest thereon and recovery of arrears of salary.

(3) The defendants in the suit are described thus:

"The G.I.P. Railway Senior Institute, Ajni Nagpur by its President, Treasurer, Secretary and Members of the Managing Committee, all of Nagpur, tahsil and district Nagpur viz.

(1) Shri Y. P. Kulkarni, Divisional Transportation Superintendent, G.I.P. Railway Nagpur, President and Treasurer, G.I.P. Railway, Senior Institute, Ajni.

(2) Shri M. Ryton, Driver, G.I.P. Railway, Ajni, Honorary Secretary, G.I.P. Railway, Senior Institute, Ajni.

(3) Shri F. X. Lobo, Divisional Engineer, G.I.P. Railway, Nagpur, Vice-President, G.I.P. Railway, Senior Institute, Ajni.

(4) Shri Naronha, Yard Foreman, G.I.P. Railway, Ajni.

(5) Shri M. Trinidad, Guard, G.I.P. Railway, Ajni.

(6) Shri Y. M. Joshi, Guard, G.I.P. Railway, Ajni.

(7) Shri H. Khan, Controller, G.I.P. Railway, Ajni.

(8) Shri E. Joseph, Controller, G.I.P. Railway, Ajni.

(9) Shri A. Roache, Driver, G.I.P. Railway, Ajni. All members of the Managing Committee, G.I.P. Railway, Senior Institute, Ajni, Nagpur.

(4) On behalf of the defendants the following are among the other objections taken to the form of the suit:

"14. None of the defendants except Mr. E. Joseph was either on the Managing Committee or any office-bearer in the year 1942 at the time when the plaintiff alleges that he was first appointed in the service of the Institute. None of the defendants took any part whatsoever in the appointment of the plaintiff as servant of the Institute. As a matter of fact, about the time of his appointment none of the defendants except Mr. Joseph and Mr. Ryton had any concern with the Institute. There is thus no liability whatsoever on the defendants about the cause of action referred to in the plaint and the defendants have no liability whatsoever in the matter. This suit against the defendants impleaded is thus not maintainable.

15. The plaintiff has to sue the persons who appointed him or the members who constituted the Institute at the time of his appointment. This suit not being against such persons is not maintainable and should be dismissed.

16. Mr. Joseph and Mr. Ryton who were members of the Institute or any particular member cannot be sued unless the remaining members of the Institute are also impleaded as co-defendants. The suit against Mr. Joseph and Mr. Ryton or any other member of the Institute is also bad for non-joinder of all the members of the Institute and is liable to be dismissed."

(5) After the written statement was filed, the plaintiff applied for the amendment of the plaint and also made an application under O. 1, R. 8, Civil P. C. Both the applications were opposed by the defendants, but they were allowed on 2-2-1951. By the amendment and consequent on the grant of the application under O. 1, R. 8, the plaintiff was allowed to sue the defendants in their representative capacity, that is, as representing the members of the G.I.P. Railway Institute and notices were ordered to issue to all the members of the Institute by publication.

(6) On 28-11-1951 the plaintiff made another application. By this application he wanted to

amend the description of the defendants by striking out reference to defendants 1 to 9 as members of the Managing Committee, by joining 14 other members of the Institute as defendants to the suit and by stating that these persons were sued individually as well as on behalf of all the members of the G.I.P. Railway Senior Institute. This application was opposed by the defendants but was granted by the Court below. It is against the grant of this application that the defendants have come up to this Court.

(7) The main point taken on behalf of the defendants is that the Club is not a juridical person and as such it cannot be sued in its own name. It is said that in such a case all the members of the Club should be sued or, if the liability is incurred by only some members of the Club, then those members of the Club should be sued. According to the learned counsel, the suit as laid is bad. Where such is the case, it is argued, the plaintiff cannot be allowed to add defendants under O. 1, R. 10(2), Civil P. C.

(8) That an unregistered and non-proprietary club is not a juridical person and as such cannot sue or be sued has been held in — 'N. W. P. Club v. Sadullah', 20 All 497 (A); — 'Michael v. Briggs', 14 Mad 362 (B); — 'Scott Oldfield v. Firm of Co-operative Stores', AIR 1925 Sind 244 (C) and — 'Bhagwandas v. Pinjra Pole Pashu Anathalaya', AIR 1927 All 789 (D). Where an unregistered and non-proprietary association like a club has to be made liable, the proper course is to sue individually the members thereof or to sue only those persons who have rendered themselves personally liable in respect of a contract or tort as the case may be.

(9) I am aware of the view taken by Kania J. in — 'Harishchandra v. Craig', AIR 1945 Bom 465 (E), to the effect that a suit of this kind can be brought against a society through all its members. That case, however, rested largely on the pleadings in the case, the failure of the defendants to challenge the order under O. 1, R. 8, Civil P. C. at the appropriate stage and the rules of that society. The view taken in the cases cited earlier appears to me to be correct and I have no hesitation in following it.

(10) The question then is whether the provisions of O. 1, R. 8, Civil P. C., can be resorted to in this case. It seems to me that O. 1, R. 8, would apply only where there is a properly constituted suit before the Court. Where a suit is brought against an unregistered and non-proprietary club it is not a proper suit at all and therefore to such a suit the provisions of O. 1, R. 8, cannot be applied. No doubt, under O. 1, R. 10(2), the Court has power to strike out a party improperly joined or to join as party one who ought to have been joined in the suit. But even this provision envisages a proper suit.

(11) In this view the application for revision must be allowed. Accordingly I allow it with costs. Counsel's fee Rs. 25/-.

B/V.R.B. Revision allowed.

A.I.R. 1954 NAGPUR 30 (Vol. 41, C. N. 8)

HEMEON J.

Banshilal Dukhiram and another, Accused-Applicants v. The State.

Criminal Revn. No. 170 of 1952, D/- 28-11-1952, to revise order of Dist. Magistrate, Raigarh, D/- 14-4-1952.

Criminal P. C. (1898), Ss. 4(1)(h), 195(1)(a) — Offences falling under S. 195(1)(a) and outside it.

Accused challaned under Ss. 186 and 506, Penal Code, on basis of report of range officer — Report held did not amount to complaint — As the Court acted without jurisdiction with regard to a part of the trial under S. 186 the whole proceedings were vitiated by the illegality committed and conviction based on such proceedings cannot stand. AIR 1936 Nag 86; AIR 1937 Bom 160; AIR 1939 Bom 129, Rel. on. (Paras 5, 6)

Anno : Cr. P. C., S. 4(1)(H) N. 13; S. 195 N. 3, 3a, 4.

J. P. Dwivedi, for Applicants; W. B. Pendharkar, Govt. Pleader, for the State.

CASES REFERRED TO :

(A) ('36) AIR 1936 Nag 86: ILR (1936) Nag 50: 37 Cri LJ 587
(B) ('37) AIR 1937 Bom 160: ILR (1937) Bom 256: 38 Cri LJ 654
(C) ('39) AIR 1939 Bom 129: 40 Cri LJ 579

ORDER: The applicants Banshilal and Nathuram were convicted and each sentenced to undergo 2 concurrent terms, one of 3 months' rigorous imprisonment under S. 186 and the other of 6 months rigorous imprisonment under S. 506, Penal Code, by the Second Class Magistrate, Sakti; and the District Magistrate, Raigarh, affirmed the convictions but reduced the sentences to 2 concurrent sentences of 6 weeks rigorous imprisonment in each case. The applicants have now come up in revision to this Court.

(2) The prosecution case was, briefly stated, as follows. On 7-9-1951, Narsingprasad (P. W. 1), range officer, went with the search warrant Exhibit P-1, which had been issued by the Divisional Forest Officer, Raigarh Division to the house of the applicant Nathuram in order to search for young bamboo shoots which had been stolen. Nathuram did not permit him to search the house and uttered the following threat:

> "If any body will carry out the search, I will kill him; and if any body enters the house, I will lock it from outside."

Narsingprasad then went to search the house of Mohan Teli, but the applicant Banshilal inhibited him from entering it and said:

> "Who is that 'sala' who would take the search of my house. I am patel of the village. I will kill that 'sala' who will search the house. His dead body will go back from this place."

(3) Narsingprasad was accompanied by Jhaduram (P. W. 3) and Baldeo (P. W. 4) on those occasions; and Chandilal, constable, was with him when Banshilal refused to permit a search of his house and threatened the range officer. The latter made the report Exhibit P-2 at the Sakti police-station, 10 miles away, on 8-9-1951 and in it cited as witnesses Chandilal (P. W. 2) and Jhaduram (P. W. 3) but not Baldeo (P. W. 4).

(4) The applicant Nathuram in examination denied that he had inhibited the range officer Narsingprasad from searching his house or that he had threatened him, but he admitted that he had opened the door of his house for him, although he could not explain why the search had not taken place. The applicant Banshilal admitted that he had prohibited Narsingprasad from entering his house, but he denied that he had threatened to beat him. After the charges had been read out to the applicants, they both pleaded guilty and admitted that they had prevented him from searching their houses and had threatened to beat him.

(5) The accused were challaned under Ss. 186 and 506, Penal Code, on the basis of a report made by Narsingprasad, but S. 195(1)(a), Criminal P. C., lays down that no Court shall take cognizance of any offence punishable under Ss. 172 to 188, Penal Code, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. "Complaint" is defined in S. 4(1)(h) 'ibid'; and in — 'Emperor v. Babulal Munnilal', AIR 1936 Nag 86 (A), Gruer J. has held that the report of a police officer, whether in a non-cognizable or in a cognizable offence, does not amount to a complaint. The Second Class Magistrate, Sakti, was, therefore, not empowered to take cognizance of the offence under S. 186, Penal Code, although he was entitled to take cognizance of the offence under S. 506 'ibid'.

(6) As the Court acted without jurisdiction with regard to a part of the trial, the whole proceedings are vitiated by the illegality committed and any conviction based on such proceedings cannot stand. This was the view taken in — 'Rudragouda Rachangouda v. Emperor', AIR 1937 Bom 160 (B), by a Division Bench; and it was followed in — 'Ramchandra v. Emperor', AIR 1939 Bom 129 at p. 137 (C). I am in respectful agreement with those rulings; and it follows that the trial of the applicants under S. 506, Penal Code, was also without jurisdiction.

(7) The convictions and sentences are, therefore, set aside and the proceedings are quashed.

B/D.H.Z. Convictions set aside.

A.I.R. 1954 NAGPUR 31 (Vol. 41, C. N. 9)

CHOUDHURI J.

Sheonarayan Sheokishan, Judgment-debtor-Appellant v. Khemraj Moziram, Decree-holder-Respondent.

Misc. First Appeal No. 116 of 1947, D/-23-2-1953, from Order of Civil Judge, First Class, Harda, D/- 24-2-1947.

Civil P. C. (1908), Ss. 47, 96 and 2(2) — Appeal.

An order under S. 47 in order to be appealable as a decree must have the essential characteristics of a decree as defined in S. 2(2), that is, it must give formal expression of an adjudication conclusively determining the rights of the parties. (Para 8)

An order deciding the preliminary issue, as to whether the orders of the Debt Relief Court and the findings were 'ultra vires' which would depend on the finding whether the provisions of the Relief of Indebtedness Act were or were not complied with by the Debt Relief Court and whether the Courts did not act according to the powers conferred on them under the Act, does not conclusively determine the rights of the parties with regard to matter in controversy and therefore does not amount to a decree under S. 2(2). Hence it is not appealable. AIR 1940 PC 105; AIR 1949 Cal 337; AIR 1936 Pat 250, Distinguished. (Para 13)

Anno: Civ. P. C., S. 47 N. 84, 86; S. 96 N. 11; S. 2(2) N. 7.

S. C. Dube, for Appellant; A. P. Sen, for Respondent.

CASES REFERRED TO:

(A) ('40) AIR 1940 PC 105: ILR (1940) Mad 599 (PC)

(B) ('51) AIR 1951 Mad 56: ILR (1951) Mad 393 (FB)

(C) ('36) AIR 1936 Pat 250: 162 Ind Cas 486

(D) ('49) AIR 1949 Cal 337: ILR (1945) 2 Cal 313

(E) ('42) AIR 1942 Nag 3: ILR (1941) Nag 732

(F) ('97) 1 Cal WN 374: 24 Cal 725

ORDER: This is an appeal filed by Sheonarayan, judgment-debtor, against the finding dated 24-2-1947 passed by the Civil Judge, First Class, Harda, in Civil Suit No. 83 of 1929 decided on 15-7-1930.

(2) The respondent Seth Khemraj had obtained a preliminary decree for sale of the village Lalmati in Harda tahsil against the defendant. He filed an application on 13-7-1937 for making the decree final. During the pendency of the application, the judgment-debtor applied to the Debt Conciliation Board, Harda, for settlement of his debts including the mortgage decree in favour of the respondent. The proceedings for making the decree final were stayed by the Debt Conciliation Board.

(3) Before the debt could be settled, the Debt Conciliation Board came to an end and the application was transferred to the Debt Relief Court, Harda, where the decree-holder raised an objection that the debt of one Kanhaiyalal shown as a creditor was fictitious and also that the defendant had property worth about Rs. 40,000/- and was in a position to pay the debt, and therefore the Debt Relief Court had no jurisdiction. The objections of the decree-holder were overruled. The decree-holder went up in revision and the case was remanded for fresh evidence.

(4) After the case was remanded, the judgment-debtor added two more creditors viz. Seth Gulabchand and Wasudeo. The Presiding officer in spite of the objection raised by the decree-holder against these creditors decided that the defendant was not in a position to pay, and assumed jurisdiction. Against this order, the decree-holder went up in revision to the Additional District Judge, Hoshangabad, challenging the jurisdiction of the Additional Presiding Officer, Harda, raising the same contentions which he had raised in the Court below. The Additional District Judge rejected the revision on 15-1-1943 on technical ground that the decree-holder should have filed a revision against the final order which was passed by the Additional Presiding Officer.

(5) The contention of the decree-holder is that the Additional District Judge refused to exercise jurisdiction which he had for deciding the question whether the jurisdiction of the Additional Presiding Officer in determining the debt of the defendant was exercised according to law. The decree-holder therefore contended that the order dated 15-1-1943 passed by the Additional District Judge was 'ultra vires' and not binding on him, and he was entitled to proceed in getting his preliminary mortgage decree made final.

(6) The appellant 'inter alia' contended that the legality of the orders and the findings of the Debt Relief Court could not be challenged and the application for making the decree final made by the decree-holder was not maintainable. The

lower Court framed the following preliminary issues

Issues.	Findings.
1. Whether it is open to the applicant to question the legality or correctness of the orders passed by the Debt Relief Court or the Revisional Orders of the A.D.J. in this proceeding? ...	Yes
2. Is the application for final decree tenable?	Yes

The lower Court overruled the objection raised by the appellant and relying on 'Secy. of State v. Mask & Co'. AIR 1940 PC 105 (A) and several other decisions of the Nagpur High Court, held that it was open to the respondent to question the legality or correctness of the orders passed by the Debt Relief Court or the revisional orders of the Additional District Judge in this proceeding, and that the application for making the decree final was maintainable. It is against this order of the lower Court that the judgment-debtor has come up in appeal.

(7) The learned counsel for the respondent raised a preliminary objection that no appeal lies against the order dated 24-2-1947 passed by the Court of the first instance rejecting the preliminary objection as the order does not finally determine the rights of the parties. Reliance was placed on — 'Desikachariar v. Ramchandra', AIR 1951 Mad 56 (FB) (B). The learned counsel for the appellant contended that the lower Court entirely overlooked the fact that the claim of the respondent had already been discharged under S. 10(4), Relief of Indebtedness Act by the order of the Additional District Judge dated 15-1-1943 and thus the lower Court was in error in not applying the law to the facts of the case and the procedure adopted, and hence the order was appealable. The following cases were cited : — 'Janki Das v. Kalu Ram', AIR 1936 Pat 250 (C); — 'AIR 1940 PC 105 (A)'; — 'Syam Chand v. Calcutta Stock Exchange Association Ltd.', AIR 1949 Cal 337 (D) and — 'Nanhoo Nyader v. Zillimul Mishrilal', AIR 1942 Nag 3 (E).

(8) An order under S. 47, Civil P. C. in order to be appealable as a decree must also have the essential characteristics of a decree as defined in S. 2(2) Civil P. C., that is, it must also give the formal expression of an adjudication conclusively determining the rights of the parties. If it is not so, the order is not appealable.

(9) 'Jogidishuary v. Kailash Chundra', 24 Cal 725 (F), is the leading decision defining an order in execution 'vis-a-vis' the definition of a decree. The learned Judges at p. 739 have laid down the following proposition :

"It is not every order made in execution of a decree that comes within S. 244. If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses would be appealable: and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree — a thing which could hardly have been intended. An order in execution proceedings can come under S. 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way."

This decision has been followed in — 'AIR 1951 Mad 56 (B)', in which it has been held that :

"On a combined reading of Ss. 47, 2(2) and 96, Civil P. C., it is apparent that an appeal from an order in execution would lie only if the following three conditions are complied with : (1) the order must relate to execution, discharge or satisfaction of the decree between the parties to the suit; (2) it shall conclusively determine the rights of the parties with regard to all or any of the matters in controversy; (3) such conclusive determination of the rights is with reference to the Court in which such rights are decided."

(10) 'Janki Das v. Kalu Ram (C) (cit. sup.)', was a civil revision dealing with the question whether a Court should grant or reject a prayer to try preliminary issue of law under O. 14. R. 2, Civil P. C. In — 'Secy. of State v. Mask & Co. (A) (cit. sup.)', the case considered was under the Sea Customs Act. As it provided special provision for appeal against the order of the Assistant Collector of Customs, further challenge of the order in the civil Court was excluded. That stage has not yet been reached in the case here.

(11) In — 'Syam Chand v. Calcutta Stock Exchange Association Ltd. (D) (cit. sup.)', the case involved two sets of issues. Decision of one in favour of the plaintiff was found only to dispose of the case. The question of decision on the other set of issues one way or the other would not have disposed of the case. It was therefore held that the first issue should be decided first.

(12) In — 'Nanhoo Nyader v. Zillimul Mishrilal (E) (cit. sup.)', it was held that when no notice under S. 7, C. P. Debt Conciliation Act was served on the creditor, the application of the debtor was not effectively admitted. None of the cases relied on behalf of the appellant is in point here. It is not the appellant's case that the preliminary issue should not have been decided first. What is challenged by the appellant is the preliminary finding that it is open to the respondent to question the legality or correctness of the order passed by the Debt Relief Court or the revisional orders of the Additional District Judge in this proceeding.

(13) The order of the lower Court deciding preliminary issue does not conclusively determine the rights of the parties with regard to the matter in controversy, that is whether the orders of the Debt Relief Court and the findings were 'ultra vires' which would depend on the finding whether the provisions of the Act were or were not complied with by the Debt Relief Court and whether the Courts did not act according to the powers conferred on them under the Act. The order therefore does not amount to a decree as defined under S. 2(2), Civil P. C., and hence it is not appealable.

(14) For the reasons recorded above, the appeal fails and is dismissed with costs.

Appeal dismissed.

B/M.K.S.

A.I.R. 1954 NAGPUR 33 (Vol. 41, C. N. 10)

HIDAYATULLAH AND V. R. SEN JJ.

Shriram Latuji, Applicant v. Saolaram Govind, Non-Applicant.

Civil Revn. No. 99 of 1952, D/- 24-12-1952, to revise order of Dist. J., Akola, D/- 7-11-1951.

Provincial Insolvency Act (1920), Ss. 24, 25 and 9 — Duty of Court.

Where a debt is alleged and it is denied by a debtor, the duty of the insolvency Court is to examine into the existence of the debt. It cannot refer the creditor to another civil suit. (Para 10)

Under the Insolvency Act, the Court has power to enquire into the genuineness of the debts denied by the debtor, and that power extends to judgment debts also. The enquiry may be made at the instance of the official receiver or the debtor himself. This does not, however, mean that the Court is bound to enquire into the allegations of the debtor in every case. There may be a case in which the debt was contested in a regular suit and upheld. The debtor in such a case cannot ask the Insolvency Court to re-investigate the matter on the same allegations: Case law Rel. on. (Para 16)

Anno: Prov. Ins. Act, S. 25 N. 1.

C. P. Kalele, for Applicant; D. W. Kathale, for Non-Applicant; P. R. Padhye appears amicus curiae.

CASES REFERRED TO :

(A) ('53) AIR 1953 Nag 189: (Civil Revn. No 729 of 1952, D/- 17-11-1952)
(B) (1875) 44 LJBk 63: LR 10 Ch 373
(C) (1872) 20 WR 322: 26 LT 174
(D) (1885) 55 LJQB 45: 16 QBD 315
(E) (1892) 67 LT 401: (1892) 2 QB 633
(F) (1907) 66 LJKB 644: (1907) 2 KB 23
(G) ('30) AIR 1930 Mad 751: 129 Ind Cas 650
(H) ('28) AIR 1928 All 380: 108 Ind Cas 147
(I) ('32) AIR 1932 Bom 253: 138 Ind Cas 442

ORDER : This is a revision by Shriram hereafter called the debtor, against the order, dated 7-11-1951, of the District Judge, Akola, confirming the order of adjudication passed by the Civil Judge, Class I, Khamgaon.

(2) The facts are these. Saolaram, hereafter called the creditor, obtained a decree for Rs. 2,440/- in civil suit No. 41-B of 1947 on 1-5-1947 against the debtor. The debtor has also executed a bond, dated 24-9-1947 for Rs. 2,275/- in favour of the creditor who has instituted a suit (civil suit no. 60-B of 1948) for recovery of the amount due on the bond and the suit is pending. The creditor has filed another suit (civil suit no 59-B of 1948) on a second bond dated 25-12-1947 for Rs. 1,085/- and that suit is also pending. Further, the creditor is an assignee of a decree for Rs. 375/- in civil suit No. 347 of 1947 against the debtor.

(3) The creditor filed a petition under S. 9 of the Provincial Insolvency Act on 13-1-1949 for adjudging the debtor as insolvent and for appointment of a receiver. He alleged that the debtor was indebted to him to the extent of Rs. 6,175/-. He had committed two acts of insolvency. Firstly, he had filed a compromise petition in the High Court in First Appeal No. 49 of 1947 arising out of a suit for partition and separate possession filed by him and his mother against his uncle Sakharam Tukaram and the compromise provides that the debtor would not prosecute the appeal and the judgment of the trial Court would stand. According to the creditor the compromise is fraudulent and collusive with an intention to defeat and delay the creditors of the debtor. The second act of insolvency consists of an execution of a 'karar kharedikhat' by the debtor on or about 6-12-1948 in favour of his uncle. This was done to defeat and delay the claims of the creditors.

(4) The petition was opposed by the debtor who denied that he was indebted to the extent of Rs. 6,175/-. Regarding the decree, he stated that it was collusive and fraudulent while the bonds executed by him were also bogus, fraudulent and without consideration and were, therefore, void. He denied that he had committed any act of insolvency. He averred that the compromise was genuine and the transfer in favour of his uncle Sakharam Tukaram was intended to be a mortgage and was made for the purpose of enabling him to carry on agricultural business and to meet the expenses of litigation.

(5) The first Court did not enquire into the allegations of the debtor in respect of the debts. It only examined the acts of insolvency alleged by the creditor. It found that the act of withdrawal of the appeal by the debtor was not an act of insolvency, but regarding the transfer to Sakharam it held that it was made with the intention to defeat or delay the creditors and was an act of insolvency on the part of the debtor under S. 6(b) of the Act. The debtor was, therefore, adjudged insolvent.

(6) The debtor took the matter in appeal. Regarding the debts, the lower appellate Court observed :

"The debtor has failed to show that the debts were bogus. He was, therefore, clearly indebted to more than Rs. 500/-."

Regarding the act of insolvency, its conclusion was the same as that of the trial Court.

(7) The contention of Shri Kaiele, learned Counsel for the debtor, is that it was the duty of the Court to enquire into the existence of the alleged debts due to the creditor. The lower appellate Court was also wrong in assuming that the debts exceeded Rs. 500/- without proof. He says that the transfer was not a sale and did not in any way prejudice the rights of the creditor. The property was already under attachment and the creditor was not affected by the transfer by reason of S. 64, Civil P. C. Further, as the transfer according to the creditor was bogus, it could not amount to an act of insolvency and there was no intention to defeat or delay his creditors.

(8) When this case first came up before us, the non-applicant creditor was not represented. As an important question of law was involved, we asked Shri P. R. Padhye to act as 'amicus curiae'. We have heard him and also Dr. D. W. Kathaley who appears for the creditor. We are indebted to Shri Padhye for his assistance. The contention of Dr. Kathaley is that no enquiry regarding debts can be made because the debtor admitted the debts in his statement, dated 16-9-1949. According to him, the judgment-debts are not open to challenge and, at any rate, one of them was based on

consent and no appeal could have been preferred against the judgment in view of S. 96, Civil P. C. Further, it is not open to this Court to go into the question of fraud which is one of fact. He urges that the compromise of the appeal was an act of insolvency.

(9) The conditions on which a creditor may proceed against a debtor are laid down in S. 9 of the Act which is as follows :

"(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless, —

(a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

The acts of insolvency are enumerated in S. 6 of the Act.

(9a) One of the essential conditions for making a petition is that the debt must amount to Rs. 500/-. The question is whether this condition has been fulfilled in the present case. We do not agree that the debtor admitted the debts alleged by the creditor. His statement is as follows :

"It is admitted that the non-applicant is indebted to this applicant, but the extent of the debt and its legality is denied."

This cannot be construed as an admission that the debts due to the creditor amount to Rs. 500/-.

(10) The debts alleged by the creditor fall under two heads : (1) judgment debts and (2) debts which form the subject matter of the two suits which may be described as non-judgment debts. The debtor does not admit any of the debts. Where a debt is alleged and it is denied by a debtor, the duty of the insolvency Court is to examine into the existence of the debt. It cannot refer the creditor to another civil suit. This rule is laid down by us in — 'Deorao v. Ramji', AIR 1953 Nag 189 (A). Section 25 of the Act requires that the insolvency Court should be satisfied with the proof of the right of the creditor to present the petition. The creditor has to prove the existence of debts amounting to Rs. 500/-. In view of the allegations of the debtor, it was the duty of the Insolvency Court to hold an enquiry regarding the existence of the debts evidenced by the two bonds dated 24-9-1947 and 25-12-1947. The argument on behalf of the creditor is that the petition would still be maintainable excluding the non-judgment debts because the judgment debts exceed Rs. 500/-. They are binding and cannot be enquired into.

(11) The main question in this revision is whether it is open to the Insolvency Court to go behind a judgment debt at the instance of a debtor and enquire into his allegations as regards their existence. The provisions of Ss. 9 and 25 are similar to those in the Bankruptcy Act, 1883. In English Courts, the view is that a Court of Bankruptcy has power notwithstanding judgment to enquire into consideration for an alleged debt. One of the well known cases is the decision of the Court of Appeal in — 'Ex parte Kibble : Re Onslow', (1875) LR 10 Ch 373 (B). The facts were that Onslow disputed a judgment debt in the bankruptcy proceeding on certain grounds. These were upheld by the Registrar who held that the debt was void and refused to make an adjudication. Kibble appealed and the appeal was dismissed. James L. J. made the following observation :

"It is a settled rule of the Court of Bankruptcy that the consideration for a judgment debt may be enquired into, and we ourselves have acted upon it in the case that has been referred to : — 'Ex parte Chatteris, re the Earl of Orkney', (1872) 26 LT 174 (C). There are obviously very strong reasons for this rule. The object of bankruptcy administration is to secure the just distribution of a debtor's assets among his real creditors. If a judgment were always conclusive, a man might allow any number of judgments to go by default in favour of friends or relatives without any debt being due to them at all."

This decision was followed by Court of Appeal in — 'Ex parte Lennox. In re Lennox', (1885) 16 QBD 315 (D), where the following rule was laid down :

"The Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment-debtor himself upon the hearing of a petition by the judgment-creditor for a receiving order, even though the debtor has consented to the judgment; and, if on the hearing of the petition facts are alleged by the debtor, of which evidence is tendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations."

In that case the defendant questioned the debt in bankruptcy proceeding. The objection of the debtor was overruled and the Registrar held that a debtor was not entitled to go behind the order and a receiving order was made. The order of the Registrar was set aside and an enquiry was ordered.

(12) We may refer to two other decisions. In — 'In re Fraser, ex parte Central Bank of London', (1892) 2 QB 633 (E), it was held :

"Upon the hearing of a creditor's petition for a receiving order against a judgment-debtor the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to enquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal."

In — 'In re Van Laun, ex parte Chatterton', (1907) 2 KB 23 (F), the head-note runs as follows :

"No judgment recovered against the bankrupt, no covenant for payment given by or account stated with him, can deprive the trustee in bankruptcy of his right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate; the trustee is, therefore, entitled to go behind these forms and to require satisfactory evidence that the debt on which the proof founded is a real debt."

(13) In William's Law and Practice in Bankruptcy (16th Edition, 1949) at page 63, it is stated :

"This power of the court to enquire into the consideration for a judgment debt, whether on a mere question of proof, or where the debt is sought the debtor has consented to the judgment, to be used for the purpose of obtaining a receiving order, is very wide. Even where if he alleges that, in spite of the judgment, there was no real debt, e.g., by reason of fraud, the court, before making a receiving order, will inquire into the truth of the allegation; and the consideration may be enquired into even where the judgment has been affirmed on appeal. So also, where the judgment was obtained by the compromise of an action, if the court, after inquiring into all the transactions leading up to the compromise can see that although not fraudulent it was unfair and unreasonable, the court will not treat the judgment debt as a good petitioning creditor's debt."

In Mulla's Law of Insolvency at page 121 (Tagore Law Lectures, 1929), the following observation occurs :

"The petitioning creditor's debt must be a real debt, that is, a debt for a consideration. The Insolvency Court therefore has power to go behind a judgment and inquire into the consideration even for a judgment debt, and this although the judgment may have gone by default or by consent."

(14) Dr. Kathaley relies on the decision in — 'Narasimha Sastri v. Official Assignee, Madras', AIR 1930 Mad 751 (G). The facts in that case are distinguishable. There the decree was an 'ex parte' decree. The judgment-debtor was arrested in execution of the decree. He sought the protection of the Insolvency Court. He impugned the decree on the ground that the pronote on which the decree was obtained was a fictitious one and that he had not been properly served. He was declared insolvent. The Official Assignee held that the debt was not proved. There was an appeal against his order and the application of the creditor was dismissed by Kumaraswami Shastri, J. The Division Bench took the view that the judgment-debtor should have applied to get the decree set aside within 30 days from the date of his arrest. He failed to do so. The learned Judges observed that 'the debtor himself, therefore, cannot get rid of that decree assuming it was a wrong or an unjust decree'. There was no allegation of fraud as here. We do not think that the Division Bench intended to lay down the rule that in no circumstances can a judgment-debtor question the existence of a judgment debt. Their attention does not appear to have been drawn to the decisions in — '(1875) LR 10 Ch 373 (B)' and —'(1885) 16 QBD 315 (D)', with which we respectfully agree.

(15) The rule relating to the Court of Bankruptcy was followed by a Division Bench in — 'Ram Lal v. Kashi Charan', AIR 1928 All 380 (H), in a case under the Provincial Insolvency Act. In India, judgment debts have been allowed to be questioned in liquidation proceedings under the Companies Act at the instance of the liquidator. The Courts have followed the principles enunciated in the English cases cited earlier in liquidation proceedings. In — 'Alimahomed Gulam Hussein v. Deccan Match Manufacturing Co. Ltd.', AIR 1932 Bom 253 (I), it was held :

"The liquidator is entitled to ask the Court sitting in insolvency jurisdiction to go behind the judgment made against the company. It is not necessary that fraud or collusion should be shown. It is sufficient if it can be shown that there ought not to have been a judgment."

The position of a liquidator is similar to that of an official receiver under the Insolvency Act.

(16) It will thus be clear that under the Insolvency Act the Court has power to enquire into the genuineness of the debts denied by the debtor. There is no prohibition express or implied under the Act. The power extends to judgment debts also. The enquiry may be made at the instance of the official receiver or the debtor himself. This does not, however, mean that the Court is bound to enquire into the allegations of the debtor in every case. There may be a case in which the debt was contested in a regular suit and upheld. The debtor in such a case cannot ask the Insolvency Court to re-investigate the matter on the same allegations.

(17) A judgment is 'prima facie' evidence against a debtor of the existence of a debt. There may be, however, cases in which a debtor is able to satisfy the Court that there is some reason why the judgment debt should not be conclusive. There may be circumstances tending to show that there has been fraud, collusion or miscarriage of justice calling for an enquiry. In the present case, there has been no enquiry by the Courts below regarding the allegations of the debtor. In fact, they did not consider whether they should exercise the power of re-examining the existence and validity of judgment debts. Consequently, the question of our reviewing any finding of fact raised by Dr. Kathaley does not arise.

(18) The jurisdiction of the Insolvency Court is attracted if the creditor is able to satisfy the existence of debts. As the first Court failed to examine whether the debts were in existence and were binding on the debtor, the order of adjudication cannot be sustained. In this view, it is not necessary to express any opinion on the findings in respect of acts of insolvency alleged by the creditor. It will be open to the Insolvency Court to record its fresh finding on that point after it is satisfied that the debts legally recoverable from the debtor fulfil the requirements of S. 9 of the Act.

(19) We set aside the order of adjudication and the order of the lower appellate Court. We remand the case and direct the Insolvency Court to dispose of the applications in the light of our decision. The revision is allowed. Costs will abide the result.

B/M.K.S. Order accordingly.

A. I. R. 1954 NAGPUR 36 (Vol. 41, C. N. 11)

HEMEON AND SEN JJ.

State v. Bhawani Prasad and others, Non-Applicants.

Misc. Criminal Case No. 137 of 1951, D/- 25-4-1952, from decree of 1st Addl. Dist. J., Nagpur, D/- 31-8-1943.

(a) High Court Rules — (Nagpur) High Court Rules, Ch. 4, R. 16 — Report by Magistrate regarding contempt of Court without affidavit.

Rule 16(a)(vi), which requires that a petition for action for contempt of Court should be accompanied by an affidavit, applies to a case where the High Court is moved by a petition to take action for contempt of Court by a party by means of a petition. The petition may be by the State Government or by a private party. A report by a Magistrate is not a petition within the meaning of this rule. (Para 5)

There is no bar to any Judge or Magistrate reporting to the High Court any matter of contempt for action committed against him or his Court and there is no rule enjoining them to send an affidavit in support of the report. It is for the High Court to call for such affidavit as it considers necessary to enable it to take action against the offenders. (Para 5)

(b) Contempt of Courts Act (1952), S. 3 — Newspaper publishing report prejudicial to party in a pending case.

It is contempt to abuse a party concerning a pending case to prejudice mankind against persons concerning the cause before it is heard.

A fair statement in a newspaper of what takes place in a Court of law is privileged. The privilege does not extend to the publication of false opinion on the facts of the case which may operate prejudicially to a party to the proceedings before the Court. AIR 1952 Nag 259 and AIR 1951 Nag 26, Rel. on.

Where the gist of a news item was that a criminal case pending against a woman was false and that the complainant himself was the real culprit;

Held the publication amounted to contempt of Court. (Para 8)

(c) Contempt of Courts Act (1952), S. 3 — Comment on pending case — Intention not material.

The intention of the person commenting on a pending proceeding is immaterial in deciding if it amounts to contempt of Court. The comment is equally actionable in the absence of an intention to interfere with the administration of justice if it has that tendency or is calculated to interfere with the administration of justice. AIR 1952 Nag 259, Foll. (Para 8)

W. B. Pendharkar, Government Pleader, for the State; R. V. S. Mani, for Non-Applicants 1 and 2 and V. T. Kedar, for Non-Applicants 3 and 4.

CASES REFERRED TO:

(A) ('52) AIR 1952 Nag 34: 1951 Nag LJ 499
(B) ('52) AIR 1952 Nag 259: ILR (1949) Nag 640
(C) ('51) AIR 1951 Nag 26: ILR (1951) Nag 266: 52 Cri LJ 452

ORDER: On the report, dated 14-3-1951, of Gourishankar Shandilya, a member of the Municipal Committee, Deori, the police prosecuted Beti Bai 'alias' Bitola under Ss. 294 and 506(1), Indian Penal Code in the Court of Shri R. R. Bharos, Magistrate Second Class, Rehli. The chalan was filed on 26-3-1951. She pleaded guilty. She was convicted and sentenced to fines of Rs. 20/- and Rs. 30/- under Ss. 294 and 506(1) respectively on 30-7-1951.

(2) During the pendency of the case, the following news-item appeared in 'Prahari' in its issue, dated 22-7-1951 of which Rameshwar Prasad Guru (N. A. No. 2) is the Editor and Publisher, while Bhawani Prasad Tiwari (N. A. No. 1) is the printer:

"'Black deeds of Janapada member'

It is learnt from reliable source that (a member of?) the congress Janapada of Deori who was so to say accused of having caught the 'anchal' of a woman and a report about which was made at the local police station, being a partisan of the Station-House Officer, the case was reversed and started against the woman. The hearing of the said case is going on in the lower Court at present. It is being discussed in the public that he called the said woman in a hotel, rebuked and scolded her. He is a great devotee of officers and from behind them reaps undue advantage from the public. The Municipal Committee had not given the work of supervising lamps to the said person, even then taking cover behind it, (he) started the case against that woman. Neither is there any resolution in the Municipal Committee nor is there any order of any officer. This very 'khadi' clad leader on his standing of for M.L.A. (ship) and future Municipal elections, has even resigned from the Municipality, because he always stands for elections. It is not understood why these opportunist leaders have tarnished the name of the Government. It is hoped that the Government will very soon cast a glance of justice towards this. The public has come to know him very well.

The public hopes for an impartial inquiry and decision from the Government."

'Subhchintak' in its issue of 23-7-1951 of which Balgovind Gupta (N. A. No. 3) is the printer and publisher while Narmada Prasad Khare (N. A. No. 4) is the editor and publisher, published the following news-item:

"The echo of catching hold of the breast portion of the 'sari' of a woman in the town. Black deed of an opportunist Khadi wearing leader.

In the local town one famous Khadi-wearing leader of Deori who is a Janpad and Municipal Member had given proof of his black deed by committing the alleged offence of catching hold of the 'anchal' (breast-portion of the 'sari') of a lady in March last. The lady had made a

report in that connection also at the local station-house. But as the Police Sub-Inspector happened to be partial, no case could be started. But on the contrary, a case was started against the said lady and it is at present pending in the Court. The public wants an impartial enquiry in respect hereof to be made by the Government as to why in this way a case was illegally instituted against the said lady. The reason appears to be fear at the sight of 'khadi'."

(3) On 10-9-1951, Shri Bharos submitted a report for action for contempt of Court against the aforesaid printers and publishers as well as Mst. Beti Bai. He observed:

"It would appear from the two publications that Mst. Beti Bai 'alias' Betola accused and the two newspapers meant to hamper justice by stating therein that this Court was trying a false case and was siding with the police. By these publications an offence under contempt of Court has been committed."

(4) The first contention raised by learned counsel for the non-applicants is that as there was no affidavit accompanying the report, the proceedings are not maintainable. Reliance is placed on R. 16 of Chap. 4 of the High Court Rules and on — 'State Government, Madhya Pradesh v. Vinaya Kumar Parashar', AIR 1952 Nag 34 (A). The second contention is that the publications did not refer to the case of Beti Bai. Thirdly, it is said that there was no intention to prejudice the trial. The non-applicants in their written statements tendered an unqualified apology if it is found that they had committed contempt of Court.

(5) There is no force in the contention that the report of the Magistrate should have been accompanied by an affidavit. Rule 16(1)(vi), Chap. 4 of the High Court Rules requires that a petition for action for contempt of Court should be accompanied by an affidavit. A report by a Magistrate is not a petition within the meaning of this rule. This rule applies to a case where this Court is moved by a petition to take action for contempt of Court by a party by means of a petition. The petition may be by the State Government or by a private party. There is no bar to any Judge or Magistrate reporting to this Court any matter of contempt for action committed against him or his Court. There is no rule enjoining them to send an affidavit in support of the report. The object of the report is to apprise this Court of the alleged contempt. It is for this Court to call for such affidavit as it considers necessary to enable it to take action against the offenders. In — 'AIR 1952 Nag 34 at p. 36 (A)' it is observed by a Bench of which one of us was a member:

"The High Court is the authority primarily and immediately concerned with matters of contempt committed against Courts subordinate to it. Every Judge and Magistrate has the right to report any matter of contempt committed against him or his Court to the High Court direct, and there are abundant cases where this has been done. It is not necessary, and in our opinion is most undesirable, that a matter relating so immediately to the administration of justice should be referred to outside authorities or that permission of any outside authority should be sought before an approach is made to this Court."

The objection is without substance. We may, however, point out that subsequent to the report, an affidavit dated 21-12-1951 of Shri Bharos, an affidavit dated 14-2-1952 of S. R. Saini, Reader to Shri Bharos, and another affidavit dated 14-2-1952 of Gouri Shankar Shandilya were filed by the learned Government Pleader.

(6) The second contention is that the publication as a news-item did not refer to the case against Beti Bai. It was pointed out that the names of the prosecutor and the accused were not mentioned. No details of the case nor the name of the Court were disclosed. Learned counsel for the non-applicants 1 and 2 suggested in his argument that the news-item might have reference to a case outside the State, and this Court has no jurisdiction to take action. There is no substance in the objection that the reference in the news-item was to some other State. Shri Bharos in his affidavit has stated that the news-item referred to the case of Beti Bai. To the same effect is the affidavit of his reader Saini who stated:

"Besides this case no other case of the kind about which articles have been published in the aforesaid newspapers on the aforesaid dates was going on in July 1951."

Gourishankar Shandilya in his affidavit affirmed:

"When my case no. 14/51 ('The State-through Gourishakar Shandilya v. Mst. Beti Bai alias Mst. Bitola') was going on in the Court of Shri R. R. Bharos Naib Tahsildar, Magistrate Second Class, Rehli, I was member of the Janpad Sabha, Rehli and Municipal Committee, Deori.

Articles published in the newspaper 'Prahari' of Jabalpur in its issue dated 22-7-1951 and the newspaper 'Subhchintak' of Jabalpur in its issue dated 23-7-1951 refer to the above-mentioned case No. 14/51 of mine alone."

The non-applicants beyond denying that the news-items did not refer to the case of Beti Bai did not give particulars of the case covered which, according to them, was the subject of the news-items. On the material before us, we are satisfied that the news-items referred to the case of Beti Bai in the Court of Shri R. R. Bharos.

(7) The next question is whether the publication of the news-items amounts to contempt of Court as opinion was expressed on the merits of the pending cases. The suggestion in the 'Prahari' was that the police had wrongly prosecuted the woman. The person who should have been prosecuted was the member of the Janpad Sabha (the reference is to Gourishankar). The offending words are:

"being a partisan of the Station-House Officer, the case was reversed and started against the woman. The hearing of the said case is going on in the lower Court at present."

In 'Subhchintak', there was a similar reflection on the conduct of the police in prosecuting the woman instead of the municipal member. It says:

"The lady had made a report in that connection also at the local Station-house. But as the Police Sub-Inspector happened to be partial, no case could be started. But on the contrary, a case was started against the said lady; (and) it is at present pending in the Court."

(8) It was argued that the intention was not to prejudice the trial, but to invite the attention of Government. A request was made for an impartial enquiry by Government. We do not agree. The gist of the news-items is that the case against the woman was false and the real culprit was Gourishankar. It is contempt to abuse a party concerning a pending case to prejudice mankind against persons concerning the cause before it is heard. In — 'T. B. Hawkins v. D. P. Mishra', AIR

1952 Nag 259 (B), a Division Bench of which one of us was a party held:

> "The intention of the person commenting on a pending proceeding is immaterial in deciding if it amounts to contempt of Court. The comment is equally actionable in the absence of an intention to interfere with the administration of justice if it has that tendency or is calculated to interfere with the administration of justice. .....Publications of comments about pending cases are to be deprecated and an undertaking of the kind is almost always hazardous. Newspapers and others must avoid such comments and if they choose to make them, they will do so at their own peril."

In — 'Wasudeoraoji Sheorey v. A. D. Mani', AIR 1951 Nag 26 (C), it was held:

> "The publication in newspapers of reports of proceedings before a Court of law must be true, accurate and without malice. A fair statement in a newspaper of what takes place in a Court of law is privileged. The privilege does not extend to the publication of false opinion on the facts of the case which may operate prejudicially to a party to the proceedings before the Court."

The non-applicants are guilty of contempt of Court.

(9) We do not, however, consider it necessary to impose any sentence. The course of trial was not affected by the publications in question. It does not appear that the trial Magistrate had read them before deciding the case. The offences for which Beti Bai was tried and convicted were not of a serious character. We were also informed during the arguments that Gourishankar had instituted criminal proceedings under S. 500, Indian Penal Code. The non-applicants in their written statements and through their counsel have tendered an apology. In the circumstances, the ends of justice will be met by recording our grave disapproval of the action of the non-applicants. The costs of paper-books will be paid by the non-applicants.

B/D.R.R. Order accordingly.

A. I. R. 1954 NAGPUR 38 (Vol. 41, C. N. 12)

HIDAYATULLAH
AND R. KAUSHALENDRA RAO JJ.

Shamrao Bhagwantrao, Defendant-Appellant v. Mst. Saraswatibai Parashram, Plaintiff-Respondent.

First Appeal No. 103 of 1943, D/- 14-11-1951, from decree of 1st Addl. Dist. J., Nagpur, D/- 31-8-1943.

(a) Hindu Law — Joint family — Trade — Member in charge of one of shops can bind joint family in respect of business done there.

Where a joint family carries on more than one business or transacts business at more than one shop, the member in actual management of the business or the shop is capable of binding the family in respect of that business or that shop. AIR 1942 Oudh 311; AIR 1937 Mad 375, Rel. on. (Para 18)

(b) Debt Laws — C. P. and Berar Relief of Indebtedness Act (14 of 1939), S. 8 — Debtor not mentioning debt in schedule — Money is not lost, if legally due, whatever the consequences of false verification. (Para 22)

(c) Limitation Act (1908), Arts. 89, 60 and 62 — Joint family of brothers A and B carrying joint family shop — S, A's wife depositing her money in shop through A — Suit for return of money — Article applicable held Art. 60 and not Art. 89 or 62. 19 Bom 775, Rel. on. (Para 28)

Anno: Limit. Act, Art. 60 N. 3, 7; Art. 62 N. 6, 17; Art. 89 N. 7.

(d) Limitation Act (1908), Art. 60 — "Demand."

The demand which would start limitation to run under Art. 60, must be an unqualified and effective demand, also in a sense peremptory, for the whole of the amount. A mere request for money would not be such a demand as to start limitation. AIR 1932 Mad 685; AIR 1938 Rang 335, Rel. on. (Para 34)

Anno: Lim. Act, Art. 60 N. 8.

M. R. Bobde and G. B. Shidhaye, for Appellant; D. T. Mangalmurti and S. W. Dhabe, for Respondent.

CASES REFERRED TO:

(A) ('42) AIR 1942 Oudh 311: 199 Ind Cas 698
(B) ('37) AIR 1937 Mad 375: 168 Ind Cas 442
(C) ('95) 19 Bom 775
(D) ('32) AIR 1932 Mad 685: 139 Ind Cas 164
(E) ('38) AIR 1938 Rang 335: 1938 Rang LR 468

JUDGMENT : This is an appeal by the defendant Shamrao against whom a decree for Rs. 21,173 with interest from the date of suit has been passed.

(2) The suit, which was for Rs. 1,93,167, was brought by the respondent Saraswatibai. The relationship of the parties appears from this genealogy.

BAJIRAO DESHMUKH (d)

Balaji (d)	Tukaram (d. 1912).	Govindrao (d. 1926).	Bhagwantrao (d. 1918).
Parashram (d. 8. 10. 38) married to (1) Saraswatibai (plff.) (2) Sundarabai (d. 1938).			Shamrao (deft.)

(3) Saraswatibai is the widow of Rai Sahib Parashram, who was cousin of the defendant Shamrao. Parashram and Shamrao formed, admittedly, a joint Hindu family. Parashram died on 8-10-1938. Saraswatibai contends that he died in jointness while the defendant contends that the co-parcenary came to an end on 4-10-1938 on which date Parashram executed a document. We are, however, not concerned with this plea here, as that point is directly in issue in F. A. No. 32 of 1943, decided by us today.

(3a) The case of Saraswatibai was that she deposited from time to time with the joint family, represented by her husband, certain sums of money. The plaintiff had inherited from her maternal side certain fields (called the Shirala estate in this case), and the income from these fields was so deposited. Saraswatibai also averred that she also deposited the proceeds of the sale of certain gold ornaments. Saraswatibai contended that these deposits were made under an agreement that the money would be returned together with interest whenever required by her. According to her, these deposits amounted to Rs. 21,235-1-9 on 25-1-1924.

(4) In addition to this Saraswatibai claimed that advances were made to third parties from

out of her money. The total amount together with interest was said to be Rs. 193,167. The other sums are not now in dispute as Saraswatibai's contention was not accepted by the trial Judge and no appeal or cross-objection has been filed. Shamrao admitted that the entries in the account books showed that the sum in deposit in the Badegaon shop (managed by Parashram) on 25-1-1924 was Rs. 21,173-1-9. Saraswatibai admits this figure and the decree passed in her favour is for this amount minus the odd anna and pies. The quantum of the decree is not in dispute in this appeal. Shamrao only questions the decision about his own liability.

(5) Shamrao denied that any deposit was in existence at the time of the death of Parashram. He admitted that the account books showed a 'khata' account called the 'Shirala estate Khata'. It was, however, alieged that Parashram spent large sums of money from the Tamaswadi shop on Saraswatibai's account in the litigation between her and her relatives concerning the Shirala estate. These suits were C. S. No. 60 of 1898 decided on 16-6-1904 (together with C. A. No. 69 of 1904 decided on 22-4-1905) and C. S. No. 44 of 1912 decided on 1-12-1913. According to Shamrao, Parashram paid himself out of these deposits and thus the deposits, if made were expended. It was also contended that after the second marriage of Parashram, Saraswatibai resided separately from him. This was in 1925, and Parashram thereafter repudiated the claim of Saraswatibai and refused to give her the amount demanded by her and treated the money as his own.

(6) Shamrao admitted that the family was joint till 4-10-1938 and that for convenience of management Parashram was since 1912 in charge of Badegaon shop, in the account books whereof the deposits are noted. It was contended that the deposits were made with Parashram personally and not with the joint family and for which Parashram was personally liable. Since, according to Shamrao, Parashram died without any assets, Saraswatibai could not claim the amount from Shamrao. He also pleaded limitation because the suit was filed more than 3 years from an effective demand. It was also pleaded that Saraswatibai herself did not refer to these deposits in her application to the Debt Conciliation Board.

(7) The learned trial Judge held that the deposits were proved, and that on 25-1-1924 there was a sum of Rs. 21,173, in deposit with the joint family. The learned Judge held that there was no proof that Parashram spent any money over the suits in which the Shirala estate was involved, or that Parashram paid himself out of the deposits.

(8) He further held that the deposits were made with the joint family and not with Parashram personally and the joint family (or in other words Shamrao who obtained the assets of the joint family) was responsible to the extent to which the assets were in his hands. The learned Judge further held that the claim was within limitation since Saraswatibai made an effective demand only on 22-10-1941 (vide Exhibit P-3) and the suit was brought within 3 years from that date. The claim of Saraswatibai was thus decreed to the extent of Rs. 21,173 together with interest from the date of suit till realization.

(9) Shamrao in this appeal challenges all these findings. The grounds on which these findings are challenged are:

(a) That the suit is barred by time.

(b) That the deposit, if any, was with Parashram personally and not with the joint family.

(c) That the managership of Parashram was not proved.

(d) That the entries in the account books do not show that there was any obligation to repay.

These are thus the points for decision in this appeal.

(10) We shall take these points in a logical sequence. The first question that arises is whether any deposit was ever made. There can be no doubt about this because the account books (which were admitted) showed that the income from the Shirala estate was being deposited every year from 1914 to 1924. The learned Judge of the Court below has given an abstract of the entries. Exhibit D-38 shows that on 19-10-1914 the amount was Rs. 8,034-0-6. In 1914-15 it was Rs. 13,534; in 1915-16 Rs. 14,363-7-6; in 1916-17 Rs. 15,223-7-6; in 1917-18 Rs. 16,223-7-6; in 1918-19 Rs. 17,398-7-6; in 1919-20 Rs. 18,648-7-6; and finally in 1925 Rs. 21,173-1-9.

(11) Now the khata is styled as the khata of the Sirala estate and the 'Rojnamas' show not only deposits but also expenditure. The account books are those of Badegaon shop, which was in the exclusive management of Parashram. He was thus the manager of this shop belonging to the coparcenary, and these entries constitute an admission which has not been satisfactorily explained. There is also the evidence of Saraswatibai that the amount was deposited. Shamrao admittedly has no personal knowledge and his evidence that Parashram spoke to him that there were no deposits cannot be believed. In Exhibit P-2 he had averred that Parashram had told him that Saraswatibai had squandered this money. If she never got this money how could she squander it? Naturally this plea was not pressed in the case. In any case the statement of Parashram would be in his own interest and would not help.

(12) There is no proof that this amount was ever paid. The fact that after 1925 there is no further entry is not of much consequence because in that year Saraswatibai left her husband's house and took the management of her estate in her own hands. No further deposits were admittedly made, and the khata was, therefore, not renewed. The intervening books have disappeared, and each side blames the other for having suppressed them.

(13) Thus, we find that in 1925 the Shirala deposit stood at Rs. 21,173 as found by the trial Judge and that there is no proof that this amount was ever paid to Saraswatibai.

(14-17) We now come to the plea that Shamrao paid himself to recover the amount spent in the litigation over the Shirala estate. (Their Lordships reviewed the evidence in this respect and proceeded :) We do not, therefore, accept this plea of the defendant Shamrao and confirm the finding of the trial Judge that this part of the case is not proved.

(18) We are also of opinion that the transaction was with the joint family. Parashram was the manager of the family 'vis a vis' the Badegaon shop, and the money was shown not merely in the 'knata' account but also in the daily cash book of the joint family. Where a joint family carries on more than one business or transacts business at more than one shop, the member in actual management of the business or the shop is capable of binding the family in respect of that business or that shop: — 'Piarey Lal v. Mahadeo Prasad', AIR 1952 Oudh 311 at p 313 (A) and —'Ram krishna v. Manikka', AIR 1937 Mad 375 at p 378 (B). There was an implied promise to pay even if the evidence of Saraswatibai that there was an express agreement be rejected. We have, however, no hesitation in holding that there was such an agreement, and Parashram acted not personally but as a manager on behalf of the joint family.

(19) We have held in First Appeal No. 32 of 1943 decided to-day that the joint family continued right upto Parashram's death on 8-10-1938. The family was possessed of vast property from which the deposit was payable.

(20) The only question that remains for decision is whether the claim is within time and it is on this ground that the appeal was mainly fought.

(21) There is evidence to show that in 1925 and thereafter Saraswatibai had to borrow money from one Himmatrao and in 1932 again from one Laxmanrao Joshi. Her application to the Debt Conciliation Board, Exhibit D-8, dated 10-2-1936 shows the extent of her indebtedness as amounting to Rs. 2712-11-0. In her schedule of assets she did not show this deposit. It is argued that there is no explanation why this is so.

(22) It is argued that this was because Saraswatibai had asked her husband for the money on various occasions and he had repudiated her demand and Saraswatibai herself treated this money as lost. The fact that Saraswatibai filed a wrong schedule would not deprive her of her money if it was legally due to her, whatever the penalty for a false verification may be. We are not impressed with the conclusion of the trial Judge that she did not know of this deposit though it is likely that she did not know the exact amount or the extent of the deposits.

(23) The question thus is whether Saraswatibai had made effective demands upon her husband for the return of her money and had lost her claim to it by reason of limitation having run out. If she did not make a demand which would rob her of her limitation, she would be entitled to claim the money, whether or not she mentioned the deposit as her assets in the Debt Conciliation proceedings.

(24) There is no positive evidence of demands. Sharmrao's evidence regarding certain statements of Parashram anent this are not of relevance. Shamrao has no personal knowledge. The case, therefore, hinges entirely on what Saraswatibai has stated in Court.

(25) Before we deal with this aspect of the case it is necessary to find out which Article of the Indian Limitation Act is apposite. According to Shamrao, the case is governed by one of the Arts. 36, 48, 49, 62, and 89 of the Act. According to Saraswatibai, the matter falls within Art. 60 of the Act. Articles 36, 48 and 49 are so clearly inapplicable that they need not be considered.

(26) Article 89, which creates limitation between a principal and his agent would have applied if Parashram retained the money in his own hands as agent of Saraswatibai. That he acted as agent of Saraswatibai in the management of her Shirala estate is probably true. But as agent he put the money to her account in the joint family shop. The agency thereafter did not come into the picture. A different juridical relation bound him and the joint family to Saraswatibai. Article 89 thus has no application to the facts of this case.

(27) Article 62, which is the sheet-anchor of Shamrao's case is to the following effect :

'For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.'

Saraswatibai on the other hand pleads Art. 60, which is to the following effect :

'For money deposited under an agreement that shall be payable on demand, including money of a customer in the hands of his banker so payable.	Three years.	When the demand is made.'

(28) There can be no doubt that the latter Article governs this case. Saraswatibai swears that there was an agreement to this effect. We have no hesitation in accepting her story. This is borne out also by the entries which are of 'amanat khata'. The former Article is not appropriate because that would cease to apply when Parashram having received the money paid it into her 'khata' account. The money ceased to be in the hands of Parashram, and as stated above a fresh juridical relation was established between Saraswatibai on the one hand and the joint family and Parashram on the other. We thus hold that Art. 60 governs this case. See—'Muncherji Bomanji v. Doramb-ji Jehangir', 19 Bom 775 (C).

(29) It remains only to decide whether Saraswatibai made such a demand as would start limitation against her and whether that was three years or more prior to the suit filed on 4-12-1941. In other words, there should be no such demand on or before 4-12-1938.

(30-33) (Their Lordships went through the evidence and concluded :)

(34) Now the law on the subject what is the kind of demand which would start limitation to run under Art. 60, is well settled. It must be an unqualified and effective demand, also in a sense peremptory, for the whole of the amount. A mere request for money would not be such a demand as to start limitation. See — 'Subbiah v. Visalakshi', AIR 1932 Mad 685 (D), and — 'Daw Hnit v. Anamalai Chettyar', AIR 1938 Rang 335 (E).

(35-42) (Their Lordships reviewed the evidence in the light of these observations and concluded :) A demand for the whole amount in a peremptory way was never made. The demand was never more than a request for money, whether from her deposit or from her husband's coffers.

(43) In view of this, we do not see any reason to differ from the conclusion reached by

the learned trial Judge that the claim is not time-barred.

(44) The appeal thus fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1954 NAGPUR 41 (Vol. 41, C. N. 13)

MUDHOLKAR AND SEN JJ.

State Govt., Madhya Pradesh, Appellant v. Maganbhai Dasaibhai, Respondent.

Criminal Appeal No. 23 of 1952, D/- 25-4-52, from order of 1st Class Magistrate, Akola, D/- 6-10-1951.

(a) Factories Act (1948), Ss. 92, 62 and 83 — Liability of occupier for contravention of provisions of Act or Rules — (C. P. and Berar Factories Rules (1949), R. 91).

An occupier will be liable for contravention of any of the provisions of the Act or rules if the responsibility for observing the provisions has not been imposed on some other person. If specific duty is laid on a particular person, the responsibility for the breach will be his. The obligation to maintain the registers is imposed on a manager and not on an occupier. An occupier cannot, therefore, be held liable for the failure of the manager to comply with the requirements of Ss. 62 and 83 and R. 91. The occupier cannot be said to have a guilty mind when he is not charged with the duty of maintaining the registers.

(Paras 11 and 14)

(b) Interpretation of Statutes — Penal Statute — Penal Statutes have to be strictly construed.

(Para 15)

(c) Penal Code (1860), S. 40 — Mens rea.

Unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. (Para 15)

Anno: Penal Code, S. 40 N. 1.

W. B. Pendharkar, Government Pleader, for the State; N. A. Athalye, for Respondent.

CASES REFERRED TO:

(A) ('38) AIR 1938 Nag 406: ILR (1940) Nag 257: 39 Cri LJ 829

(B) ('49) Cri. A. No. 1 of 1949, D/- 23-2-1949 (Nag)

(C) ('51) Cri. A. No. 236 of 1950, D/- 16-4-1951 (Nag)

(D) ('52) Cri. A. No. 268 of 1951, D/- 21-1-1952 (Nag)

JUDGMENT: This is an appeal by the State Government, Madhya Pradesh, against the acquittal of respondent Maganbhai.

(2) The Patel Oil Mills, Akola, is a factory within the meaning of S. 2 (m), Factories Act, 1948, (hereinafter called the Act). The respondent Maganbhai was the occupier of this factory as defined in S. 2 (m). W. J. Thete worked as the Manager at the material time. He died during the pendency of the trial.

(3) Shri A. P. Varkhedkar, Inspector of Factories, Madhya Pradesh, inspected the Patel Oil Mills on 13-9-50. He noticed certain irregularities which he recorded in his inspection report. A complaint against respondent and Thete was filed on 30-10-1950 in the Court of Magistrate, First Class, Akola.

(4) The case of the prosecution was that the transmission machinery was not securely fenced. There was breach of S. 21, punishable under S. 92 of the Act. Workers were allowed to work without proper entries of their names and other particulars being made in the register of adult workers. This constituted a breach of S. 62, punishable under S. 92 of the Act. There was also a failure to maintain the register of leave wages with the prescribed entries duly filled in. There was a contravention of S. 83 read with R. 91 of the Madhya Pradesh Factories Rules, punishable under S. 92 of the Act.

(5) On behalf of the prosecution, A. P. Varkhedkar was examined. The respondent disclaimed responsibility for the breaches, if any. In his defence he examined 6 witnesses.

(6) The trial Court held that there was no contravention of S. 21. The respondent Maganbhai was not liable for any contravention of Ss. 62 and 83 and R. 91. The question of breaches was not decided.

(7) The trial Court was right in holding that there was no breach of the provisions of S. 21. Shamlal (D. W. 1) a Fitter in the Mills, in his evidence stated:

> "I was present at the time when the Inspector of Factories had come for inspection. That time the guards over gears of the expellers were removed because one of the gear wheels had come out and it had to be refixed.
>
> This refixation could not be done unless guards were taken out..... I had refixed the wheel and was taking trial of it without fixing the guard, and just then the Inspector arrived."

It does not appear that he was cross-examined by the prosecution. To the same effect was the evidence of Ishaque (D. W. 2). Their testimony was believed by the trial Court. The finding of the trial Court is as follows:

> "I have found that the two gears A and B parts of the machinery are dangerous parts and needed to be necessarily fenced. Gear C was well secured in spite of there being no guard and that the wooden gate was an appendage and not necessary fencing. I have further found that guards of gears A and B were thrown off in order to carry out repairing and adjustment of the machinery and this act was protected under S. 22."

(8) The learned Additional Government Pleader did not contest the acquittal under S. 92 read with S. 21.

(9) The learned Government Pleader says that the trial Court was wrong in its interpretation of S. 92. According to him, both Manager and Occupier are responsible for contravention of any of the provisions of the Act and the rules. The respondent should have been held liable even though the duty was cast on the Manager to maintain the registers.

(10) We are of opinion that the trial Court was right in holding that the respondent could not be held liable for any contravention of the provisions of Ss. 62 and 63 of the Act and R. 91 by the Manager.

(11) Section 92 is as follows:

> "Save as is otherwise expressly provided in this Act and subject to the provisions of S.

93, if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rule made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both, and if the contravention is continued after conviction with a further fine which may extend to seventy-five rupees for each day on which the contravention is so continued."

An occupier will be liable for contravention of any of the provisions of the Act or rules if the responsibility for observing the provisions has not been imposed on some other person. If specific duty is laid on a particular person, the responsibility for the breach will be his.

(12) Section 62 of the Act enjoins that the manager of every factory shall maintain a register of adult workers showing certain particulars specified therein. There is no reference to an occupier. The breach of S. 62 is punishable under S. 92. As the section does not require the occupier to maintain the register, he cannot be held liable for the failure of the manager to comply with the requirements of that section. The words in S. 92 "Save as is otherwise expressly provided in this Act" clearly absolve the occupier from liability for the contravention of S. 62 by the manager.

(13) Section 83 is as follows:

"The Provincial Government may prescribe the keeping by managers of factories of registers showing such particulars as may be prescribed and requiring such registers to be made available for examination by Inspectors."

This section also speaks of managers and does not refer to an occupier.

(14) Rule 91 is in the following terms:

"Leave with Wages Register: (1) The manager shall keep a register in Form No. 18 hereinafter called the "Leave with Wages Register":

Provided that if the Chief Inspector is of the opinion that any muster-roll or register maintained as part of the routine of the factory or return made by the manager, gives, in respect of any or all of the workers in the factory, the particulars required for the enforcement of Chap. VIII of the Act, he may, by order in writing, direct that such muster-roll or register or return shall, to the corresponding extent, be maintained in place of and be treated as the register or return required under this rule in respect of that factory.

(2) The Leave with Wages Register shall be preserved for a period of three years after the last entry in it, and shall be produced before the Inspector on demand."

The obligation to maintain the register is imposed on a manager and not on an occupier. An occupier cannot be held liable for the failure of the manager to comply with the requirements of S. 83 and R. 91.

(15) There are several sections where there is no reference to a manager or occupier. Section 21 is an instance. In case of contravention of S. 21, S. 92 makes both the occupier and the manager liable. There are some provisions under which the responsibility is cast on the occupier. In such cases a manager cannot be held liable for the contravention. Penal statutes have to be strictly construed. It is a cardinal principle of criminal law that unless the statute, either clearly or by necessary implication, rules out 'mens rea' as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The occupier cannot be said to have a guilty mind when he is not charged with the duty of maintaining the register under Ss. 62 and 83 and R. 91. The decisions in — 'Provincial Govt. C. P. and Berar v. Seth Chapsi Dhanji', AIR 1938 Nag 406 (A); — 'Provincial Govt., C. P. and Berar v. Gajadhar Rudmal', Cri. A. No. 1 of 1949, D/- 23-2-1949 (Nag) (B); — 'State Government, Madhya Pradesh v. Janabai', Cri. A. No. 236 of 1950, D/- 16-4-1951 (Nag) (C); — 'State Government, Madhya Pradesh v. Holkarmal', Cri. Appeal No. 268 of 1951, D/- 2-1-52 (Nag) (D) relied on by the learned Government Pleader are inapplicable to the present case.

(16) In — 'AIR 1938 Nag 406' (A) the prosecution was against the manager and agent under S. 60 (b) (i) read with S. 42, Factories Act, 1934. That case dealt with the question of good faith and 'mens rea'. It was pointed out that it was sufficient in a prosecution under the Factories Act to prove that the accused has infringed the Act or rules under the Act. Section 42 was as follows:

"No adult worker shall be allowed to work otherwise than in accordance with the Notice of Periods for Work for Adults displayed under sub-s. (1) of S. 39 and the entries made beforehand against his name in the Register of Adult Workers maintained under S. 41."

There was no reference to manager or occupier. In the case of contravention S. 60 made both manager and occupier liable. Here the prosecution cannot say that the respondent has infringed Ss. 62 and 83 and R. 91 as no duty was cast by these provisions on him.

(17) In — 'Cri. A. No. 1 of 1949, D/- 23-2-49 (Nag) (B)' the prosecution was for contravention of Ss. 42 and 38, Factories Act and of R. 48 (i), C. P. Factories Rules, 1935, punishable under S. 60. Section 38 did not refer to manager or occupier and was in general terms.

(18) In — 'Cri. A. No. 236 of 1950, D/- 16-4-1951 (Nag) (C)' the prosecution was under Ss. 60 (b) (i), 60 (c) and 60 (g), Factories Act, 1934. In — 'Cri. A. No. 268 of 1951, D/- 21-1-1952 (Nag) (D)' the prosecution was under S. 92 of the Act for contravention of S. 21.

(19) We may also point out that the rule—

"'Mens rea' is not an essential element in an offence under the Factories Act. It is, therefore, sufficient in a prosecution under the Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that the accused intended to infringe the Act or the rules. Good faith is no defence,"

has to be read in the context of the Act of 1934. Section 60 imposed a penalty of fine only. It was, therefore, regarded as a minor offence. Section 92 of the Act, however, imposes a punishment of 3 months' imprisonment or fine.

It cannot be classed as an offence on the same footing under S. 60 of the former Act.

(20) The appeal fails and is dismissed.

B/G.M.J. Appeal dismissed.

A. I. R. 1954 NAGPUR 43 (Vol. 41, C. N. 14)

GRILLE C. J. AND HIDAYATULLAH J.

Co-operative Central Bank Ltd., Malkapur, Appellant v. Mulchand Hirasa Parwar and another, Respondents.

Letters Patent Appeal No. 12 of 1943, D/- 16-9-1947, from appellate decree of Pollock J., D/- 4-8-43 in S. A. No. 344 of 1942.

(a) Berar Land Revenue Code (1928), S. 149(2) — Successor-in-interest of person imposing mortgage is bound by mortgage.

The word 'imposed' must be construed liberally so as to give a logical and rational meaning to S. 149(2). The description of the person, who would be bound by a prior mortgage, includes not only the predecessor-in-interest who actually imposes the encumbrance on the property but also the successors-in-interest. (Para 6)

P mortgaged a field to the plaintiff in 1928 and in 1932 he again mortgaged it to a Co-operative Society which assigned its rights under the mortgage to a Co-operative Central Bank. The Bank obtained an award on the mortgage of 1932 and purchased the field in an auction sale held on 29-6-1939. The sale was subject to the mortgage of the plaintiff. The field was again put up for sale for arrears of land revenue for the years 1938-39 and 1939-40 and was purchased by the Bank. Thereafter the plaintiff brought a suit on his mortgage of 1928 and the question was whether the Bank purchased the field free from the plaintiff's mortgage.

Held that whether the Bank purchased the field 'bona fide' or 'mala fide', it must be deemed to be a person who imposed the encumbrance upon the property and as such S. 149(2) would apply to it. (Para 7)

(b) Interpretation of Statutes — Interpretation should make sense, not non-sense of legislation. (Para 6)

Anno: C. P. C., Preamble N. 7.

M. R. Bobde, V. V. Kelkar and C. P. Kalele, for Appellant; P. K. Tare with K. B. Tare, for Respondents.

CASES REFERRED:

(A) ('16) AIR 1916 PC 227: 44 Cal 573 (PC)
(B) ('43) AIR 1943 Nag 302: 1942 Nag LJ 538
(C) ('39) AIR 1939 PC 86: ILR (1943) Kar 149 (PC)

JUDGMENT: This is a Letters Patent Appeal against the judgment and decree of Pollock J. in second Appeal No. 344 of 1942, decided on 4-8-1943.

(2) The facts of the case are clear and not in dispute. Punjaji (defendant 1) mortgaged with the plaintiff field No. 83/1 in mouza Umali, Pargane and taluq Malkapur, district Buldana, and again in 1932 with the Umali Co-operative Society. The Co-operative Society assigned its rights under the mortgage to the Co-operative Central Bank, Malkapur, on 19-8-1933, and the Bank obtained an award on the mortgage of 1932 and purchased the field in an auction sale held on 29-6-1939. Possession was delivered on 17-9-1939.

This sale was subject to the mortgage of the plaintiff because the Umali Co-operative Society or the Bank only got the right, title and interest of Punjaji. The field was again put up for sale in Revenue Case No. 557/31 of 1939-40 of mouza Umali for arrears of land revenue for the years 1938-39 and 1939-40, and was purchased by the Bank. In the present suit, which was based on the mortgage of 1928, the question was whether the Bank bought the field free from the mortgage of the plaintiff. The trial Court dismissed the suit of the plaintiff, but the first appellate Court and Pollock J. have decreed it, holding the Bank liable under the mortgage of 1928.

(3) It has been held that in point of fact the Bank was not aware of the existence of the mortgage imposed on this property by Punjaji and that throughout the Bank has acted 'bona fide' in the matter. It was argued that the defaulter, according to the report of the Tahsildar, was Punjaji and not the Bank, and that the Courts have no power to go behind the report of the Tahsildar because of S. 140, Berar Land Revenue Code. This point was not decided by Pollock J. and on a careful consideration of the matter we are also of the opinion that it is irrelevant for the present purpose.

(4) The sole question that arises in this appeal is whether under S. 149(2) of the Code the Bank is still liable for the mortgage created by Punjaji in 1928 in favour of the plaintiff. It was argued that S. 149(2) speaks of an encumbrance 'imposed' on the immovable property by any person other than the purchaser. Emphasis was laid upon the word 'imposed' and it was urged that the mortgage was 'imposed' by Punjaji and not the Bank, and, therefore, on interpreting the section according to its wording, it could not be said that the Bank was bound by the encumbrance. Pollock J.'s view is that the word 'imposed' must be given a liberal interpretation, otherwise some startling results will follow. According to the learned Judge the section includes not only the person who imposed the encumbrance in the first instance but any successor-in-interest of that person. It is true that the word 'imposed' is somewhat inartistic inasmuch as it indicates the person who in the first instance takes action to impose an encumbrance upon the immovable property, but we are in respectful agreement with the interpretation placed by Pollock J. for the simple reason that the successor cannot have more rights than his predecessor.

(5) As has been pointed out by Pollock J. if interpretation sought to be placed upon the section by the Bank were accepted, it would mean

> "that a son inheriting a holding from his father could by allowing the holding to be sold for arrears of land revenue purchase it free from any encumbrances."

The same position would also ensue in the case of a transferee from the original mortgagor. It could not have been intended that such absurd and inconsistent results should follow. The Legislature used the word 'imposed' contemplating not only the persons who actually impose the encumbrance but also such persons who come thereafter in possession of

Bajya', AIR 1941 Nag 177 (B) an isolated act of lending money cannot constitute a business of money-lending within the meaning of the Act. The question then is if the condition of registration was imposed for merely administrative purposes.

(6) The English law on the point is the same. In —'Smith v. Mawhood', (1846) 15 LJ Ex 149 (C), Parke, B. observed at page 154:

"....., I think the object of the legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the act of parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue. But, looking at the Act of Parliament, I think its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue. The plaintiffs, therefore, would be entitled to recover upon their contract, according to the principle laid down in — 'Johnson v. Hudson', (1809) 11 East 180 (D).

The third plea is not bad in form, because it alleges that the plaintiffs are dealers in and manufacturers of tobacco: but it is bad upon the other ground, that the legislature did not intend to vitiate the contract by reason of a non-compliance with the requisites of the 26th section, but only to render the party carrying on trade upon such premises liable to a penalty. I quite agree, that if it be shewn that the legislature intended to prohibit any contract, then whether this were for the purpose of revenue or not, the contract is illegal and void, and no right of action can arise out of it."

In the same case Alderson, B., observed at page 155:

"The question is, does the legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, etc. painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. x x x x
It seems to me, therefore, that there is nothing in the act of parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites."

What has been laid down in — 'Smith v. Mawhood', (C) (supra) was approved of in — 'Taylor v. The Crowland Gas and Coke Co.', (1854) 156 ER 455 (E) wherein Parke, B., observed at page 456:

"The true principle is laid down in — 'Cope v. Rowlands', (1836) 2 M & W 149 (F) and — '(1846) 14 M & W 452 (C): and the question in all these cases is, whether, looking at the statute, the object of the Legislature in imposing a penalty was to prohibit the particular act, or whether it was for a different purpose."

Alderson B., added at page 457—

"The question is very plain. The principle being admitted, what we have to consider is this, does the statute prohibit the act being done by an unqualified person, or does it merely require that every person who does it shall pay for a certificate? I think the former. The statute after having declared that every person, except a particular class, who shall do the act without a certificate, shall be subject to a penalty, goes on to provide that nothing therein contained shall prevent any person from doing another particular act. If that act would not have been prevented except for the proviso, then its words have no meaning."

It was held in that case that the prohibition being against unqualified persons acting as conveyancers was in the interest of general public and that the plaintiff who was not licensed could not recover remuneration for the work done by him.

(7) Under the Act any person who declares that he is carrying on or intends to carry on the business of money-lending can obtain a certificate without any enquiry. The registering Officer has not to decide whether the applicant is a fit person to carry on the business. It is a matter of supreme indifference to him whether the person applying is financially sound or is otherwise a desirable money-lender. 'Smith v. Mawhood', (C) was a case of an enactment which granted licence to any person applying for it, while — 'Taylor v. The Crowland Gas and Coke Co.', (E) was a case of an enactment under which the applicant had to possess certain qualifications before he could get a certificate.

(8) The Act which was passed in the year 1934 and came into force on 1-4-1935 did not contain the provisions regarding registration of money-lenders now found in Ss. 11-A to 11-J. The provisions of the Act as they existed in 1935 left the part of loan transaction concerning the principal untouched and deprived the money-lender only of the interest and costs when certain conditions were not fulfilled. Their object as will appear from the preamble was to make better provision for the regulation and control of the transactions of money-lending. There was nothing in the preamble or in the provisions to suggest that the money-lending transaction was prohibited under any circumstances. It was by the C. P. and Berar Money-lenders (Amendment) Act, 1940 (Act XIV of 1940) that Ss. 11-A to 11-J were inserted, and it is significant that no change was made in the preamble at that time. As observed by Crawford in his Statutory Construction at page 124, S. 88, the preamble of a statute is an excellent aid to the construction of ambiguous statutes or statutes of doubtful meaning. It is a key to the construction of a statute and should be resorted to to unlock the minds of its makers. It can, therefore, be safely inferred from the fact that the preamble was kept unaltered that in inserting Ss. 11-A to 11-J the legislature did not want to go beyond what was intended when the Act was passed in 1935.

(9) The learned counsel for the applicant, however, says that the preamble itself shows that the condition of registration is imposed for the protection of the persons dealing with those on whom the condition is imposed. In

this connection we have to take into consideration the fact that the condition of registration was introduced in the year 1940 when all the other provisions of regulation and control of the transactions of money-lending were already there. So far as the debtor is concerned, this condition of regulation made very little change, and we are of the opinion that this condition was imposed for merely administrative purposes. We find strong support for this view in S. 11-C and its amendment in 1949. The section as it stood in 1940 prescribed a registration fee of Rs. 18/- for four years in respect of each district. In 1949 that fee was raised to Rs. 12/- per annum in respect of each district. This shows that the condition of registration and the penalty for its contravention were imposed for collection of revenue.

(10) The learned counsel for the applicant then relied on the House of Lords decision in — 'Cornelius v. Phillips', (1918) AC 199 (G) which was a case under the English Money-lenders Act. The question which had arisen in that case was the same as the question in this case, namely whether the transaction was void or it only exposed the money-lender to liability for criminal proceedings without rendering the transaction void. It was decided in that case that the transaction amounted to a carrying on of his business by the money-lender at an address other than his registered address in contravention of S. 2, sub-s. 1(b), Money-lenders Act, 1900 and that the effect of the Act was to avoid the transaction. A comparison of the English Money-lenders Act, 1900 and the C. P. and Berar Money-lenders Act, 1934 will clearly show that the two differ on several important points. The definition of "money-lender" in the two Acts is not the same. The former contains provisions regarding "registered name" and "registered address" which are not to be found in the latter. Section 2 (1) (c) of the former expressly prohibits individual agreements which is not the case with the latter. So the cases decided under the English Money-lenders Act cannot be of much help in deciding cases under the Central Provinces and Berar Money-lenders Act. We may here quote the warning given by their Lordships of the Privy Council in — 'Lasa Din v. Mt. Gulab Kunwar', AIR 1932 PC 207 (H):

> "It is they think, always dangerous to apply English decisions to the construction of an Indian Act."

We, therefore, do not propose to discuss the other cases under the English Money-lenders Act cited by the learned counsel for the applicant.

(11) There is another provision regarding registration, namely S. 11-B which also strengthens the view that the Central Provinces and Berar Money-lenders Act does not prohibit individual transactions. It provides that every person who carries on or intends to carry on the business of money-lending shall get himself registered. The operation of this amendment was not postponed to enable the money-lenders to obtain valid registration certificates. So we cannot accept the interpretation of the learned counsel for the applicant that the word "carries" in S. 11-B refers only to the date on which the amendment came into force and that every transaction made by a money-lender thereafter without first obtaining a certificate to that effect is invalid. For that purpose we shall have to modify the provision by substituting the words "is carrying on on the date the amendment comes into force" for the word "carries".

This modification is not permissible unless the language in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience, or absurdity, hardship or injustice, presumably not intended. (Maxwell on Interpretation of Statutes, Edn. 9, page 236, Chap. IX, S. I). This special statute which trenches on the contractual rights must be construed strictly against those who seek to avail of it. There are no reasons to suppose that the Legislature intended that every transaction of money-lending made after the amendment came into force till the lender was able to obtain a registration certificate was invalid and unenforceable thereby enriching the debtor at the cost of the creditor without any fault of the latter. The learned counsel has not brought to our notice any compelling reasons to accept his construction which manifestly leads to injustice to the money-lenders.

(12) Under S. 69, Indian Partnership Act a suit by or on behalf of a firm is not maintainable in certain cases unless the firm is registered. The Act provided that this provision would come into force a year after the Act came into force, evidently to enable the firms to get themselves registered and even then the point of time when a firm must be a registered firm is the date of the institution of the suit and not the date of the transaction or the date when the provision came into force. Section 214, Indian Succession Act provides that no Court shall pass a decree against a debtor of a deceased person except on production of a succession certificate etc. Production of such a certificate is, therefore, not necessary for the valid institution of a suit but necessary for the passing of a decree. A somewhat similar provision has been made in S. 11-H of the Act which provides that no suit for the recovery of a loan advanced by a money-lender shall proceed in a civil Court until the Court is satisfied that he holds a valid registration certificate etc. It thus does not authorise the Court to straightway dismiss a suit if a valid registration certificate is not produced. What is to be done in those circumstances is given in — 'Laxman v. Yogaji', Civil Revn. No. 770 of 1941, D/- 2-12-1942 (Nag) (I) wherein it has been held that S. 11-H affects the procedural law and not the substantive law and that the provision applies even to suits to recover loans made before the passing of the Act. It says that the suit cannot be dismissed but can only be stayed to enable the money lender to get himself registered and to produce the registration certificate, and it can be dismissed only if the money-lender is recalcitrant and does not produce the certificate within the reasonable time allowed by the Court. The High Court granted time to the plaintiff in that case to get himself registered and to produce the certificate.

(13) The following observations in the Statutory Construction by Crawford at page 524 apply to the present case:

> "Each statute must be judged by itself as a whole, regard being had, not only to its

language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract viod in order to accomplish the purpose of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract."

(14) It will be clear from all this discussion that S. 11-F applies to the business of money-lending and not to an individual transaction of lending money and that the condition is attached and the penalty is imposed for the convenience of collection of the revenue, and the legislature did not declare an individual transaction of money-lending made by the money-lender who had not obtained a registration certificate invalid. It is not necessary for the validity of the contract of loan that the money-lender must be registered on the date of the transaction. He, however, cannot obtain a decree on his loan unless he possesses a valid registration certificate on the date on which the decree is to be passed. Though the transactions of money-lending are not affected for want of a registration certificate, a money-lender is exposed to the penalty provided by S. 11-F of the Act for carrying on the business without a valid registration certificate. We may cite — 'Shamshir Ali v. Ratnaji', AIR 1952 Hyd 58 (FB) (J).

(15) The application for revision, therefore, fails and is dismissed with costs. Counsel's fee Rs. 50/- if certified.

B/K.S.B. Revision dismissed.

A. I. R. 1954 NAGPUR 48 (Vol. 41, C. N. 16)

SINHA C. J.

Ram Narayan and another, Applicants v. Ramprasad Nathmal and another, Non-Applicants.

Civil Revn. No. 939 of 1951, D/- 10-12-1952, against order of Civil 2nd Class J., Durg, D/- 14-11-1951.

(a) **Court-fees Act (1870), S. 7(iv)(f) — Suit for accounts — Valuation — Plaintiff intending to obtain decree for Rs. 11,675/- — They cannot value plaint at Rs. 100/-.**

Under S. 7(iv)(f) in a suit for accounts, the plaintiff has to state the amount at which he values the reliefs sought and court-fee has to be paid on that amount. But that does not mean that it is open to a plaintiff deliberately so to under-estimate his claim as to deprive the defendant of his valuable right of appeal to the High Court. In that sense, it is not only a matter of court-fees but it becomes a question of jurisdiction also. Where the plaintiffs really intended to obtain a decree for Rs. 11,675/-, they should value their claim approximating that sum. But the plaintiffs cannot say that the approximate amount of their claim is Rs. 100/-, and value their plaint accordingly and pay court-fee thereon. This amounts to the abuse of the process of the Court. (Para 5)

Anno: Court-fees Act, S. 7(iv)(f) N. 1; S. 7 (iv)(c) N. 21, 22.

(b) Civil P. C. (1908), S. 115 — Question of limitation

Court below going wrong in deciding question of limitation — No interference in revision. (Para 7)

Anno: Civil P. C., S. 115 N. 13.

†(c) Civil P. C. (1908), O. 9, R. 13 — Sufficient cause.

Suit for accounts — Though plaintiff entitled to put his own valuation, he deliberately grossly undervaluing plaint and accordingly paying court-fee thereon — Defendant misled in thinking that the suit was for amount near about to that put on plaint and being a man of business not defending suit thinking that he would rather pay the claim than undergo the botheration of litigation — Ex parte decree passed — Decree actually passed for much larger sum (more than 100 times the valuation put on plaint) — Held that there was sufficient cause to set aside ex parte decree. (Paras 6, 8)

Anno: Civil P. C., O. 9, R. 13 N. 23.

R. G. Siras with D. T. Mangalmurti, for Applicants; T. P. Naik and D. V. Bhalerao, for Non-Applicant 1.

ORDER: This is an application in revision against an order, dated 14-11-1951, passed by Civil Judge, Class-II, Durg, setting aside the 'ex parte' preliminary and final decrees in a suit for accounts.

(2) The facts leading up to this application may shortly be stated as follows.

On 5-8-1949 the petitioners instituted a suit for accounts against the non-applicants. Summonses appear to have been served on 14-9-1949 and the case was fixed for hearing on the 14th October the same year. 'Ex parte' proceedings continued until 15-3-1950. A preliminary decree for accounts was passed and a commissioner appointed to look into the accounts. After the commissioner had duly reported, a final decree was passed on 21-6-1950. It was not till 10-3-1951, when the decree was sought to be executed, that the application for setting aside the 'ex parte' decree was made.

The application was made on the ground that the applicant (non-applicant 1 in this Court) fell ill towards the end of July 1949 and having lost all hopes of his life, was moving about from place to place in search of medical aid. During his movements from place to place, the plaintiffs, he further alleged, obtained a decree for Rs. 11,675/- plus Rs. 1,165/- odd by way of costs, although they had valued the suit only at Rs. 100/-. He also alleged that on receipt of the summons in the suit he had sent a telegram to the Court about his serious illness, but on account of his wanderings due to ill health he could not appear in Court to look after the defence of the suit.

He alleged that he came to know of the decree on 5-3-1951 and then hurried up to make this application. He also made a grievance that neither the commissioner nor the Court, during the proceedings for making the decree final, served any notice upon him either to produce his account books or to show cause why a decree for such a large sum of money should not be passed against him.

(3) After evidence had been gone into, the Court below ordered that both the preliminary and the final decrees be set aside and the suit be re-heard. An order for costs of Rs. 100/- had been passed against the applicant in the Court below by way of compensatory costs to the plaintiffs.

(4) It has been found by the Court below that the non-applicant (applicant in the Court below)

had been duly served with the summons in the suit and that he had sent a telegram to the Court praying for adjournment on the ground of his illness. The applicant did not care to defend the suit because, according to the summons, the claim was only for Rs. 100/- and a copy of the plaint had not been served on him. He did not care to defend the claim for Rs. 100/- but later he came to know that a decree for Rs. 11,675/- odd had been passed and then he realised the seriousness of the situation.

The Court below further found that three qualified doctors had been examined in support of his case that he had been suffering from functional defect of heart, enlargement of liver, malarial pain in the liver area, jaundice, anaemia etc., on account of which he had been advised to stay on sea side. According to that advice, he lived in Puri for about seven months; but the Court found that if the defendant was cognizant of the fact that there was anything like a claim of Rs. 11,675/- odd, he would have taken steps to defend the claim, but he was negligent in doing so on the assumption that the claim was only for Rs. 100/-.

The Court below has further found that the plaintiffs deliberately undervalued their claim in the plaint by estimating their claim at Rs. 100/-, when they knew fully well that their dues would amount to more than Rs. 11,000/-. From that fact the Court below has inferred that the plaintiffs were playing a fraud on the Court and on the defendants. As fraud is a matter wholly unconnected with an application under R. 13 of O. 9, Civil P. C., it is no more necessary to say anything about that; but one cannot help saying that for some reason or other the plaintiffs were interested in deliberately understating their claim so as to have their suit tried by a Court which was not legally competent to try it, if they believed that they had really a claim for an amount in excess of Rs. 11,000/-.

(5) It has been argued on behalf of the petitioners that it is open to a plaintiff to put any valuation he liked on a plaint and then pay court-fee on the amount actually found due in accordance with the provisions of the Court-fees Act.

It is true that under S. 7 (iv) (f) in a suit for accounts, the plaintiff has to state the amount at which he values the reliefs sought and court-fee has to be paid on that amount. But that does not mean that it is open to a plaintiff deliberately so to under-estimate his claim as to deprive the defendant of his valuable right of appeal to the High Court. In that sense, it is not only a matter of court-fees but it becomes a question of jurisdiction also. If the plaintiffs really intended to obtain a decree for Rs. 11,675/-, they should have valued their claim approximating that sum. It may not necessarily have been Rs. 11,000/-, but certainly the plaintiffs could not say that the approximate amount of their claim was Rs. 100/-, which is the valuation they actually put on the plaint and paid court-fee thereon.

I have noticed a tendency amongst litigants in these parts to put a nominal valuation on plaints for accounts and to take undue advantage of the provision of law which enables the plaintiff to pay court-fee on a much larger sum after he has been assured that he is to have a decree for that amount. This in many cases, as in the instant case, amounts to an abuse of the process of the Court.

(6) When the defendant received the summons in this case, which apparently said that the claim was laid at Rs. 100/-, he being a man of business would rather pay Rs. 100/- than undergo the botheration of litigation which would naturally involve him in much larger expenses, little knowing that it was a thin end of the wedge as it has proved to be in the instant case.

(7) It has been vehemently argued in this case —and not without justification—that the Court below has misdirected itself on the question of limitation and on the dilatory and negligent conduct of the defendant. Fortunately, this case comes before me not in appeal but in the revisional jurisdiction of this Court; and I am not bound to interfere even though the Court below might have gone wrong in deciding the question of the limitation. In this case I find that the Court below— it may be for wrong reasons – has come to the right conclusion, namely, that the defendant was misled into thinking that the claim against him was only for Rs. 100/- and that he could well afford to pay that amount without thinking any more about it. But on facing a decree for Rs. 11,675/- plus costs amounting to Rs. 1,165/-, he had to move in the matter and therefore he sought protection of the Court.

(8) I do not stop to consider whether it was incumbent on the commissioner, who continued the proceedings after the passing of the preliminary decree, to serve a notice on the defendant to produce his account books or whether it was necessary for the Court to serve a notice on the defendant to show cause why a final decree for Rs. 11,675/- should not be passed against him. In my opinion, the Court below was perfectly justified in taking the view that the plaintiffs stole a march over the defendant, and that the defendant by his negligent conduct allowed himself to be landed into that unfortunate position.

(9) Now that the 'ex parte' decree stands vacated, the case has to be heard afresh. If the plaintiffs insist on their claim of Rs. 11,000/- and odd, they must amend their plaint accordingly and then the case will have to be tried by a Court of competent jurisdiction. The plaint will have to be returned for presentation to the proper Court.

(10) The Court below has passed a decree for costs amounting to Rs. 100/- to be paid to the plaintiffs. In my opinion, that is an under-estimate of the costs the plaintiffs must have incurred in these proceedings. Though the plaintiffs have not been free from blame, still they are entitled to be compensated for the amount of costs thrown away by them as a result of these proceedings. The Court below should have called upon the defendant to pay Rs. 300/- to the plaintiffs in order to compensate them for the costs thrown away by them.

I would therefore, while maintaining the order of the Court below for reasons already indicated, modify that order by substituting the sum of Rs. 300/- for the sum of Rs. 100/- by way of compensatory costs to the plaintiffs, who are the petitioners in this Court. With this modification in the amount of costs, the application is dismissed. There will be no order as to costs in this Court.

B/R.G.D. Order accordingly.

A.I.R. 1954 NAGPUR 49 (Vol. 41, C. N. 17)

SEN AND DEO JJ.

Kapurchand Garidbas, Plaintiff-Appellant v. State Govt. Madhya Pradesh and another, Defendants-Respondents.

Second Appeal No. 71 of 1951, D/- 2-4-1953, against decree of Addl. Dist. J., Seoni, D/-27-12-1950.

(a) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 23(1) Proviso — Notice of enquiry.

After the intimation of vacancy under Cl. 22 is received, the notice of enquiry must be given to the landlord and he must be afforded an opportunity of being heard before an order of fresh allotment is made. (Paras 4-5)

(b) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cls. 22 and 23 — Sufficient compliance.

Intimations under Cls. 22 and 23 must be so interpreted as to make them effective and not to make them nugatory. They are not to be construed with a view to find fault with them unless the mistakes or inaccuracies are deliberately inserted for fraudulent purposes.

Held on facts of the case that there was sufficient compliance with cl. 22 read with the proviso to cl. 23. (Para 6)

(c) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cls. 24 and 22 — Scope of.

Clause 24 cannot be invoked unless an intimation of vacancy is not received as provided by Cl. 22. (Para 7)

(d) Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946), S. 10(2) — Scope.

Section 10(2) gives protection to the State for anything in good faith done or intended to be done in pursuance of the Act or any Orders made thereunder. But where the Sub-Divisional Officer did not act in good faith and in pursuance of the Act or any Order made thereunder, on the contrary his actions were opposed to the provisions of the Order, the State is liable for the costs of the plaintiff. (Para 9)

K. G. Chendke, for Appellant; A. L. Halve, for Respondents.

CASES REFERRED TO:

(A) ('51) AIR 1951 Nag 22: ILR (1951) Nag 228 (Pr 5)
(B) ('18) AIR 1918 PC 102: 46 Cal 458 (PC) (Pr 6)
(C) ('48) 1948 Nag LJ Note 62 (Pr 8)
(D) ('51) 1951 Nag LJ Note 92 (Pr 8)
(E) ('42) AIR 1942 Nag LJ 25 (Pr 8)
(F) ('52) S. A. No. 661 of 1949, D/- 24-1-1952 (Nag) (Pr 8)
(G) ('40) Civil Revn. No. 170 of 1940, D/-19-11-1940 (Nag) (Pr 8)
(H) ('27) AIR 1927 PC 176: 51 Bom 725 (PC) (Pr 8)

JUDGMENT: This is plaintiff's appeal in a suit for possession and damages at Rs. 12/- per month from 31-8-1949 to 30-11-1949.

(2) The facts are: On 19-3-1949 the plaintiff's house No. 141/2 was allotted by the Sub-Divisional Officer, Seoni, to Shri S. R. Dube, under cl. 5, C. P. and Berar Collecting of Information and Letting of Houses Order, 1946, vide Ex. D-4. On 2-8-1949 the Sub-Divisional Officer allotted another house to Shri Dube. That order is Ex. D-5. On 5-8-1949 Shri Dube vacated the house. Earlier on the same day the plaintiff submitted a stamped application (Ex. D-1) intimating that Shri Dube was vacating the house and that he did not want to let it out as he needed it for shop purposes. Without making any enquiry and without hearing the plaintiff as required by the proviso to cl. 23(1), C. P. and Berar House Rent Control Order, 1949, which was published in the Gazette on 29-7-1949, the Sub-Divisional Officer endorsed on the application:

"Not to be vacated.

Sd/-E.V.R.

5/8"

On 16-8-1949 he allotted this house under cl. 24 of the said Order to defendant 3 Chakravarti. This order (Ex. P-1) was served on the plaintiff on 20-8-1949. On the same day the plaintiff protested against the allotment and intimated that he needed the house for his own use. This intimation bears the following endorsement of the Sub-Divisional Officer:

"Already allotted. Rejected.

Sd/- E.V. Reinboth,
S. D. O.
20-8-1949."

Under colour of this order (Ex. P-1) defendant 3 took possession on 31-8-1949. After serving the State with a notice of suit under S. 80, Civil P. C., the plaintiff has brought this suit for ejectment and damages against the defendant Chakravarti and the State. The Sub-Divisional Officer was made defendant 2 but was discharged by the Court by the order dated 11-4-1950. Plaintiff did not get this order revised and did not urge in the first appeal or here that he was a necessary party.

(3) Defendant 3 pleaded that he took possession under the order Ex. P-1 and was therefore not liable to be ejected. On behalf of the State it was pleaded that the house did not become vacant on 5-8-1949, that the Sub-Divisional Officer could not take action under S. 23(1) within the prescribed time on the intimation Ex. D-1 as it was not in the form prescribed, that the order of allotment was valid, and that the State is not liable for the claim because the acts of defendant 2 were done in good faith and intended to be done in accordance with law. This written statement was signed by the same Sub-Divisional Officer who had allotted the house in suit. He pleaded that he had taken action in good faith and in accordance with law.

(4-5) The contention that the house did not become vacant on 5-8-1949 is clearly frivolous. Shri Dube had vacated the house and occupied another house on 5-8-1949. We asked the learned counsel for the State to explain the meaning of the endorsement by the Sub-Divisional Officer made on Ex. D-1; but he was not able to give any satisfactory explanation. It has got no other meaning, according to us, than that the house was not to be vacated by Shri Dube and consequently the application need not be considered. This attitude was clearly not 'bona fide' in view of the allotment order in favour of Shri Dube passed two days earlier. The Sub-Divisional Officer has not even cared to make any enquiry, much less "due enquiry" as enjoined by the proviso to cl. 23(1). The disposal of the application Ex. D-1 can hardly be said to be done in good faith. If the house had not become vacant, the Sub-Divisional Officer had no jurisdiction to allot it to defendant 3 Chakravarti on 16-8-1949 and the latter took possession under an illegal order. It is evident that the Sub-Divisional Officer had made up his mind not to examine the contention of the plaintiff though he was bound so to do under law. An order of allotment cannot be made unless the Deputy Commissioner is satisfied after "due enquiry" that the house is not needed by the landlord for his own occupation. As stated

in — 'Shankerlal v. Addl. Deputy Commr.', AIR 1951 Nag 22 (A), to which one of us was a party:

"the expression 'due enquiry' postulates at least a proper consideration of whatever evidence the landlord desires to offer in support of his statement that he needs the premises for his own occupation. The landlord cannot submit the considerations which in his view are relevant to the matter under enquiry unless he has notice that the Deputy Commissioner is proceeding with the enquiry."

It is thus apparent that notice of enquiry must be given to the landlord and he must be afforded an opportunity of being heard.

(6) It is, however, contended that the Sub-Divisional Officer was not bound to make an enquiry as the intimation Ex. D-1 was not in accordance with cl. 22(1) which provides that the intimation should be given in the form prescribed in the schedule. The information is required to be given under 13 different heads. Exhibit D-1 gives information under heads 1 to 5 and 11. No. 12 is optional. Nos. 6 to 10 refer to the particulars of the accommodation and amenities. The head 13 refers to the amount of rent last paid. Clause 22 requires the landlord to give an intimation within 7 days from the date on which he becomes finally aware that the house will be vacant or available for occupation by himself or for other occupation on or about the specified date. The intimation of this fact is to be given in the form prescribed in the schedule aforesaid. The clause prohibits the landlord from letting or occupying the house except in accordance with clause 23. The intimation to be given is of the fact that the house would be available for occupation by the landlord or for other occupation. In the first case the Sub-Divisional Officer has no jurisdiction to allot the house unless he is satisfied "after due enquiry" that the landlord does not need it. The landlord had given intimation of the fact that he required the house for his own occupation. The information supplied by him was quite adequate to decide this question. If it was in any way inadequate, the Sub-Divisional Officer is required by the proviso to cl. 23 to require the landlord to substantiate his case. Therefore, the intimation given by the landlord was adequate for the purpose. It was not necessary for him to state the rent because he did not want to let it out. The information under heads 6 to 10 and 13 is necessary for a prospective tenant to determine whether he will apply for its allotment without inspecting the premises and to enable the Sub-Divisional Officer to determine whether an allotment should be made to him. In the instant case not only that the house was not to be let out, but that the Sub-Divisional Officer fully knew of the accommodation of the house. As stated by their Lordships of the Privy Council in — 'Harihar Banerji v. Ramsashi Roy', AIR 1918 PC 102 (B), these notices are not to be construed with a view to find fault with them unless the mistakes or inaccuracies are deliberately inserted for fraudulent purposes. This is not the case here. It is a fundamental rule of construction that a document must be so interpreted as to make it effective and not to make it nugatory. We are, therefore, of the view that there was sufficient compliance with cl. 22 read with the proviso to cl. 23.

(7) It will be noticed that the Sub-Divisional Officer purported to act under cl. 24 in passing the order of allotment in favour of defendant 3. That clause cannot be invoked unless an intimation of vacancy is not received as provided by cl. 22. In our view the Sub-Divisional Officer could not act under cl. 24. His action is illegal.

(8) It now remains to notice the several decisions relied on by the learned counsel for the respondents. — 'Wasudeo v. Sadashiv', 1948 Nag LJ Note 62 (C), — 'Bhakryadas v. Upasyadas', 1951 Nag LJ Note 92 (D), and — 'Gulabrao v. Mst. Basantibai', 1942 Nag LJ 25 (E), are cases under the Money-lenders Act which provides for maintenance of accounts and sending of statements of accounts to the debtors in a particular way and provides for a penalty for breach. In — 'Lokman v. Mt. Mustafa Jan', S. A. No. 661 of 1949 D/- 24-1-1952 (Nag) (F), it was held that a notice not expiring with the month of the tenancy is not a valid notice determining the tenancy under S. 111(h) read with S. 106, T. P. Act. — 'Kesharichandsa v. Bapusa', Civil Revn. No. 170 of 1940, D/- 19-11-1940 (Nag) (G), is not even remotely relevant. In — 'Bhagchand v. Secy. of State', AIR 1927 PC 176 (H), it was held that the contention that a suit for injunction against officials for acts purporting to have been done by them in the discharge of official duties can be brought before the expiry of two months' time was not correct, and that the section applies to all kinds of suits.

(9) It is next contended that the State is not liable in damages and was not a necessary party to the suit in view of S. 10(2), C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946). Damages are claimed not against the State but against defendant 3 for use and occupation by him. The State was joined as defendant on the ground that possession was delivered to defendant 3 by one of its officers in his executive capacity. The State did not rest with raising the plea under S. 10(2) but tried to support the actions of the Sub-Divisional Officer and denied the claim. The section gives protection to the State for anything in good faith done or intended to be done in pursuance of this Act or any orders made thereunder. As already stated, the Sub-Divisional Officer did not act in good faith and in pursuance of the Act or any order made thereunder. On the contrary his actions were opposed to the provisions of the Order above referred to. Under these circumstances the State is liable for the costs of the plaintiff.

(10) The appeal therefore succeeds and is allowed with costs. Counsel's fee Rs. 75/-. Plaintiff's suit for possession of the suit house is decreed. Defendant 2 Shri Chakravarti shall pay Rs. 36/- as damages till the date of the suit. An enquiry into subsequent mesne profits is directed under O. 20, R. 12(1)(c), Civil P. C. Defendant 2 will bear his costs throughout. Defendant 1 will pay plaintiff's costs in the three Courts and bear its own. The deficit court-fees paid in the three Courts shall be included in the plaintiff's costs. A decree be drawn up accordingly.

B/H.G.P. Order accordingly.

A.I.R. 1954 NAGPUR 51 (Vol. 41, C. N. 18)

MUDHOLKAR J.

Zahoor Ahmad Beg, Defendant-Appellant v. Mst. Tahrabi, Plaintiff-Respondent.

Second Appeals Nos. 658 and 659 of 1946. D/- 16-4-1953, from appellate decree of 2nd Addl. Dist. J., Jabalpur, D/- 27-3-1946.

(a) Civil P. C. (1908), S. 20 — Suits for divorce.

Though a Court in India would be a foreign Court in relation to persons who

have migrated to Pakistan yet where the parties to suits for divorce were domiciled in India at the commencement of the suit the Court would have jurisdiction to decide the suit. (Para 9)

Anno: C. P. C., S. 20 N. 27.

(b) Civil P. C. (1908), S. 20 — Suit for restitution of conjugal rights.

In suits for restitution of conjugal rights what is material for giving jurisdiction to the Court is the residence of the parties within the jurisdiction of the Court at the time of institution of the suit. Where they were resident then, a decree passed by the Court would be binding on the parties and can be executed against them outside the jurisdiction of that Court or even outside the country. (Para 10)

Anno: C. P. C., S. 20 N. 26.

M. Y. Shareef, for Appellant; A. Razak, for Respondent.

CASES REFERRED TO:

(A) (1927) 1927 AC 641: 96 LJ PC 105 (Pr 9)
(B) (1895) 1895 AC 517: 64 LJ PC 97 (Pr 9)

JUDGMENT: This judgment will also govern the decision of Second Appeal No. 659 of 1946.

(2) Zahoor Ahmad, the appellant in both these appeals, is the husband of the respondent Mst. Tahrabi. The parties were married on 23-5-1938. After the marriage the wife went to live in her husband's house and stayed there till December 1938, though during this period she used to visit her father's house occasionally. On 28-5-1938 she executed in her husband's favour a deed of relinquishment of her dower. It is alleged by her that this deed was obtained from her by force by the husband and that he had actually pointed a loaded gun at her in order to secure her signature on the deed. It is also alleged that during the time the two lived together, the husband treated the wife with cruelty and even caned her. It is also said that the husband's family was dissatisfied with the looks of the wife and her capacity to do household work. A good deal of correspondence passed during this period between the husband and the girl's father Wahiduddin. The girl returned to her father's house about the middle of December 1933. On 21-12-1933 she lodged a complaint with the Police to the effect that she was made to execute the deed of relinquishment by force. At this stage, friends and well-wishers of the families of the parties intervened and the matter was compromised on 5-1-1939. Under that compromise, Zahoor Ahmad destroyed the deed of relinquishment executed in his favour by Mst. Tahrabi and solemnly undertook to live with her and treat her with love and affection. Wahiduddin on his part executed an agreement under which he agreed to destroy all the letters which were received by him from Zahoor and promised to send back Mst. Tahrabi to Zahoor's house the moment she was sent for by the latter.

(3) According to Mst. Tahrabi, despite the compromise, her husband did not take her to his house or maintain her and that she was therefore compelled to institute proceedings against him under S. 488, Criminal P. C. and secure an order for maintenance from the Court. Further, according to her Zahoor declined to return to her the ornaments which were given to her by her father as dowry and that she was forced to sue him for the price of those articles. She states that she obtained a decree against Zahoor for Rs. 719/14/-. According to her, she was living with her father right from 5-1-1939 to the date of suit and she feels that there is no chance of her husband ever treating her with consideration or in accordance with the injunctions of the Quoran. On these grounds she sought dissolution of her marriage with Zahoor. She has also stated as follows in para. 4 of her plaint:

> "The cause of action accrued in December 1938 and subsequently on every other occasion when plaintiff's life was made miserable by cruelty of conduct on the part of the defendant and in the year 1939 when the defendant refused to return the plaintiff's articles at Jabalpur within the jurisdiction of this Court."

On the basis of this pleading it was argued in the Courts below that Mst. Tahrabi was entitled to obtain a divorce on the ground of her husband's cruelty.

(4) Zahoor denied cruelty or his unwillingness to maintain Mst. Tahrabi. According to him, after the compromise she actually went to live with him at Jabalpur and then she accompanied him to Banda where he was posted as a Sub-Inspector of police. He says that she actually lived with him for about two months and then, while he was on tour, she of her own accord left his house and returned to her father's house at Jabalpur. It may be mentioned that after Mst. Tahrabi secured an order for maintenance in her favour, Zahoor married a second time and that this woman is still living with him as his wife. As a counter-blast to the suit for divorce, Zahoor brought a suit for restitution of conjugal rights against Mst. Tahrabi. To this suit he joined Wahiduddin as a defendant.

(5) The trial Court dismissed the suit for divorce but decreed the suit brought by Zahoor for restitution of conjugal rights. The lower appellate Court reversed the decision of the trial Court in both the suits and granted a divorce to Tahrabi. Zahoor has therefore come to this Court in appeal against both the decisions of the lower appellate Court.

(6) In September 1948, Zahoor admittedly migrated to Pakistan and he is still living there. It was stated before me by Shri Shareef that a few days before he left for Pakistan, Tahrabi left her father's house and joined him in his house at Jabalpur and actually went to Pakistan along with him. According to him, the two are living together as a man and wife ever since.

(7) Shri Razak who had put in appearance on behalf of Tahrabi in this Court tried his best to obtain instructions on the point but was unable to do so, though he did state before me at one stage that he had heard that the girl had gone and joined her husband in Pakistan. It was then suggested by me that the matter should be settled and that both the parties should withdraw their respective suits. Shri Razak then tried to get into touch with his client Tahrabi, but without success. Ultimately he sought the permission of the Court to withdraw from both the appeals, and he has been accorded permission to do so.

(8) When it was brought to my notice that both the parties had migrated to Pakistan, I felt some doubt as to the power of this Court to grant restitution of conjugal rights or to affirm the decree for divorce. I therefore requested counsel to address me on the question of the competence of this Court to decide these two matters. Both Shri Shareef as well as Shri Razak addressed arguments on this point and both were agreed that this Court had jurisdiction to decide these two matters.

(9) Dicey in his Conflict of Laws, 6th edition, has formulated the following rule at page 216:

"The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.

This jurisdiction is not affected by—

(1) the residence of the parties; or

(2) the allegiance of the parties; or

....

...."

Similarly, Dicey has said at page 368:

"The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce."

At the commencement of the suit, both the parties were domiciled in India and therefore, according to this rule, this Court, though a foreign Court in relation to persons who have migrated to Pakistan, has jurisdiction to decide the suit for divorce. In this connection I may also refer to — 'Salvesen v. Administrator of Austrian Property', (1927) AC 641 at p 665 (A), where following the decision in — 'Le Mesurier v. Le Mesurier', (1895) AC 517 (B), it has been laid down that it is established that the law of England recognizes the competence and the exclusive competence of the Court of the domicile to decree dissolution of a marriage. There is therefore no doubt whatsoever that this Court has jurisdiction to deal with the appeal arising out of a suit for divorce.

(10) Then as regards restitution of conjugal rights, it is clear from what is stated in Halsbury's Laws of England, Volume 6, paras. 356, 360 and 362, and in Volume 10, para. 1027, that what is material for giving jurisdiction to the Court is the residence of the parties within the jurisdiction of the Court at the time of the institution of the suit. The parties were admittedly resident in India when the suit and when even the second appeal was filed. A decree that may now be passed in second appeal would be binding on the parties and can be executed even outside the jurisdiction of this Court or even outside this country.

C/M.K.S. Order accordingly.

A.I.R. 1954 NAGPUR 53 (Vol. 41, C. N. 19)

MUDHOLKAR AND SEN JJ.

Lakhumal Hirdemal, Petitioner v. N. C. Gupta, Deputy Commr. and others, Respondents.

Misc. Petn. No. 253 of 1952, D/- 16-4-1953.

(a) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 29 — Right of appeal.

There is no express provision in the Rent Control Order providing for an appeal from an order of an Additional Deputy Commissioner to a Deputy Commissioner. Though the proceedings under the Rent Control Order are treated as revenue proceedings by the Rent Control authorities this does not mean that the provisions of the Land Revenue Act are applicable to those proceedings. No right of appeal can be exercised under the C. P. Land Revenue Act. (Para 3)

(b) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 29 — Unconditional delegation of powers.

In the absence of a condition by the Deputy Commissioner while delegating to the Additional Deputy Commissioner his powers under cl. 23 that the order of the Additional Deputy Commissioner shall be subject to scrutiny by himself, the Deputy Commissioner is not entitled to interfere in any manner with the order passed by the Additional Deputy Commissioner under the powers delegated to him. (Paras 5, 6)

(c) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 23 — Order beyond 14 days.

The order of allotment by the Deputy Commissioner, made beyond the period of 14 days of the intimation of vacancy is contrary to law. (Para 7)

Y. P. Varma, for Applicant; T. P. Naik, Addl. Govt. Pleader, (for Nos. 1 and 2); V. M. Kulkarni, (for No. 3); Y. V. Jakatdar, (for No. 4), for Non-Applicants.

ORDER: In this petition under Art. 226 of the Constitution, the petitioner, who is a refugee, challenges the order of respondent 1, the Deputy Commissioner, Balaghat, setting aside in appeal an order passed by respondent 2, the Additional Deputy Commissioner, Balaghat, allotting to him a certain house for his residence.

(2) The point taken is that the Deputy Commissioner had no power to hear an appeal from the order of the Additional Deputy Commissioner, firstly because there is no express provision to that effect in the Rent Control Order and secondly because the order of allotment made by the Additional Deputy Commissioner was in the exercise of the powers delegated to him by the Deputy Commissioner.

(3) It is not disputed that there is no express provision in the Rent Control Order providing for an appeal from an order of an Additional Deputy Commissioner to a Deputy Commissioner. The Deputy Commissioner, however, has relied on the provisions of the Central Provinces Land Revenue Act on the ground that the proceedings before the Additional Deputy Commissioner are land-revenue proceedings. It may be that the proceedings under the Rent Control Order are treated as revenue proceedings by the Rent Control authorities but this circumstance does not mean that the provisions of the Land Revenue Act are applicable to those proceedings. The right of appeal is always a creation of a Statute and where such a right is claimed what one has to look to is the law under which a particular order was passed. If that law does not provide for an appeal against a particular order then no appeal is admissible.

(4) It is then argued that since the Additional Deputy Commissioner exercises only such powers as are delegated to him by the Deputy Commissioner it is always open to the Deputy Commissioner to scrutinize the order passed by the Additional Deputy Commissioner and modify it or vacate it if he thinks it proper so to do. No doubt, under the Rent Control Order the power to allot a house to a refugee or a Government servant is given primarily to the Deputy Commissioner and he is permitted to delegate that power to any officer subordinate to him not below the rank of Extra-Assistant Commissioner.

The provision under the Order which enables him to delegate his powers is Cl. 29 which reads thus:

"The Deputy Commissioner may by order empower any officer subordinate to him not below the rank of Extra-Assistant Commissioner to exercise

any power conferred on him under Cls. 23,24,25 and 28 in such circumstances and under such conditions, if any, as may be specified in the order."

(5) It would be clear from this provision that the Deputy Commissioner while delegating his powers under Cl. 29 is entitled to make tnat delegation conditional. It would thus be open to the Deputy Commissioner while delegating to the Additional Deputy Commissioner his powers, under cl.23 of the Rent Control Order to provide that the order of the Additional Deputy Commissioner shall be subject to scrutiny by himself. If he does lay down a condition of that kind, then of course it would be open to the Deputy Commissioner to modify the order of the Additional Deputy Commissioner or substitute it by his own order. In the present case, however, there is no such reservation as would be clear from para. 2 of the order passed by the then Deputy Commissioner Shri G. G. Desai on 5-12-1950, which reads thus:

"2. I further direct that the powers vested in me under Ss. 23, 24 and 25 of the R. C. Order will be exercised by the S. D. O. at Waraseoni and by the Rent Controller at Balaghat appointed by me from time to time."

In the absence of a condition of the kind we have indicated, it must be held that the Deputy Commissioner is not entitled to interfere in any manner with the order passed by the Additional Deputy Commissioner under the powers delegated to him. We cannot agree with the proposition that an authority delegating its powers to another has an inherent right to review or reconsider the order of the delegate.

(6) It is then said that the authority which delegates its powers to do an act to another does not lose its right to exercise those powers itself & that it can exercise those powers independently of the Additional Deputy Commissioner. We agree that the authority which delegates its powers to another does not by the mere fact of delegation cease to be entitled to exercise the powers iteslf but, in our opinion, if the powers unconditionally delegated to a delegate are exercised by the delegate, then they are exhausted. In such a case we think that the authority delegating its powers cannot exercise those powers because those powers have already been exercised by its delegate. In our opinion, therefore, the order of the Deputy Commissioner cannot be sustained on any ground whatsoever.

(7) There is also an additional reason for holding that the Deputy Commissioner's order cannot be sustained. In the instant case, notice of vacancy was given by the landlord to the Additional Deputy Commissioner on 5-7-1952. He passed an order of allotment in favour of the petitioner on 19-7-1952. The Deputy Commissioner set aside the order of the Additional Deputy Commissioner on 22-9-1952, and allotted the house to respondent 3. Under Cl. 23 of the Rent Control Order an order of allotment has to be made within 14 days of the intimation of the vacancy. The order of the Deputy Commissioner, regarded as an original order of allotment, was made beyond the period of 14 days and is, therefore, contrary to law. Of course, the position may have been different had the Deputy Commissioner the right to entertain an appeal against the order of the Additional Deputy Commissioner. For, in that case the appellate order could well have related back to the date of the original order and thus the allotment made therein would have been within time.

(8) In the view we take, the petition succeeds and is allowed with costs. Costs in this Court shall be borne by respondent 3 who was the person primarily interested in opposing the petition. Counsel's fee in this Court Rs. 50/-. The petitioner is entitled to the refund of the outstanding amount of security deposited by him.

B/D.H.Z. Petition allowed.

A.I.R. 1954 NAGPUR 54 (Vol. 41, C. N. 20)

SINHA C. J.

Mahebubkhan Himmatkhan, Plaintiff-Applicant v. Mohamadkhan Lalkhan and others, Defendants-Non-applicants.

Civil Revn. No. 153 of 1952, D/- 9-10-1952, against order of 1st Civil J., 2nd class, Amraoti, D/- 16-2-1952.

Civil P. C. (1908), O. 6, R. 17 — Amendment of plaint by introducing new case.

The introduction of a new case is no ground for refusal of amendment, so long as the defendant has the opportunity of meeting that new case by amendment of the written statement and by leading evidence in support of that defence. (Para 4)

Anno: C. P. C., O. 6 R. 17 N. 3 Pt. 28.

C. P. Kalele with A. L. Halve, for Applicant; A. V. Khare and T. B Pendharkar, for Non-Applicants 1 and 2.

ORDER: This application in revision is directed against the order dated 16-2-1952 passed by the Civil Judge Class II of Amravati refusing leave to the plaintiff to amend his plaint in a suit for possession.

(2) It appears that after the suit had been pending for about a year the plaintiff applied for leave to amend his plaint by seeking to introduce a claim based on the sale deed of 27-7-1944 in his favour. That amendment was being prayed for in answer to the defendants' case in the written statement based on the 'hiba-bil-iwaz' of Ismailbi.

(3) This application was opposed on behalf of the defendants chiefly on the grounds (1) that whereas in the plaint as originally framed the claim to the house was limited to a moiety share, in the amendment as prayed for, the claim would extend to the whole house; and (2) that a new case was being sought to be introduced by way of amendment. The Court below has taken the view that the amendment was sought at rather a late stage because the suit was fixed for evidence, and that the defendants may be prejudiced in their defence.

(4) In my opinion, the interests of the defendants may be preserved by directing that the claim shall not be enlarged, by the amendment, to the whole house, but that it will continue to be confined to a moiety share therein as originally claimed, and that the defendants will certainly be entitled to amend their written statement so as to raise all the pleas available to them in defence to the action, after the amendment of the plaint is allowed. If these two reservations are made I do not see any reason why the amendment should not be allowed, specially when the amendment sought does not change the nature of the suit, though it may introduce a new case. But the introduction of a new case is no ground for refusal of amendment, so long as the defendants have the opportunity of meeting that new case by amendment of the written statement and by leading evidence in support of that defence. So long as the defendants are not prejudiced in their defence I do not see any reason to refuse the amendment,

especially when it has the merit of avoiding multiplicity of suits.

(5) The plaintiff-petitioner must compensate the defendants by costs for having come to Court with the prayer for amendment at a late stage. Curiously enough, the Court below does not appear to have passed any order for costs in favour of the defendants, even though it had refused the prayer for amendment. I would, as a condition precedent to the amendment, make the plaintiff-petitioner liable to the defendants' costs—hearing fee Rs. 25 — before the amendment is allowed.

(6) In these circumstances, the order passed by the Court below is set aside, and the amendment with the reservations indicated above is allowed in the plaint, subject to the payment of costs as already directed. As success in this Court is divided between the parties each party will bear its own costs in this Court.

C/V.R.B. Order set aside.

A.I.R. 1954 NAGPUR 55 (Vol. 41, C. N. 21)

CHOUDHURI J.

Adhargir Chhotegir Gosai, Applicant v. The State.

Criminal Revn. No. 681 of 1952, D/-25-6-1953, from order of Addl. Dist. Magistrate, Chhindwara, D/- 3-12-1952.

Penal Code (1860), Ss. 378 and 403 — Removal of cattle turned loose.

Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown and the taking of such cattle is theft and not criminal misappropriation. Where the taker sells it subsequently his dishonest intention while taking away the cattle can be inferred from that fact. 8 All 51; 9 All 348; 17 Cal 852; AIR 1917 Pat 459, Distinguished; 4 Bom LR 626; AIR 1938 Rang 138, Rel. on. (Paras 9, 10)

Anno: Penal Code, S. 378 N. 1, 8; S. 403 N. 2.

S. P. Kotwal, for Applicant; W. K. Sheorey, Additional Govt. Pleader, for the State.

CASES REFERRED:

(A) ('85) 8 All 51: 1885 All WN 326 (Pr 5)
(B) ('87) 9 All 348: 1887 All WN 73 (Pr 5)
(C) ('90) 17 Cal 852 (Pr 5)
(D) ('17) AIR 1917 Pat 459: 18 Cri LJ 564 (Pr 7)
(E) ('02) 4 Bom LR 626 (Pr 10)
(F) ('38) AIR 1938 Rang 138: 1938 Rang LR 63: 39 Cri LJ 607 (Pr 10)

ORDER: The applicant Adhargir was convicted under S. 379, Penal Code by the Magistrate Second Class Amarwada, for the theft of a horse belonging to Jawaharlal (P. W. 1) and sentenced to four months rigorous imprisonment. His conviction and sentence were maintained in appeal by the Additional District Magistrate, Chhindwara.

(2) The prosecution case in brief is that a horse belonging to Jawaharlal (P. W. 1) was left for grazing on 10-6-1951. The animal was missing from that date. Lula (P. W. 2), who is a servant of Jawaharlal, searched for the animal for a week. During the search, he saw a dead horse from a distance and thinking it to be the one which was missing he informed his master accordingly. Subsequently in the month of September he found his master's horse with Sawlia in village Bhanaswada and reported to his master. During the investigation the horse was seized from Sawlia on 22-9-1951, vide seizure memo (Exhibit P. 4). Sawlia had informed that he had purchased it from Ramcharan for Rs. 110/-. Ramcharan admitted to have sold this horse to Sawlia, but stated that he had purchased it from the accused Adhargir for Rs. 58/- as per receipt (Exhibit P. 7). Ramcharan was also prosecuted along with Adhargir. He was convicted under S. 411, Penal Code by the Magistrate of the trial Court, but was acquitted in appeal by the Additional District Magistrate.

(3) The accused Adhargir denied that he stole this horse. He also denied that he sold it to Ramcharan.

(4) It has been held by both the Courts below on the evidence of Parmu Kotwar (P. W. 5) and Gaorishankar (P. W. 6) that the accused had visited the village Atama in the month of July 1951 and had sold the horse to Ramcharan on 11-7-1951, vide receipt (Exhibit P-7). I see no reason to disagree with the concurrent finding of facts stated above.

(5) It was strenuously argued on behalf of the applicant that even assuming the facts proved, no offence of theft was committed inasmuch as there was no dishonest intention on the part of the applicant which is a necessary ingredient of the offence of theft as defined in S. 378, Penal Code. In support of the above contention, reference was made to illustrations (f) and (g) under that section and also to the decisions in — 'Queen-Empress v. Bhandhu', 8 All 51 (A), — 'Queen-Empress v. Nihal', 9 All 348 (B), — 'Romesh Chunder Sannyal v. Hiru Mondal', 17 Cal 852 (C).

(6) The cases relied on by the learned counsel for the applicant related to the theft of bulls which were let loose in accordance with the Hindu religious usage. These animals belonged to nobody, and it was held in those cases that such animal was not 'property' which was capable of being made the subject of dishonest receipt or possession within the meaning of S. 410 and 411, Penal Code. The decision in those cases, therefore, has no application to the present case.

(7) The learned counsel for the applicant also relied on a decision in — 'Rup Lal v. Durga Prasad', AIR 1917 Pat 459 (D). In that case, the accused, finding the complainant's pony at large which had broken loose from its tether to which it had been tied the previous night, mounted it and took a ride on it returning home on the following day in the evening. It was held that he had not committed the offence of theft, to constitute which there must be an intention on the part of the person to take a thing to steal it and that he might have been proceeded against under S. 403 instead of S. 379, Penal Code. The facts of the present case are different from the facts of the case cited above.

(8) The learned Government Pleader argued that the horse was under the constructive possession of Jawaharlal (P. W. 1) when it was let loose by his servant for the purpose of grazing. The dishonest intention of the applicant can be inferred from the fact that he had sold it to Ramacharan.

(9) Lula (P. W. 2) has deposed to the effect that his master Jawaharlal owned five horses. In the month of Jaith last one of the horses had gone astray. They were let loose for grazing in the morning. In the evening one red horse did not come home. The accused has not explained how he came in possession of this animal. From the evidence on record, both the Courts below were justified in drawing the presumption against him that he must have taken away the animal when it was let loose for grazing. The fact that he sold the animal shows that he had a dishonest intention in taking it while it was grazing.

(10) In — 'Emperor v. Karsan', 4 Bom L R 626 (E), it has been held that the removal of animals grazing in open lands where the owner has driven them amounts to theft and not criminal misappropriation. So also in — 'Nga Paw Din v. The King', AIR 1938 Rang 138 (F), where the accused stole a bullock from the jungle, where it was put to graze by its master, a cartman, and then killed it for food. He was convicted of the offence of theft and mischief. I am of the opinion that the cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation.

(11) From the facts shown in the present case, the conviction of the applicant under S. 379, Penal Code is in order and it is affirmed. The applicant has undergone jail sentence for eight days. Taking into consideration the circumstances of the case, a heavy sentence of fine coupled with the jail sentence already undergone would, in my opinion, meet the ends of justice. I, therefore, reduce the jail sentence awarded by the Courts below to the period already undergone and impose a fine of Rs. 100/- against the applicant. In default of payment of fine, he shall undergo rigorous imprisonment for four months.

(12) With this modification in the sentence, the revision fails and is dismissed.

B/M.K.S. Revision dismissed.

A.I.R. 1954 NAGPUR 56 (Vol. 41, C. N. 22)

CHOUDHURI J.

Parasram Harprasad and others, Defendants-Appellants v. Pannalal Munnalal and others, Plaintiffs-Respondents.

Misc. First Appeal No. 109 of 1949, D/- 2-3-1953, from order of 2nd Addl. Dist. J., Saugar, D/- 5-7-1949.

(a) Oaths Act (1873), S. 8 — Form of oath.

The oath or solemn affirmation referred to in S. 8 may be in any form common amongst or held binding by persons of the race or persuasion to which "the deponent" belongs and not repugnant to "justice or decency." AIR 1927 PC 165, Foll. (Para 11)

Anno: Oaths Act, S. 8 N. 1.

(b) Civil P. C. (1908), O. 32, R. 7 — Agreement to be bound by oath, if a compromise.

When a next friend of a minor expresses his willingness to get the dispute settled by a special oath to be taken by the opposite party, the settlement does not amount to a compromise, and if the interest of the minor is identical with that of the next friend, sanction under O. 32, R. 7 is not necessary for adopting the special form of proof. 27 Cal 229; AIR 1930 Cal 463; AIR 1927 All 584; AIR 1936 Lah 235; AIR 1946 Pat 272, Rel. on. (Para 20)

Anno: C. P. C., O. 32, R. 7 N. 10.

M. R. Bobde, for Appellants; R. S. Dabir, for Respondents 1 to 5.

CASES REFERRED:

(A) ('27) AIR 1927 PC 165: 2 Luck 316 (PC) (Pr 11)
(B) ('30) AIR 1930 Cal 463: 129 Ind Cas 408 (Prs 12, 18, 19)
(C) ('29) AIR 1929 Pat 741: 8 Pat 788 (Pr 12)
(D) (1900) 27 Cal 229: 4 Cal WN 327 (Pr 19)
(E) ('27) AIR 1927 All 584: 49 All 842 (Pr 19)
(F) ('36) AIR 1936 Lah 235: 162 Ind Cas 921 (Pr 19)
(G) ('46) AIR 1946 Pat 272: 222 Ind Cas 210 (Pr 19)

ORDER: This is an appeal filed by the defendants against the judgment dated 5-7-1949 passed by the Second Additional District Judge, Sagar, in Civil Appeal No. 19-B of 1947 arising out of Civil Suit No. 26-B of 1947 decided on 16-10-1947 of the Court of the Civil Judge, Class II, Khurai.

(2) The suit out of which this appeal arises was brought by the plaintiffs Munnalal and his sons Pannalal, Jamnaprasad, Gulabchand and Hemchand against the defendants for the recovery of a sum of Rs. 1540/- primarily as compensation for fraud practised by defendant 1 and in the alternative for loans advanced on the pledge of ornaments. As against the claim of the plaintiffs, deft. 1 made a counter-claim for a sum of Rs. 960/- as a set off. The cause of action for the claim as well as the counter-claim was grounded on a contract of pledge of ornaments and loan advanced thereon.

(3) A number of ornaments alleged to be of gold were pledged by defendant 1 with plaintiff 1 on different dates as security for advances made to defendant 1. The aggregate sum of the loan was Rs. 813/- and carried interest at the rate of Rs. 9/- per cent. per annum.

(4) The case of the plaintiffs was that the pledge of the ornaments was accepted on the representation made by the first defendant that they were genuine articles of gold. As defendant 1 failed to redeem the ornaments he was served with notices on various dates. It is alleged that on 16-11-1946 defendant 1 went to the plaintiffs and negotiated an agreement by which the ornaments were sold to the plaintiffs for the sum of Rs. 1540/-. The same day, a notice was also served on the first defendant at his request intimating the sale of the ornaments as the first defendant had represented that the ornaments belonged to a third person. As a slightly larger sum was due under the loan transactions, it was agreed that some days later the parties would sell the ornaments at Sagar, and if any surplus amount was recovered from the sale of the ornaments it would be credited to defendant 1 who also undertook to make up the deficiency should it occur.

(5) It was further contended that in the fourth week of December 1946, plaintiff 2 and defendant 1 went to Sagar for the sale of the ornaments. The sale could not be effected as the purchasers said that the ornaments did not appear to be of good gold. Subsequently on

4-1-1947 at the instance of defendant 1 the ornaments were melted in his presence. They were found to be spurious and hardly worth Rs. 200/-. In view of the above fraud, the plaintiffs claimed a sum of Rs. 1540/- which was the price agreed between them. In the alternative the plaintiffs claimed this amount as the debt due by the defendants. Defendants 2 and 3 are sons of defendant 1. They were impleaded on the ground that they were under pious obligation to pay their father's debts.

(6) Defendant 1 denied that there was any express warranty or any agreement on 16-11-1946 to sell the ornaments to the plaintiffs. He contended that when he went to the plaintiffs in pursuance of their notice dated 18-11-1946, he was asked to tender payment. He went again the following day when some melted and alloyed gold was shown to him which he declined to accept. He therefore submitted that the pledged ornaments contained 25 tolas of gold, the rate of which was Rs. 100/- per tola on 16-11-1946 when the plaintiffs themselves purchased the ornaments. The price of these ornaments thus would amount to Rs. 2500/- and after allowing the plaintiffs' dues of Rs. 1540/-, he made a counter-claim of Rs. 960/-.

(7) Issues were framed on 12-8-1947 on the pleadings of the parties and the trial commenced on 7-10-1947. The evidence of the plaintiffs' witnesses was recorded from day to day. When the hearing commenced on the third day i.e. on 9-10-1947 Munnalal (plaintiff 1) and his son Gulabchand (plaintiff 4) intimated their intention to offer a special oath to the first defendant. They were asked to file an application proposing the form of oath which they did. The first defendant accepted the offer with the condition that in the event of his taking the oath the plaintiffs should agree to suffer a decree for Rs. 960/- which he has claimed from them. Munnalal (plaintiff 1) agreed to the above condition personally and on behalf of his minor son Hemchand (plaintiff 5) stating that the plaintiffs 2, 3, 4 and 5 are his sons and he was authorized to propose the special oath for the decision of the matters in dispute in this case. Before the Judge of the trial Court started for the temple where defendant 1 was to take the special oath, an objection was filed on behalf of the plaintiffs regarding the counter proposal made by defendant 1. The special oath was taken by defendant 1 on 9-10-1947. On 11-10-1947 plaintiffs 2 and 3 made an application contending that the oath taken by defendant 1 was not binding on them as they had not agreed to the proposal.

(8) The Court of the first instance rejected the two applications i.e. one filed on 9-10-1947 just before the oath was administered and the other filed on 11-10-1947 by plaintiffs 2 and 3. The trial Court accepted the special oath of defendant 1, passed judgment dismissing the suit of all the plaintiffs and decreed the counter-claim of defendant 1 against plaintiffs 1 and 5.

(9) The appeal filed by plaintiffs 2 to 5 who are the sons of plaintiff 1 against the decree was allowed on the ground that the special oath under S. 8, Oaths Act was not legal and that as there was no express sanction given by the Court under O. 32, R. 7, Civil P. C., plaintiff 1 could not enter into an agreement for the special oath on behalf of the minor plaintiff 5 for whom he was acting as a next friend. The decree of the Court of the first instance was set aside in its entirety even against plaintiff 1 who had not appealed, and the suit was ordered to be readmitted to its original number with the direction that it should proceed from the stage at which it had reached when the offer for special oath was made. The defendants being aggrieved by the above decision of the Additional District Judge have come up in appeal.

(10) It was argued on behalf of the appellants that the terms in which the oath was couched could not be objected to when it had already been taken by defendant 1 in the presence of the Court of the first instance, and the lower appellate Court was in error in raising the objection 'suo motu' and in giving effect to it.

(11) In — 'Inder Prasad v. Jagmohan Das', AIR 1927 PC 165 (A), it has been held that the oath or solemn affirmation referred to in S. 8, Oaths Act may in any form common amongst or held binding by persons of the race or persuasion to which "the deponent" belongs and not repugnant to "justice or decency". In the present case the form of the oath to be taken by defendant 1 has been given in the application filed by the plaintiffs on 9-10-1947 and it is as follows:

> "In the name of Shankar, I swear that the ornaments kept in the Courts and the ornaments which have been made after moulding the old ornaments and which are at present in the Court are not those ornaments which I had pawned with the plaintiff and I was not present at the plaintiff's house when these ornaments were moulded, and my consent was not taken when these ornaments were moulded. Oh God Mahadeo if I am telling anything false then I be ruined and I be turned into a laper."

The form was not objected to by the defendants. Defendant 1 was to take the special oath in the above form standing in front of the idol of Shankar which is in the temple situated at the western side of the bank. This the defendant did in the presence of the presiding Judge as has been noted by him in the order-sheet dated 9-10-1947. In my opinion, the oath taken by defendant 1 was a legal one.

(12) It was next argued on behalf of the appellants that the application for administering the special oath to defendant 1 was made by all the plaintiffs and as the counter proposal made by defendant 1 was accepted by plaintiff 1 who was the manager of the joint family consisting of all the plaintiffs who are his sons, the acceptance of the counter proposal by plaintiff 1 should be deemed to be the acceptance by all the plaintiffs. It was also urged that at least the set off claimed by the defendant in his counter proposal should have been decreed against plaintiff 1 and his minor son plaintiff 5 who was represented by plaintiff 1 as his next friend, as no sanction for settlement of the dispute by a special oath is necessary under O. 32, R. 7, Civil P. C. for the minor. Reliance was placed on — 'Mahammad Mahmud v. Behary Lal', AIR 1930 Cal 463 (B) and — Lalchand Thakur v. Seogobind Thakur', AIR 1929 Pat 741 (C).

(13) It was contended on behalf of the respondents that the suit was not brought by plaintiff 1 in the capacity of a manager of the joint Hindu family, and as all the coparceners were made plaintiffs, their individual proposal made

by defendant 1 for his claim by way of set off. It was also contended that plaintiffs 2 and 3 did not consent to get the suit and the counter proposal of defendant 1 decided by a special oath and as such they were not bound by the special oath taken by him.

(14) It cannot be disputed that by the application dated 9-10-1947 though signed by Munnalal plaintiff 1, and Gulabchand plaintiff 4, all the plaintiffs had agreed to get their claim decided by a special oath to be taken by defendant 1. Shri R. N. Shrivastava pleader was representing all the plaintiffs. The relevant portion of the above application is as follows:

"If the defendant agrees to take the oath then in accordance with the oath, the suit filed by the plaintiff would be dismissed with costs. All the plaintiffs agree to this but the defendant who has claimed a set-off in this suit against the plaintiffs shall get his claim dismissed and shall not file a separate suit."

To the above proposal defendant 1 made the following oral statement which was recorded by the presiding Judge:

"I am prepared to take the special oath as offered but I do not agree that my claim for Rs. 960/- be also dismissed. If the plaintiffs agree that in the event of my taking oath their claim be dismissed and mine for Rs. 960/- and costs be decreed then I am willing to take the special oath."

This counter proposal was accepted by plaintiff 1 in the following words:

"Plaintiffs 2, 3, 4 and 5 are my sons. I am authorized to propose the special oath for the decision of the matters in dispute in this case. So far as I and the minor plaintiff 5 are concerned we agree to the proposal of defendant 1 and we would suffer decree for Rs. 960/-, in case he takes special oath."

(15) It is manifest that plaintiff 1 accepted the counter proposal on behalf of his minor son Hemchand plaintiff 5. No statements were separately made on behalf of plaintiffs 2, 3 and 4 for the acceptance of the counter proposal. Plaintiffs 2 and 3 were not at all present on 9-10-1947 when the joint application was made by the plaintiffs for getting the dispute settled by a special oath. This application was as already pointed out signed by Shri R. N. Shrivastava as counsel for the plaintiff as well as by Munnalal plaintiff 1 and Gulabchand plaintiff 4. The contesting plaintiffs Pannalal (plaintiff 2) and Jamnaprasad (plaintiff 3), though they did not sign this application, did not dispute that their father Munnalal plaintiff 1 and their pleader Shri R. N. Shrivastava had authority to get the dispute decided by a special oath to be taken by defendant 1.

(16) Munnalal plaintiff 1 has made the oral statement that plaintiffs 2, 3, 4 and 5 are his sons and that he was authorized to propose the special oath for the decision of the matters in this case. This authority of Munnalal has not been denied by plaintiffs 2, 3 and 4. The order-sheet dated 9-10-1947 shows that before the presiding Judge proceeded to the temple accompanied by Shri Sapre, Shri Muley, Shri N. P. Shrivastava pleader for the plaintiffs, plaintiff 1 and the defendants for administering the special oath, an application said to be on behalf of the plaintiffs was filed by Shri Sapre. It is not signed by any of the plaintiffs. In this application, the authority of Munnalal to settle the dispute by a special oath has not been disputed. The main objection raised was that the civil Court had no jurisdiction to decree a counter-claim. This objection was on a question of law and did not affect the acceptance of the counter proposal by Munnalal plaintiff 1 on behalf of all the plaintiffs.

(17) Taking into consideration the entire circumstances appearing in the case I am satisfied that Munnalal plaintiff 1 was authorized on behalf of all the plaintiffs to propose the special oath for the decision of the matters in dispute in this case. His acceptance of the counter proposal made by defendant 1 is therefore binding on all the plaintiffs. The subsequent application filed on behalf of plaintiffs Pannalal (plaintiff 2) and Jamnaprasad (plaintiff 3) on 11-10-1947, after the oath had already been taken, stating that these two plaintiffs did not agree for proposing the oath to defendant 1 is frivolous and was rightly rejected by the Court of the first instance.

(18) The next question for consideration is whether a sanction for effecting the settlement was necessary under O. 32, R. 7, Civil P. C. as plaintiff 5 is a minor who is represented by his father plaintiff 1 as the next friend. It has been held in — 'Mahammad Mahmud v. Behary Lal (cit. sup.) (B)' that a minor is bound by the consent of his guardian to abide by deposition given by opposite party on oath although given without the leave of the Court under O. 32, R. 7, provided there is no fraud or negligence on the part of his guardian.

(19) In — 'Sheo Nath v. Sukh Lal', 27 Cal 229 (D), which was followed in — 'Mahammad Mahmud v. Behary Lal (cit. sup. (B)' cited by the learned counsel for the appellants it was held as follows:

"The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Indian Oaths Act, stands on a very different ground from an agreement or compromise contemplated by S. 462, Civil P. C. In such a case, the minor is bound by the consent of his guardian, although given without the leave of the Court, provided that there is no fraud or gross negligence on the part of the guardian."

The same view was expressed in — 'Deoraj Mishra v. Mt. Abhai Raji', AIR 1927 All 584 (E) which was followed in — 'Sultan Muhammad v. Mehr Khan', AIR 1936 Lah 235 (F) in which it was held as follows:

"If the next friend of a minor expresses his willingness to relinquish the claim of the minor, should the opposite party take a certain oath, it is only a special method of proof adopted by the next friend and is not at all a compromise, and if the interests of the next friend are identical with the minor then sanction under O. 32, R. 7, Civil P. C., is not necessary for adopting special oath as a form of proof."

See also — 'Baldeo Singh v. Niras Singh', AIR 1946 Pat 272 (G).

(20) Following the above cases, I hold that when a next friend of a minor expresses his willingness to get the dispute settled by a special oath to be taken by the opposite party, the settlement does not amount to a compromise,

and as in the present case the interest of the minor was identical with that of the next friend, sanction under O. 32, R. 7, Civil P. C. was not necessary for adopting the special form of proof. Plaintiff 5 is therefore also bound by the acceptance of plaintiff 1 to get the claim dismissed and the counter-claim of the defendants decreed by the special oath taken by defendant 1. The decision of the Court of the first instance was therefore correct.

(21) For the reasons recorded above, the appeal is allowed with costs. The order of the lower appellate Court setting aside the decree of the trial Court and remanding the case for fresh trial is set aside, and the decree of the Court of the first instance is restored.

B/V.S.B. Appeal allowed.

A.I.R. 1954 NAGPUR 59 (Vol. 41, C. N. 23)

DEO J.

Shrikisan Laxman and another, Plaintiffs-Appellants v. Ramprasadsingh Chhatrapalsingh and others Defendants-Respondents.

Second Appeal No. 108 of 1952, D/- 3-8-1952, from appellate decree of Addl. Dist. J., Khamgaon D/- 17-10-1951.

(a) Civil P. C. (1908), O. 41 R. 27 — No sufficient cause for non-production of evidence in lower Court.

Document sought to be produced under O. 41 R. 27, all the while in possession of the party seeking its production — No sufficient cause why it was not produced in lower Courts — It cannot be allowed to be produced under O. 41 R. 27. (Para 2)

Anno: Civil P. C., O. 41 R. 27 N. 1, 8.

(b) Berar Land Revenue Code (1928), Ss. 2(7) and 112(1) — "Land" and "every suit" in S. 112(1) — Suit for injunction.

"Land" within meaning of S. 2(7) includes even the superstructures erected on it. The term 'land' in S. 112(1) is not restricted to agricultural land and the words "every suit" in that section includes a suit for injunction. (Para 2)

(c) Berar Land Revenue Code (1928), S. 112(1) — Late production of certified copy of record of rights — Procedure — Effect — (Civil P. C. (1908), O. 41 R. 27).

Plaintiff not producing certified copy of record of rights in lower Courts though asked by Courts to do it — No objection raised by opposite party — Non-compliance not noticed till the time of writing judgment by lower appellate Court — Suit accordingly dismissed — Plaintiff seeking to produce certified copy in second appeal — Plaintiff should be given opportunity to show cause for late production of document and if Court finds that cause shown is not sufficient, the suit should be dismissed. (Para 7)

Anno: Civil P. C., O. 41 R. 27 N. 1, 8.

N. V. Gadgil, for Appellants; A. N. Chorghade, for Respondent No. 1.

CASES REFERRED:

(A) ('39) S. A. No. 672 of 1937, D/- 30-8-1939, (Nag) (Pr 4)

(B) ('42) 1942 Nag LJ 396 (Pr 5)

(C) ('43) S. A. No. 368 of 1941, D/-24-12-1943, (Nag) (Pr 5)

(D) ('47) S. A. No. 421 of 1942, D/- 9-7-1947, (Nag) (Pr 6)

JUDGMENT: This is plaintiffs' appeal against the dismissal of their suit by the lower appellate Court on a preliminary point that a certified copy of the record-of-rights relating to the land in suit was not filed by the plaintiffs.

(2) The plaintiffs have made an application here under O. 41, R. 27, Civil P. C., for admission of a certified copy on the ground that the Court would require the said document to enable it to pronounce judgment. The application also states that there was sufficient cause for not producing it in the trial Court, but no facts are alleged why the document was not produced in the first Court or before the lower appellate Court though the document was all along in the plaintiffs' possession. The plaint was presented on 11-8-49. An application for certified copy was made on 18-8-49 and the copy was obtained on 1-9-49 well before the date of first hearing in the trial Court.

The appellants, however, have alleged that the copy was not filed in the trial Court as it was not necessary because

(a) the suit was merely for injunction and

(b) the immovable property involved was not land under cultivation.

As defined in S. 2(7), Berar Land Revenue Code, land means a portion of the earth's surface and, where such land is referred to in the law, it shall be deemed to include all things attached to or permanently fastened to anything attached to such land.

It is thus clear that 'land' includes even the superstructures erected on it. There is no scope for the argument that the term 'land' in S. 112(1) is restricted to agricultural land and that the words "every suit" in that section does not include a suit for injunction. I, therefore, hold that the application made to this Court does not disclose any sufficient cause for not producing the document in the trial Court.

(3) Although on the date of presentation of the plaint the learned Judge directed the plaintiffs to produce the certified copy, non-compliance of this order was not noticed in the trial Court. The defendants did not take any objection. The plaintiffs obtained a decree in that Court. In the grounds of appeal also this point was not raised. There is nothing in the order sheets of the appellate Court or in the judgment under appeal to show that this omission was brought to the notice of the appellants. It appears that at the time of writing the judgment the lower appellate Court noticed this omission and dismissed the suit for that omission.

(4) In — 'Tanba v. Rama', S. A. No. 672 of 1937 D./- 30-8-1939 (Nag) (A), Grille J. held that in view of S. 112(1), Berar Land Revenue Code the trial Court had no jurisdiction to proceed with the suit unless the certified copy was produced and the Court was bound to dismiss the suit for failure to do so. Section 112(2) runs thus:

"If the plaintiff or applicant fails so to do for any cause which the Court deems sufficient, he shall produce such certified copy

within a reasonable time to be fixed by the Court; and if such certified copy is not so produced, the suit or application shall be dismissed but the dismissal thereof shall not of its own force preclude the presentation of a fresh plaint in respect of the same cause of action or of a fresh application in respect of the same subject-matter."

The production of a certified copy is not essential for decision of any suit. This is a procedural provision which does not affect the merits of the case. If the plaintiff fails to produce the certified copy on or before the first hearing as required by S. 112(1), he can assign a cause which the Court may deem sufficient for his failure to produce the copy and the Court may grant him reasonable time for its production.

Though the decision in — 'S. A. No. 672 of 1937, D/- 30-8-1939 (Nag) (A)', is expressed in very wide terms and was obiter as the appeal failed on merits, the learned Judge really meant to say that if no cause is assigned by the plaintiff for failure to produce the copy which the Court may deem sufficient, the Court is bound to dismiss the suit.

In that case, although the relevant certified copy was available the plaintiff failed to produce that copy in the first Court and produced a copy of a different pot-hissa of the survey number in dispute and persisted all along that that was the correct copy. On the plaintiff's failure to produce the relevant certified copy even at the second appellate stage, the Court had no alternative but to confirm the dismissal of the suit.

(5) In — 'Balasaheb Deosthan v. Bajrang Das', 1942 Nag L. J. 396 (B), it was held that where the plaintiff fails to file a certified copy of an entry in the record-of-rights the Court should not dismiss the suit at once. The plaintiff should be called upon to explain the omission and should be given an opportunity to file it. This view proceeds on the well-known principle that the Court should not be astute to defeat a claim on a technical point of procedure without considering the case on merits.

In — 'Sakharam v. Pandurang', S. A. No. 368 of 1941, D/- 24-12-1943 (Nag) (C), — 'Balasaheb Deosthan v. Bajrang Das', (B) was followed. There the contention of the plaintiff was that S. 112 does not apply to a suit for pre-emption as it is not a suit relating to land. The learned Judge observed that this was a debatable point and it was doubtful whether a suit for pre-emption can be said to be a suit relating to land even though the land is directly involved. If the plaintiff had not filed the document in this belief, there was sufficient cause for allowing him to file the document at a later stage. The copy of the record-of-rights was tendered in second appeal and was accepted and on setting aside the decree of the lower appellate Court the case was remitted to that Court for decision on merits.

(6) In — 'Mahadu v. Bhawanlal', S. A. 421 of 1942, D/- 9-7-1947 (Nag) (D), it was held that if there is no cause which the Court considers sufficient for non-production of the certified copy of the record-of-rights at the proper stage, the Court is bound to dismiss the suit. In that case the plaintiff did not tender the copy even when the objection was raised though he had to file three copies and had one copy ready. On the contrary he put forward a false excuse that the copies were not available as the register of record-of-rights was not traceable.

(7) It, therefore, appears that the plaintiffs should be given opportunity to show cause for late production of the document and if the Court finds that the cause shown is not sufficient the suit should be dismissed. At the hearing of this appeal I pointedly brought to the notice of the learned counsel for the appellants that he had not shown any sufficient cause for non-production of the document and consequently the provisions of S. 112(2) are attracted.

The learned counsel, however, has not asked for time to make a proper application under S. 112(2). If such an application is not made, the decision of the lower Court dismissing the suit has to be affirmed.

That course I would ordinarily have followed but in this case I find that the plaintiffs had the document with them all along. No objection was taken to its non-production in the Courts below; and the suit was dismissed for this technical defect without receiving the plaintiffs' explanation. I am reluctant to penalise the litigants for failure of their counsel in this Court to appreciate the effect of failure to show a proper cause for non-production of the document till it was produced in this Court. I, therefore, adjourn this case for three weeks to enable the appellants to make a proper application, supported by an affidavit, subject to payment of the costs of the hearing which I assess at Rs. 40/-. The payment of the costs will be a condition precedent. Put up on the 25th September 1952.

B/R.G.D. Order accordingly.

A.I.R. 1954 NAGPUR 60 (Vol. 41, C. N. 24)

SINHA C. J.

Sunderlalji Bhate, Applicant v. Sheikh Lal Sheikh Dalu and others, Non-Applicants.

Civil Revn. No. 393 of 1952, D/- 16-3-1953, from decree of Addl. Civil J., Class 1st, Yeotmal, D/- 17-4-1952.

Contract Act (1872), S. 226 — Purchase of goods from Adtiya — Liability of purchaser.

A purchased certain goods from B, an adtiya, with the knowledge that the goods belonged to C. A paid Rs. 169 in cash to B and the remaining amount of Rs. 365 was set off against the dues which B owed to A. As C did not receive any amount, C sued both A and B for its recovery;

Held that under S. 226, Contract Act, and also according to the facts of the case, A, the purchaser, was liable to pay C the price of the goods;

(2) that B, being the adtiya for C, was entitled to receive the entire amount in cash or perhaps by cheque and on such payment A would have been discharged from his obligation to pay to the owner C. (1866) LR 1 QB 352 and (1839) 5 M. & W. 645, Rel. on;

(3) that B was not entitled to make any adjustments with A. A was, therefore, liable to pay C Rs. 365/- and B was liable to pay C Rs. 169 which B had received in cash from A. (Paras 7, 8)

Anno: Contract Act, S. 226 N. 1.

P. R. Padhye and D. B. Padhye, for Applicant; W. B. Pendharkar, (for No. 3); R. S. Dabir, for (Nos. 1 and 2) and K. Rama Gupta, (for No. 1), for Non-Applicants.

CASES REFERRED:

(A) (1866) 1866-1 QB 352: 35 LJ QB 111 (Pr 8)

(B) (1839) 5 M & W 645: 9 LJ (NS) Ex 106 (Pr 8)

ORDER: This is an application under S. 25, Provincial Small Cause Courts Act by defendant 2 challenging the decree passed by the learned Civil Judge, Class I, of Yeotmal, dated 17-4-1952 decreeing the plaintiffs' suit for Rs. 429 against both defendants 1 and 2.

(2) It appears that the plaintiffs had kept their goods viz., gum, with defendant 1 for sale. The first defendant is the broker, who auctioned the gum, which was purchased by defendant 2 on 27-3-1950. On that very date the purchaser, defendant 2, took delivery of the goods purchased. As the plaintiffs were not paid the price of the goods sold either by defendant 1, the broker, or by defendant 2, the purchaser, they sued both the defendants for recovery of the amount.

(3) The claim was contested by defendant 1 on the ground that he was merely a broker, and that he was not an 'adtiya' on behalf of the plaintiffs. He, therefore, denied his liability for any amount. It is not necessary to notice his other defences, which related to questions of fact, and which have been decided against him by the Court below.

(4) Defendant 2, while admitting to have purchased the goods by public auction from defendant 1, denied any knowledge of the allegation that the goods belonged to the plaintiffs. He, therefore, contended that the plaintiffs were not entitled to sue him for the price. He also alleged that defendant 1 owed him money, viz., Rs. 365, which amount was set off against the sale price and the remaining amount of Rs. 169 was paid in cash to defendant 1. He thus claimed to have paid up the entire price to defendant 1 in the manner aforesaid.

(5) The Court below has held that defendant 1 acted as the plaintiffs' 'adtiya' in respect of the goods in question, that the goods were entrusted to him for sale, that defendant 2 was aware of the fact that the goods belonged to the plaintiffs, and that the sum of Rs. 365 was adjusted against a portion of the price as alleged by defendant 2. On those findings the Court below has passed a decree against both these defendants as if they were jointly and severally liable for the price in respect of the transaction of sale. Defendant 2 has moved this Court on the ground that he had paid the price to defendant 1 and therefore should not have been made liable for any portion of the price of the goods purchased by him.

(6) It is manifest that the Court below has erred in law in so far as it has made both the defendants jointly and severally liable, if it really intended to do so by saying in its judgment that the 'claim must be decreed against both the defendants'. No such joint liability arises either on the pleadings of the parties or under the Contract Act. The liability of the defendants to the plaintiffs is not joint and several. Defendant 1 only may be liable to the plaintiffs if he, as their agent, received all the purchase price from defendant 2. Defendant 2 may have been liable for the entire purchase price if he had not paid it either to the plaintiffs or to their agent, the first defendant. Or, the third alternative may be that defendant 2 is liable for Rs. 365 not actually paid to defendant 1 towards the purchase price, and the first defendant may be liable for the amount received by him in cash and which he did not pay over to the plaintiffs.

(7) In my opinion, the third alternative is the right adjustment of the rights and liabilities of the parties. Under S. 226, Contract Act the plaintiffs are entitled to enforce payment of the price as against the purchaser, defendant 2. The first illustration to that section makes the position absolutely clear. In this case the finding of the Court below is that the purchaser knew that the goods belonged to the plaintiffs. Hence, it becomes doubly sure that not only under S. 226, Contract Act, but on the actual facts of the case as found, the purchaser knew that he was liable to the plaintiffs for payment of the price of the goods purchased by him. Defendant 1 being the 'adtiya' of the plaintiffs was entitled to receive the entire amount in cash, or perhaps by cheque, in full payment of the price, and if he had so received the price the purchaser would be discharged from his obligation to the owner of the goods. That is clear from the second illustration to S. 226, Contract Act. But in this case, it appears, the two defendants between themselves, without the plaintiffs' knowledge and concurrence, arrived at an arrangement of their own, whereby defendant 1 agreed to give defendant 2 credit for Rs. 365 by way of set-off, as if the purchase price was his own. This, he was not entitled to do in law.

(8) In this connexion the decision of Blackburn J. in — 'Williams v. Evans', 1866-1 QB 352 (A), may be relied upon. In that case the learned Judge held that payment to an auctioneer by a bill of exchange is not a valid payment. He relied upon the earlier decision in — 'Sykes v. Giles', (1839) 5 M. & W. 645 (B), in which the Court of Exchequer had ruled that an auctioneer cannot receive payment from a buyer except in cash. In that case the Court did not decide the further question whether a payment by cheque, if it was the custom to pay by cheques, would not be a good payment. That question does not arise for decision here. It is enough to point out that defendant 1 was not entitled to receive the price except in cash. That being so, defendant 2 continued to be liable to the plaintiff for the sum of Rs. 365. As regards the rest of the price, defendant 1, who received the money in cash from defendant 2 is liable to the plaintiffs as their agent.

(9) The decree of the Court below is, therefore, modified by making the petitioner (defendant 2) liable only for Rs. 365 with interest and defendant 1 liable for the rest of the price, as found by the Court below. As the question raised in this controversy between the parties was not free from doubt and difficulty the Court below had sought to cut the Gordian knot by making both the defendants jointly and severally liable. That position, as already pointed out, was certainly assailable in law. In view of this consideration I would direct that each party should bear its own costs in this Court, but the defendants must pay the plaintiffs' costs in the Court below in proportion to the decree passed against them as directed above.

B/D.R.R. Decree modified.

A.I.R. 1954 NAGPUR 62 (Vol. 41, C. N. 25)

CHOUDHURI J.

Jhunu Pradhan Pandbo Kolta and others, Plaintiffs-Applicants v. Mayadhar Arjun Soura and others, Defendants-Non-applicants.

Civil Revn. No. 672 of 1951, D/- 30-9-1952, against order of Dist. J. Raipur, D/- 4-7-1951.

(a) Civil P. C. (1908), O. 9 R. 9 — "Sufficient cause".

In deciding that a suit dismissed in default should be restored under O. 9 R. 9, what has to be considered is whether the party was really trying to appear on the date fixed for the case; and if he honestly intended to be present not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. Each case has to be decided on its own facts but the exercise of discretion should not be far from equitable considerations arising from those facts. (Para 5)

Thus where it was clear from the order sheets of the trial Court that the plaintiff was throughout diligent in prosecuting the suit that several adjournments were given by the Court for no default of the plaintiff, that on the date on which the suit was dismissed in default, no evidence was to be recorded, that there was no doubt that the plaintiff had been ailing and the evidence adduced by the plaintiff about his illness had not been rebutted:

Held, that the trial Court failed to see that the principle 'actus curiae neminem gravabit' (an act of the Court shall prejudice no man) applied. The plaintiff, who was all along diligently prosecuting the suit, would not be dilatory against his own interest by remaining deliberately absent on the date of hearing. Thus there was sufficient cause for his non-appearance and the order of dismissal of the suit could be set aside. (Paras 6, 7 and 8)

Anno: Civil P. C., O. 9 R. 9 N. 8.

A. P. Sen, for Applicants; G. B. Badkas, for Non-applicants.

ORDER: This is a revision petition filed by the applicants against the order of the District Judge, Raipur, dated 4-7-1951 in Miscellaneous Civil Appeal No. 12 of 1950.

(2) One Pandbo brought a suit in the lower Court for ejectment of the defendants from certain fields of 'mouza' Kalenda in Mahasamund tahsil on the basis of an unregistered lease-deed dated 17-12-1940. The suit was fixed for evidence on 24-6-1948. It was adjourned to 14-9-1948 for evidence and for arguments on the question of the admissibility of the unregistered lease-deed. On this date, another adjournment was prayed for by the counsel of the plaintiff on the ground that the plaintiff could not attend due to illness. The case was then fixed for 18-10-1948 on which date Shri Nimonkar appeared for the plaintiff and requested for a further adjournment. The suit was dismissed in default of the plaintiff under Order 9, Rule 8, Civil P. C., as Shri Nimonkar stated that he had no further instructions when the adjournment was refused.

(3) An application to set aside the dismissal was filed by Pandbo under Order 9, Rule 9, Civil P. C. He stated that he could not attend the Court on 18-10-1948 on account of his illness. The application was opposed by the defendants. The trial Court after recording the evidence dismissed the application. An appeal filed by Pandbo against this order to the District Judge, Raipur, also failed as the lower appellate Court held that Pandbo's failure to attend on the date of hearing was not due to illness. During the pendency of the appeal, Pandbo died. The present applicants are his legal representatives.

(4) The learned counsel for the applicants urged that the evidence adduced by Pandbo of his illness has not been rebutted and should be accepted as a good cause for his inability to attend the Court on the date of hearing. It was also pointed out that the evidence of Ujar (N. A. W. 1) and Shriram (N. A. W. 2) who say that Pandbo came to Mahasamund on 'Dasera' day, is unreliable. If it were true that Pandbo was at Mahasamund on that day, he would have surely attended the Court as he would not act in a dilatory manner against his own interest when he was prosecuting the suit since December 1947. As against this, it was argued on behalf of the non-applicants that both the Courts below have passed an order on concurrent finding of fact and as there was no material irregularity in the exercise of discretion, no interference is called for.

(5) Order 9, Rule 9, Civil P. C. lays down that if the plaintiff, whose suit has been dismissed for default, satisfies the Court that there was 'sufficient' cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs. In deciding that a suit dismissed in default should be restored under Order 9, Rule 9, what has really to be considered is whether the party was really trying to appear on the date fixed for the case; and if he honestly intended to be present not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. Under this rule, illness of party is considered as a sufficient cause. Each case has to be decided on its own facts but the exercise of discretion should not be far from equitable considerations arising from those facts.

(6) Here it would be clear from the order sheets of the trial Court that Pandbo was throughout diligent in prosecuting the suit. The case was fixed for evidence on 16-3-1948. Pandbo was present with his counsel. The defendants were represented by Shri De. The witnesses of the plaintiff as well as of the defendants were present, but the case could not be taken up as the presiding Judge was busy in recording evidence in another case. Hence it was adjourned to 24-6-1948 for no default of the plaintiff. On the adjourned date, the Judge again did not record the evidence although the witnesses were present just because the Judge was not sure whether the unregistered lease-deed would be admissible. The case was again adjourned to 14-9-1948 for no fault of the plaintiff. On this adjourned date, the plaintiff could not appear as he was ill. The plaintiff's counsel prayed for an adjournment to file an application for amendment. The adjournment was allowed subject to payment of costs. The order sheet shows that the Judge was still indecisive regarding the question of admissibility of the lease-deed. The case was adjourned to 18-10-1948 on which date the plaintiff was absent due to illness. The counsel prayed for time to amend the plaint. A medical certificate was also produced to show that the plaintiff was ill. The Judge declined to give any adjourn-

ment and dismissed the suit in default as the plaintiff's counsel stated that he had no further instructions. The plaintiff's application for restoration should have been considered with the above background from which it would be clear that several adjournments were given by the Court for no fault of the plaintiff.

(7) On the date on which the suit was dismissed in default, no evidence was to be recorded. On previous dates the Court did not record the evidence for no fault of the plaintiff. The trial Court failed to see that the principle 'actus curiae neminem gravabit' (an act of the Court shall prejudice no man) applied to the facts of the present case.

(8) There is no doubt that the plaintiff has been ailing since before 14-9-1948. He had produced medical certificate of illness on that date. He had produced another medical certificate dated 15-10-1948. Later on the plaintiff died. The evidence adduced by the plaintiff about his illness has not been rebutted and it must be accepted. The plaintiff, who was all along diligently prosecuting the suit, would not be dilatory against his own interest by remaining deliberately absent on the date of hearing. He had shown that there was sufficient cause for his non-appearance when the suit was called on for hearing. The order of dismissal of the suit must be set aside.

(9) The revision is allowed with costs. The order of the lower appellate Court as well as of the trial Court is set aside. The trial Court shall now appoint a date for proceeding with the suit. Counsel's fee Rs. 15/- if certified.

C/H.G.P. Revision allowed.

A.I.R. 1954 NAGPUR 63 (Vol. 41, C. N. 26)

SINHA C. J.

Nandlal Shiokaran, Plaintiff-Applicant v. **Rajaram** Shiokaran, Defendant-Non-applicant.

Civil Revn. No. 170 of 1952, D/- 18-11-1952, from judgment and decree of 2nd Civil J., Class I, Amravati, D/- 31-12-1951.

Civil P. C. (1908), O. 1 R. 10 — Joint promisees — Partner as agent of firm entering into contract on behalf of firm, can himself sue on it.

Where the plaintiff, one of the partners of a firm, as agent of the firm, enters into an arrangement with the defendant that the latter should fetch certain amount from a person with whom it was lying in deposit to the credit of the firm, and the defendant takes the amount but does not hand it over to the plaintiff, a suit by the plaintiff alone, without joining the co-partners, for recovery of the amount from the defendant is maintainable. The defendant cannot take shelter behind the proposition that as the money was meant for the benefit of the firm the entire firm must have figured as plaintiff and in the absence of the firm suing as such, the suit was not maintainable. AIR 1933 Nag 221(2), Foll. AIR 1929 Bom 177; (1861) 14 Moo PC 160, Rel. on; 1 All 453; 6 Cal 815; 14 All 524; 17 Bom 6, Distinguished. (Para 6)

Anno: Civil P. C., O. 1 R. 10 N. 19.

J. N. Chandurkar, for Applicant; G. R. Mudholkar, for Non-applicant.

CASES REFERRED:

(A) ('25) AIR 1925 Sind 181: 17 Sind LR 324 (Pr 5)
(B) ('75-77) 1 All 453 (Pr 5)
(C) ('92) 14 All 524: 1892 All WN 104 (Pr 5)
(D) ('81) 6 Cal 815: 8 Cal LR 457 (Pr 5)
(E) ('93) 17 Bom 6 (Pr 5)
(F) ('33) AIR 1933 Nag 221(2): 29 Nag LR 310 (Pr 6)
(G) ('29) AIR 1929 Bom 177: 53 Bom 110 (Pr 6)
(H) (1861) 14 Moo PC 160: 4 LT NS 155 (Pr 6)

ORDER: This is a plaintiff's application in revision against the judgment and decree passed by the Small Cause Court Judge of Amravati dismissing the plaintiff's suit on the ground that the plaintiff alone was not entitled to maintain the suit.

(2) It appears that the amount claimed in this suit, namely, Rs. 806/15/- had been lying in deposit with Shri V. V. Bapat, pleader, to the credit of the firm "Nandlal Rajaram" of which the plaintiff is the managing partner. The plaintiff deputed the defendant to fetch that amount from the aforesaid pleader. On receiving the amount from the pleader, the plaintiff's case is, the defendant did not pay the amount to the plaintiff. Hence this suit.

(3) The defence was that the defendant was a partner along with the plaintiff in the firm, which was a joint family firm run in the name of "Nandlal Rajaram", that the defendant on receiving the amount from the pleader aforesaid credited it in the accounts of the firm and that the suit was bad because the suit should have been instituted in the name or on behalf of the firm.

(4) The Court below has negatived the defence that the defendant was a member of the firm "Nandlal Rajaram". It also held that the defendant brought the amount from the pleader aforesaid at the instance of the plaintiff, but dismissed the suit holding that the plaintiff alone was not entitled to sue. Hence this application in revision.

(5) The only question in controversy between the parties, therefore, is whether the plaintiff suing in his own name was entitled to maintain the suit. The Court below has relied upon a decision of a Bench of the Sind Judicial Commissioner's Court in — 'Ralliram Shewaram v. Budhuram Parmanand', A. I. R. 1925 Sind 181 (A) which lays down that a suit cannot be maintained by one only of the partners of a firm or by one of the joint promisees in respect of a cause of action which has accrued to all jointly. The decision relied upon two decisions of the Allahabad High Court — 'Dular Chand v. Balram Das', 1 All 453 (B) and — 'Immamuddin v. Liladhar', 14 All 524 (C).

In this Court the learned counsel for the non-applicant-defendant has also relied upon two decisions, one of the Calcutta High Court in — 'Ramsebuk v. Ramlall Koondoo', 6 Cal 815 (D) and of the Bombay High Court in — 'Motilal Bechardas v. Ghela Bhai Hariram', 17 Bom 6 (E) in support of his contention that under the Contract Act it is all the joint promisees who must enforce the contract, and not one of them. But it must be remembered that the present case is distinguishable from those cases in so far as it is the plaintiff's case that it was the plaintiff who deputed the defendant to get the money. So it was a promise made not to the firm as such but to the plaintiff as an individual, who was of course acting on behalf of the firm. Therefore the defendant was bound to pay the money into the hands of the plaintiff whose agent he was.

(6) The decision of the Court below is contrary to the decision in — 'Rajendrasingh v. Ibrahim', A. I. R. 1933 Nag 221 (2) (F), which is a decision of a Single Judge of the Judicial Commissioner's Court. This decision is based on a Division Bench ruling of the Bombay High Court in — 'Kapurji Magniram v. Panaji Devichand', A. I. R. 1929 Bom 177 (G) which laid it down that a partner with whom a contract had been personally made was entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm. This decision of the Bombay High Court was itself based upon a very old decision of the Privy Council in the case of — 'Agacio v. Forbes', (1861) 14 Moo PC 160 (H). This decision is based on the well recognized rule that an agent having an interest in the contract which he has entered on behalf of his principal is entitled to sue in his own name.

The plaintiff in the instant case was acting as the agent of his firm when he entered into the arrangement with the defendant that the latter should fetch the amount from the pleader with whom it was lying in deposit to the credit of the firm. Of course, the plaintiff would be responsible to the firm itself for the amount thus recovered on behalf of the firm: but so far as the defendant is concerned, he cannot take shelter behind the proposition that as the money was meant for the benefit of the firm the entire firm must have figured as plaintiff and in the absence of the firm suing as such, the suit was not maintainable.

(7) For these reasons the judgment of the Court below is set aside and the suit decreed with costs throughout. Hearing fee Rs. 25/- in this Court.

B/R.G.D. Application allowed.

A.I.R. 1954 NAGPUR 64 (Vol. 41, C. N. 27)

HEMEON AND CHOUDHURI JJ.

Fateh Mohd. Jan Mohd. and others, Applicants v. State.

Misc. Criminal Case No. 92 of 1953, D/- 2-7-1953, for leave to appeal to Supreme Court against judgment of Hemeon J., in Cri. Appeal No. 194 of 1952, D/- 5-3-1953.

(a) Constitution of India (1950), Art. 134(1)(c) — Sufficient ground for granting leave.

A question as to the weight to be attached to the evidence of witnesses on the record in a criminal case cannot be deemed to be a sufficient ground for allowing leave under Art. 134(1)(c) of the Constitution of India. AIR 1953 All 133, Foll. (Para 3)

Anno: C. P. C., App. III, Constn. of Ind Art. 134 N. 1.

(b) Criminal P. C. (1898), S. 297 — Summing up evidence for prosecution and defence.

In a charge to the jury the Judge's duty is to sum up the entire material on the record and he is not called upon to give his own conclusions. Judge explaining that accomplice's evidence required corroboration and that he is not a reliable witness — Some materials inculpating accused available in case — It is for the jury and not the judge to evaluate the evidence and in doing so the jury are entitled to disregard the warning given by the Judge. (Paras 2, 3)

Anno: Cr. P. C., S. 297 N. 6.

(c) Criminal P. C. (1898), S. 297 — Misdirection.

Judge taking pains to explain that evidence of accomplice requires corroboration in material particulars and that an accomplice was not a reliable witness — Charge one that strongly favoured the accused — Held that there was no defect of misdirection or non-direction amounting to misdirection in the charge. (Para 2)

Anno: Cr. P. C., S. 297 N. 11, 12.

S. K. Deshpande, for Applicants.

CASE REFERRED TO:

(A) ('53) AIR 1953 All 133: 1953 Cri LJ 372 (Pr 3)

ORDER: This an application under Art. 134 (1)(c) of the Constitution of India for a certificate filed by 5 of the 6 persons whose appeal was dismissed by one of us on 5-3-1953. The appeal was against their convictions and sentences to 2 concurrent terms, each of 3 years rigorous imprisonment, under Ss. 395 and 120B, Penal Code by the Sessions Judge, Hoshangabad, who had accepted a unanimous verdict of the jury to the effect that they were liable under those sections.

(2) The contention that the learned trial Judge had not given proper directions to the jury and that because of this they had found the applicants liable cannot succeed. He had been at pains to warn the jury not only that the evidence of the accomplice required corroboration in material particulars but that he was not a reliable witness. It was open, however, to the jury to disregard this warning and as there was some material which inculpated the accused, it was for the jury and not for the Judge to evaluate it. The learned Sessions Judge's charge to the jury was one which, as indicated, strongly favoured the accused and it cannot, therefore, be said that it was defective by reason either of misdirection or non-direction amounting to misdirection. There was also no reason to suppose that the members of the jury had not comprehended the law as laid down by him.

(3) That being so, there is no reason why the applicants should be given leave to appeal to the Supreme Court of India. In other words, we do not consider that we should certify that the case is a fit one for appeal to that Court; and we are in agreement with the view of a Division Bench in — 'Rajaram v. State', AIR 1953 All 133 (A), to the effect that a question as to the weight to be attached to the evidence of witnesses on the record in a criminal case cannot be deemed to be a sufficient ground for allowing leave under Art. 134(1)(c) of the Constitution of India and that in a charge to the jury the Judge's duty is to sum up the entire material on the record and he is not called upon to give his own conclusions.

(4) We accordingly dismiss the application without notice to the State.

A/M.K.S. Application dismissed.

A.I.R. 1954 NAGPUR 65 (Vol. 41, C. N. 28)

DEO J.

S. K. Buty, Appellant v. Shriram Hari Tambe, Respondent.

Second Appeal No. 534 of 1946, D/-10-3-1952, from appellate decree of Dist. J., Nagpur, D/-19-1-1946.

(a) Nagpur Improvement Trusts Act (C. P. Act 36 of 1936), S. 68 (1) and (6) — Trust not notifying acquisition of land — S. 68(1) and consequently S. 68(6) has no application. (Para 13)

(b) T. P. Act (1882), S. 55(1)(g) — Owner of land bound to construct works of development in accordance with agreement with Improvement Trust in consideration of its sanctioning construction of buildings — If expenses for construction of development works are to be incumbrances on property, then the owner of land is bound to discharge them before he sells the land unless there is an agreement to the contrary, with the buyer. (Para 13)

Anno: T. P. Act, S. 55 N. 8.

(c) Specific Relief Act (1877), S. 16 — Section does not apply where a contract consists of one single part. (Para 14)

Anno: Spec. Relief Act, S. 16 N. 1.

(d) Specific Performance — Improvement Trust sanctioning layout scheme of defendant owner of land and agreeing to grant sanction for construction of buildings by purchasers from defendant on condition of defendant incurring personal liability to Trust for carrying out development works or to reimburse the Trust if it was required to carry them out — Defendant agreeing — Agreement with plaintiff to sell plot to him — Defendant cannot refuse to perform the agreement with plaintiff on ground that transferability depended on sanction of Trust, which depended on payment of charges to it in accordance with agreement between defendant and Trust — Defendant cannot invoke his own defaults in fulfilling his obligations. (Para 16)

(e) T. P. Act (1882), S. 55(1)(g) — Buyer is not bound to pay municipal taxes paid by seller for period prior to date of sale. (Para 17)

Anno: T. P. Act, S. 55 N. 8.

(f) Specific Relief Act (1877), S. 15 — Agreement to sell land entered into by Karta of joint Hindu family consisting of himself and minor son — Sale found to be for benefit of estate — Suit for specific performance — Karta cannot take defence under S. 15 — Agreement can be enforced against Karta for whole area agreed to be sold — (Hindu Law — Alienation — Manager). (Para 18)

Anno: Specific Relief Act, S. 15 N. 3.

(g) Civil P. C. (1908), O. 6 R. 18 — Time granted for incorporating amendment in plaint can be extended in proper cases (Court held properly and judicially exercised jurisdiction in granting extension) (Para 19)

Anno: Civil P. C., O. 6 R. 18 N. 1.

(h) Civil P. C. (1908), O. 6 R. 17 — Amendment can be allowed at any stage — Delay due to inefficient, inactive and negligent legal advisers — Litigant should not be visited with sins of omission of the legal advisers — Amendment, not objectionable in character either as changing subject matter of suit or as being otherwise unfair should be allowed even at late stage — Lower court properly exercising jurisdiction in allowing amendment — No interference by appellate Court. AIR 1937 PC 42, Rel. on. (Para 20)

Anno: Civil P. C., O. 6 R. 17 N. 13, 22.

(i) Hindu Law — Alienation — Manager — Benefit of estate — Transaction is binding and enforceable against family including minor members.

The manager of a joint Hindu family which includes minors can enter into a contract for the sale or purchase of immovable property and the contract can be specifically enforced against the family including the minors provided the transaction is for legal necessity or for the benefit of the estate. (Paras 21, 23)

Tests to see whether transaction is for benefit of estate indicated. Case law reviewed. (Para 26)

(Transaction of sale held for benefit of estate) (Paras 21, 27)

(j) Limitation Act (1908), Preamble and S. 3 — Laches — Defendant entering into agreement with plaintiff on 10-10-40 for sale of plot of land — No time for specific performance fixed — Defendant not giving any notice fixing reasonable time — Plaintiff making several attempts to obtain specific performance — Ultimately plaintiff sending lawyer's notice on 16-4-1942 demanding specific performance — Defendant's reply on 29-4-42 amounting to breach of agreement on his part — No action on part of plaintiff since then leading defendant to believe that plaintiff abandoned the contract — Suit by plaintiff on 30-9-43 i.e. last date of limitation for specific performance — Plaintiff held not guilty of laches — (Specific Relief Act (1877), S. 22): (1874) LR 5 PC 221 and (1881) 6 AC 740, Rel. on. (Para 30)

Anno: Limit. Act, Preamble N. 5; S. 3 N. 40; Sp. Rel. Act, S. 22 N. 5.

B. R. Mandlekar with Bobde, for Appellant; Y. S. Tambe, for Respondent.

CASES REFERRED:

(A) ('26) AIR 1926 Nag 493: 96 Ind Cas 949 (Pr 18)

(B) ('21) AIR 1921 Mad 172: 44 Mad 605 (FB) (Prs 18, 21-23, 25)

(C) ('43) AIR 1943 Nag 313: ILR (1944) Nag 33 (Pr 18)

(D) ('37) AIR 1937 PC 42: 16 Pat 149 (PC) (Pr 20)

(E) ('46) AIR 1946 Nag 139: ILR (1946) Nag 116 (Pr 21-23)

(F) ('17) AIR 1917 PC 33: 40 Mad 709 (PC) (Prs 21-23, 25, 26)

(G) ('23) AIR 1923 Bom 453: 73 Ind Cas 1017 (Prs 21-23, 25)

(H) ('35) AIR 1935 Bom 295: 59 Bom 525 (FB) (Prs 21-23, 25)

(I) ('54-57) 6 Moo Ind App 393: 1 Sar 552 (PC) (Pr 25)

(J) ('75) 2 Ind App 145 (PC) (Pr 25)

(K) ('76-77) 2 Cal 341: 4 Ind App 52 (PC) (Pr 25)

(L) ('22) AIR 1922 Bom 122: 46 Bom 312 (Pr 25)

(M) ('33) AIR 1933 Nag 109: 29 Nag LR 41 (Pr 26)

(N) ('28) AIR 1928 All 454: 50 All 969 (FB) (Pr 26)

(O) ('50) AIR 1950 Nag 238: ILR (1950) Nag 386 (Pr 28)
(P) (1874) LR 5 PC 221: 22 WR 492 (Pr 29)
(Q) (1881) 6 AC 740: 50 LJ QB 689 (Pr 29)

JUDGMENT: This is defendant's appeal against the reversing judgment decreeing the plaintiff's claim for specific performance.

(2) The defendant is a moneylender and has extensive house and landed property. He was a malguzar of mouza Ambazari till the malguzari rights were abolished by the Abolition of Proprietary Rights Act of 1951. He was the owner of khasra No. 77 which was waste morrum land. Out of the area of 23 acres of this khasra number, the defendant prepared a lay-out of 12.58 acres dividing it into 60 building plots of varying dimensions. The lay-out was sanctioned by the Civil Station Sub-Committee, Nagpur, on 5-11-1936 as this area was then within the jurisdiction of that Committee. The defendant started selling these plots from about January 1937 in full proprietary rights and had disposed of about 17 plots before the agreement in dispute.

(3) The Improvement Trust, Nagpur, which came into existence later on, included the entire field khasra No. 77 in the Dharampeth Extension Scheme. Unless the defendant got the Trust to exclude the area from the Scheme, it would have acquired the land and in that event the defendant would have obtained a nominal compensation as for fallow agricultural land. Khasra No. 78, area about 25 acres, which adjoins this land and is similar in agricultural productivity was acquired by the Trust on payment of compensation at Rs. 250/- per acre. As deposed to pay D. W. 3, that land was under cultivation. Khasra No. 77 was always lying fallow and did not yield any income. Under these circumstances it was necessary in the interest of the defendant and his family and in discharge of the obligations to the persons to whom he had already conveyed some of these plots to obtain the sanction of the Improvement Trust for the lay-out. The defendant was anxious to obtain the sanction for the lay-out of the entire area of 23.96 acres, but by the resolution dated 28-9-1940 (Exhibit P-11) the Board of Trustees sanctioned the lay-out of 12.58 acres as was previously sanctioned by the Civil Station Sub-Committee. The defendant agreed to this revised lay-out on 18-9-1940 & to the draft of the agreement prepared by the Trust on 19-9-1940. The defendant then desired that he should not be burdened with the entire cost of the two roads and that the Trust should share the costs. The final agreement Ex. P-18 was executed on 18-10-1940 after it was approved by the Board of Trustees on 28-9-40. Since the agreement with the Civil Station Sub-Committee embodying the terms on which the sanction was granted to the lay-out is not on record, it is not possible to say if the later agreement with the Trust was more onerous than the former. The sanction of the Civil Station Sub-Committee to the lay-out could not have been obtained without the defendant undertaking the works of development of the lay-out and the Civil Station Sub-Committee would not have accepted that burden.

(4) On 10-10-1940 the defendant entered into the agreement (Exhibit P-1) with the plaintiff to sell to him one plot out of this lay-out at the rate of 4½ square feet per rupee. The description of the plot as given in the agreement is "plot No. 4, in block C, measuring 120 feet north-south and 100 feet east-west, abutting on the road of 60 feet wide towards the north, according to the dimensions in the revised lay-out of the Improvement Trust when completed." It was agreed that the sale deed would be executed after the agreement between the Improvement Trust and the defendant was completed. By 10-10-1940 the defendant received Rs. 500/- as earnest money. On the same date the defendant gave a letter (Exhibit D 5) which is signed by his agent, stating that the price agreed included the general contribution, sewer charges of the improvement(?)

(5) The defendant did not execute the sale deed according to the agreement. After making various efforts to get the sale deed, the plaintiff sent a lawyer's notice (Ex. P. 2) dated 16-4-1942 demanding specific performance of the agreement. Exhibit P-3 dated 29-4-42 is the reply sent by Shri Bobde on behalf of the defendant. The defendant alleged that he was required by the Trust to pay charges not only for the sewer and general contribution but also for storm drains, water-main and 60 feet road which the plaintiff was bound to pay to the defendant "in pursuance to and in consequence of the agreement of sale between the parties". The defendant complained that the plaintiff was shirking the payment of his share of the charges on account of these three additional items. The defendant expressed his willingness to execute the sale deed on payment of those amounts. He did not specify the amount of contribution which he claimed from the plaintiff. By the reply Ex. P. 17, dated 7-5-42, plaintiff repudiated this statement and insisted on the defendant executing the sale deed in accordance with the terms agreed between the parties. The plaintiff asserted that there was no agreement to vary those terms and to pay the charges claimed. The defendant having refused to execute the sale deed in accordance with the agreement between the parties, the plaintiff instituted this suit.

(6) The defendant denied the claim on the ground that the plaintiff was wrongfully refusing to pay the contribution for storm drains, water-main and 60 feet road payable under the express agreement recited in Ex. D-5. Even otherwise, the defendant was entitled to be reimbursed in law for this contribution for developments which he paid to the improvement Trust. On account of the plaintiff's refusal to make these payments, he had forfeited his earnest money. The defendant also claimed the dismissal of the suit on the following grounds:

(a) that the land specified in the agreement Ex. P-1 was not available for transfer as the final lay-out of the Improvement Trust materially altered the situation and consequently the agreement became incapable of specific performance;

(b) by decreeing the claim the plaintiff would be getting an unfair advantage over the defendant by having these development amenities at the cost of the defendant;

(c) the plaintiff's refusal to pay the public charges accrued since the date of the agreement, including those payable to the Improvement Trust disentitles him to any relief;

(d) specific performance cannot be enforced inasmuch as the transferability depends upon the sanction of the lay-out by the Improvement Trust and also depends upon the obligation to pay such charges as would be levied by the trust; and

(e) the defendant who is a manager of the joint Hindu family is incompetent to transfer the interest of his minor son. Alternatively it was pleaded that if the plaintiff is found entitled to specific performance in spite of the above defences, he can claim specific performance only of the interest of the defendant on payment of the full consideration.

It was asserted that the defendant was always willing to convey his half interest in the plot for the full considerations agreed between the parties.

(7) The trial Court held that the agreement between the parties was as contended by the plaintiff and the grounds on which the defendant refused to perform the contract were all untrue and improper. The trial Court, however, held that the agreement entered into by a manager of a joint Hindu family on behalf of the family can be specifically enforced not only against the interest of the manager in the family property but also against the interest of the other coparceners including the minors provided that the transaction is for the legal necessity or for the benefit of the estate. As the case of legal necessity or benefit to the estate was not set up by the plaintiff, the suit for specific performance was dismissed and the alternative claim for refund of earnest money and damages was decreed.

(8) The plaintiff appealed and applied for amendment of his plaint. The learned District Judge allowed the application and framed the following issues for trial by the lower Court:

(i) Did the defendant enter into the agreement to sell the plot as the Karta of the joint Hindu family?

(ii) Is the sale of the plot in suit for the benefit of the estate?

These issues were remitted to the lower Court for trial as the defendant wanted to lead evidence in regard to these issues. As a matter of fact the first issue did not arise in view of the defendant's admission that he had entered into the agreement as 'karta'. The defendant then filed a written statement in answer to the amended plaint in which he alleged that the transaction was not for the benefit of the estate & there was no legal necessity to sell the land, that the scheme of converting the agricultural land into building plots for sale was not the ancestral business carried on by the family and that the transaction of this new business could not bind the minor son. It was further alleged that the defendant did not ascertain the costs of the improvement, that this venture proved too costly and was injurious to the intere t of the joint family, that the land could have been used for gardening, orchards, flower garden and general agriculture, that the land would have fetched Rs. 1000/- per acre, and that the defendant did not thus act as a prudent manager in selling the land on the terms of the lay-out. After recording such further evidence as the parties chose to adduce, the trial Court found that the transaction was for the benefit of the estate and that the joint family benefited enormously by the move taken by the defendant. The defendant filed cross-objections challenging these findings.

(9) Although the learned District Judge had directed the appellant to amend the plaint, the amendment was not incorporated in the plaint. After the findings were received an application was made to the District Judge for extension of time under Section 148, Civil P. C., to amend the plaint. This application was opposed by the defendant on the ground that time could not be extended in law and that alternatively there was no sufficient cause for granting the extension as the appellant was careless and negligent in not carrying out amendments within the time prescribed by Order 6, Rule 18, Civil P. C. The learned District Judge overruled these contentions and allowed the plaintiff to amend the plaint. The learned Judge accepted the finding of the trial Court, allowed the appeal and decreed the claim for specific performance.

(10) This decree is attacked by the learned Counsel for the defendant-appellant on every conceivable ground and he addressed very lengthy arguments in support of his contentions.

(11) The first contention raised by the learned Counsel is that the specific performance should be refused as the agreement Ex. P. 1 is indefinite regarding the plot to be conveyed and the plaintiff has not laid a claim regarding the plot in the lay-out of the Improvement Trust. It was further contended that the plot agreed to be sold is not now available as the final lay-out has materially altered the situation. None of these contentions has any substance. As will appear from the agreement Ex. P-1, the variation in the dimensions of the area by the final lay-out of the Trust was [illegible] contemplation of the parties. On a true construction of the agreement it must be held that the agreement was to sell the plot at the site mentioned in the agreement as will appear in the final lay-out of the Improvement Trust and the area so ascertained will be paid for at the rate specified in the agreement. A lump sum price for the whole plot was not fixed as the dimensions and the area were liable to be varied in the lay-out of the Trust. The plaintiff seeks to enforce this agreement and has pleaded all relevant facts. The lower appellate Court has rightly held him entitled to a decree for the plot as in the final lay-out of the Improvement Trust. The dimensions of the plot are slightly varied in this lay-out. The east-west dimension is 112'-6" while the north-south dimension is 119' on the eastern side and 107'-6" on the western side. The plot is abutting on the 60-feet road and also on the 30-feet road to the east.

(12) The learned Counsel next contends that the suit should be dismissed as the plaintiff had refused to abide by the contract Ex. P-1, read with Ex. D-5. It was pleaded that the plaintiff had agreed to pay the charges which are specifically mentioned in the letter Ex. D. 5. That document states that the price of 4¼ square feet per rupee includes "the general contribution, sewer charges of the improvement". By Ex. P-18 the defendant agreed to pay to the Improvement Trust a particular sum as general contribution to meet the expenses of general works of the nature of water-main, outfall sewer, sewage disposal etc. It is evidently to this liability that reference is made in Ex. D-5. That document provides that the plaintiff will not be liable to pay for "general contribution" in addition to the price. The construction of storm drains, water, main and 60-feet road was the obligation of the defendant under the agreement Ex. P-18. This was admittedly in addition to the general contribution mentioned in Ex. D-5. The defendant claims contribution from the plaintiff for these expenses which he had to incur in preparing a lay-out in addition to a proportionate contribution towards the amount payable to the Improvement Trust as a general contribution. The plaintiff as P. W. 1 has stated that he expressly told the defendant that he would not be liable to pay anything with regard to the Improvement Trust charges and that he was not to pay anything in addition to the price agreed. He admitted that there was no specific mention at the time of agreement about contribution for 60-feet road.

The defendant's statement that he made it clear to the plaintiff that he would have to contribute towards the expenses of storm drains, 60-feet road and water-main in addition to the amount payable to the Improvement Trust under the agreement Ex. P-18 cannot be true. If the plaintiff was to bear all these charges, they would have been specified in Ex. D-5 or in Ex. P-1. As stated by him,

he agreed to pay the general contribution and sewer charges payable to the Improvement Trust under Ex. P-18 and that was included in the rate agreed. Though Landge declined to abide by the alleged contract and pay the additional charges claimed by the defendant, the latter returned the earnest money to the former together with interest at 1/- p. c. p. m. The defendant would not have paid this interest if Landge was not justified in refusing to pay additional charges (Ex. D-4). Under these circumstances, I agree with the lower appellate Court that the claim under the three heads in dispute was an afterthought and was not part of the agreement.

(13) The learned Counsel next submits that the defendant is entitled to these charges apart from the agreement in view of Section 68 (1) & S. 68 (6) of the Improvement Trusts Act, 1936. These provisions are:

"68. (1) Wherever in any area comprised in any improvement scheme under this Act the Provincial Government has sanctioned the acquisition of land which is subsequently discovered to be unnecessary for the execution of the scheme, the owner of the land or any person having an interest therein, may make an application to the Trust requesting that the acquisition of the land should be abandoned in consideration of the payment by him of a sum to be fixed by the Trust in that behalf.

....

(6) Every payment due from any person under any agreement executed under sub-section (4) shall be a charge on the interest of that person."

....

The defendant has not pleaded this case nor has he claimed any particular amount as contribution. Nor has he given any data to arrive at that figure. On the contrary, as a witness he has asserted that the Trust had not notified this land, thereby meaning that the Trust had not notified acquisition of the land. If that were so, Section 68 (1), and consequently Section 68 (6) would have no application. The charge specified in sub-section (6) is as regards the amount payable under sub section (1) as a price for abandoning the acquisition. The contribution towards that price was admittedly included in the rate agreed between the parties. The defendant was bound under the agreement Ex. P-18 to construct the several works of development mentioned in that agreement in consideration of the Improvement Trust agreeing to accord its sanction to the construction of buildings on this site. If these expenses could be construed as incumbrances on the property, then under Section 55 (1) (g), Transfer of Property Act the seller is bound to discharge the incumbrances unless there is an agreement to the contrary. There as no such agreement in this case.

(14) The learned Counsel next relied on Section 17, Specific Relief Act which provides that a Court shall not direct specific performance of a part of a contract except in cases coming under one or the other of the last three preceding sections. The learned Counsel invokes all the three Sections 14, 15 & 16. Section 16 has obviously no application as it refers to a case where the contract consists of two separate and independent parts and one of them can and ought to be specifically performed while the other cannot and ought not to be so performed. This is not the case here.

(15) Section 14 provides:

"Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may at the suit of either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency."

The learned Counsel submits that the plot in the Trust lay-out is not identical with the original plot agreed to be sold and has a larger area. The plaintiff can claim performance, if at all, of the area agreed to be sold and since the rules of the Trust do not provide for splitting up of the plot, specific performance should be refused. This argument proceeds on a misconception as regards the nature of the agreement as pointed out above. The agreement is for the entire area as will appear in the final lay-out sanctioned by the Trust. If specific performance is granted, the defendant would be entitled to the price for the entire area at the rate specified in the agreement.

(16) It was further submitted that the transferability of the plot in the final lay-out depends upon the sanction of the Improvement Trust which is subject to the payment of the charges payable to it under the agreement Ex. P-18 and as may be levied by the Trust thereafter. Under the agreement Ex. P-18 the defendant was liable to pay a specified amount for the general contribution to meet the expenses of general works of the nature of water-mains, outfall sewer, sewage disposal and the like. That amount has been paid by the defendant, as will appear from the evidence of the defendant and his account books Ex. D-15. Under the agreement the defendant had undertaken to do certain constructional development works and had agreed to deposit Rs. 8,000/- as security for carrying out this obligation. The agreement provides:

"in case he fails to carry out the works or any of them as per items agreed hereby, the said Trust shall be entitled to carry out the same at his risk and cost and to recover the cost from the said securities. Should the amount of the securities be found insufficient to cover the cost, the said Mr. Buty will be liable to the Trust for the entire or balance of the cost, as the case may be. The Trust agrees that in consideration of Mr. Buty agreeing to the above terms of Trust will grant sanction for construction of buildings in accordance with the building regulations of the Trust in force on the plots in the lay-out."

The Trust has thus sanctioned the lay-out and agreed to grant sanctions for the construction of buildings by purchasers from the defendant who incurred a personal liability to the Trust for carrying out the development works or to reimburse the Trust if it was required to carry them out. There is no evidence that the Trust refused its sanction to the construction of any building for the alleged failure of the defendant to carry out his obligations under the agreement. Moreover, the defendant cannot invoke his own defaults in fulfilling his obligations under the agreement to defeat the plaintiff's claim if it is otherwise good. There is no dispute in this case of the levying of any public charges by the Improvement Trust other than the obligations under the agreement Ex. P-18. The defendant cannot be and was not made liable by the Trust for any public charges payable by the plaintiff.

(17) The learned Counsel contended that the defendant is entitled to claim from the plaintiff the municipal taxes said to have been paid by him for the plot in suit and evidenced by Exs. D-13 & D-14. This claim was not set up by the defendant either in the notices or in the written statement.

Under Section 55 (1) (g), Transfer of Property Act the seller is bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale, interest on all incumbrances on such property due on such date and except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing. The defendant is not entitled to reimbursement for any municipal taxes paid by him for a period prior to the date of sale.

(18) The next contention is that half of the plot belongs to the minor son of the plaintiff and the agreement cannot consequently be enforced having regard to Section 15, Specific Relief Act unless the plaintiff is willing to pay the full consideration for the one-half interest of the defendant. Section 15 runs thus:

"Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

Reliance is placed on — 'Singhai Ramlal v. Kanhayalal', A. I. R. 1926 Nag 493 (A) which follows — 'Baluswami Aiyar v. Lakshmana Aiyar', AIR 1921 Mad 172 (FB) (B) and on — 'Mohammadkhan v. Bapumiya', AIR 1943 Nag 313 (C), where the intended alienations were neither for legal necessity nor for benefit to the estate. In the last case the contract was conditional on the consent of the co-owners who were not parties to the contract and they refused their consent. It was not the case of an agreement by the 'karta' for sale either for legal necessity or for benefit to the estate. The lower appellate Court has found that the sale was for the benefit of the estate and consequently the agreement could be enforced specifically against the manager for the whole area.

(19) The learned Counsel next pressed the disingenuous and ill-advised defence of the defendant that the transaction is not for the benefit of the estate and confers an unfair advantage on the plaintiff. The learned Counsel contends that this case of benefit to the estate, which was not raised in the original plaint, should not have been allowed by the lower appellate Court to be introduced by a belated amendment, particularly when a very senior Counsel of this Bar appeared for the plaintiff in the trial Court. The learned Counsel also raised the contention that the amendment should not have been allowed to be incorporated in the plaint and should be deemed to have been disallowed as it was not incorporated within 14 days of the order as required by Order 6, Rule 18, Civil P. C.

No doubt, the junior counsel for the plaintiff who evidently was in charge of the case was not diligent enough to incorporate the amendment in the plaint in the proper time, but as soon as the omission was noticed the plaintiff made an application to the trial Judge for extension of time and for leave to incorporate the amendment. That Court rejected the application on the ground that it had no jurisdiction to extend the time as the District Judge had passed the order allowing the amendment. An application was therefore made to the District Judge for an extension of time and that application was granted. The learned Counsel could not bring to my notice any authority in support of his contention that the District Judge had no jurisdiction to extend time. His contention is against the specific provision in Order 6, Rule 18, Civil P. C., to extend time. As the learned Judge rightly pointed out, the defendant was vehemently opposing the application because he had no case on merits. In my view the jurisdiction was properly and judicially exercised and I see no reason to interfere with that order.

(20) In answer to the interrogatories served on him by the defendant, the plaintiff had stated that he did not know that the property was ancestral and the minor son of the defendant had a share therein, that he was never in doubt regarding the defendant's legal capacity to alienate the plot till the contention was raised in the written statement. He further stated that the defendant had entered into numerous transactions of a similar nature for the benefit of the estate in the course of management of the family & as 'karta'. Such transfers were not only prior but also subsequent to the transaction in suit. As a witness the plaintiff stated that he did not think it necessary to amend the plaint in the trial Court as the case was sufficiently stated in the aforesaid answers. No doubt his counsel should have been alert & applied for amendment shortly after the written statement was filed; but his inaction or negligence is not an adequate ground for refusing amendment. Necessity for amendment of pleadings frequently arises on account of blunderings of inefficient, inactive or negligent legal advisers. It would be unfair to visit the litigants invariably with the sins of omission of the members of this monopolistic profession.

The learned Counsel did not urge any substantial ground to oppose the amendment. Under O. 6, R. 17, Civil P. C., the Court has power to allow amendment at any stage of the proceeding. The amendment was within the competence of the District Judge having regard to the terms of this rule and is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair. The defendant is not prejudiced in any way. He was allowed to amend his pleading and to adduce evidence. The subject-matter of the suit is not changed in any way. In — 'Ramdhan Puri v. Lachmi Narain', AIR 1937 PC 42 (D), their Lordships refused to interfere with the discretionary order of the High Court allowing in appeal amendment of the plaint in a suit by sons for setting aside the several alienations made by the father on the ground of immorality. The plaintiff was allowed to state facts connecting the loans to immorality The defendant was allowed to amend his written statement and to lead additional evidence. I am therefore satisfied that there is no ground to interfere with the discretionary order of the District Judge.

(21-23) It is settled law that the manager of a joint Hindu family which includes minors can enter into a contract for the sale or purchase of immovable property and the contract can be specifically enforced against the family including the minors provided the transaction is for legal necessity or for the benefit of the estate. 'Ramrao v. Suganchandra', AIR 1946 Nag 139 (E). Relying on — 'Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi', AIR 1917 PC 33 (F), — 'AIR 1921 Mad 172 (B)', — 'Vishnu Vishwanath v. Ramchandra', AIR 1923 Bom 453 (G) and — 'Hemraj Dattubuva v. Nathu Ramu', AIR 1935 Bom 295 (FB) (H), the learned Counsel for the defendant contends that there is no warrant in the princi-

ples of Hindu law for holding that an alienation must be treated as justified and binding on the minor members of the family because the manager considers it advantageous at the time to exchange joint family land for money. Before examining this contention it would be desirable to examine the facts of this case. (His Lordship examined the facts and showed how the transaction and the plan of the defendant was advantageous to the joint family. His Lordship then continued) It cannot therefore be argued that the agreement to sell the plot in dispute without claiming as addition to the price, the contribution for the expenses the defendant had to incur under the agreement Ex. P-18, is injurious to the interest of the joint family.

(24) In these sale deeds the defendant has given a warrant that he is the sole owner of the plots and that he will indemnify the purchasers if anybody makes any claim. He further admits that he has received adequate price and has benefited the estate. The learned Counsel argues that it is not the defendant's case that these sales were imprudent transactions as he received adequate price for these sales, but in the case of the plaintiff adequate price has not been received. Exhibit P-7 is a document signed by the defendant some time after 16-2-1943 in which he demanded Rs. 210/- from Landge in addition to the price agreed between the parties. The price of the plot agreed to be sold to the plaintiff was therefore inadequate, if at all, by Rs. 210/- for an area of approximately 12750 square feet. The price for this area, according to the rate agreed in the sale deed dated 15-10-1940, would be Rs. 450/- less than the price which he would get under the agreement in dispute. Even if it is assumed, contrary to the recitals in Ex. D-15 relating to the sale, that that purchaser had to pay the disputed charges in addition to the price, the transaction in suit would be more advantageous than that transaction.

(25) It would be useful at this stage to examine the cases relied on by the learned Counsel. 'AIR 1921 Mad 172 (FB) (B)', has already been noticed. It does not help the defendant in determining what is benefit to the estate. In — 'AIR 1935 Bom 295 (FB) (H)', it was held that a sale for a price higher than the market price is not in itself for the benefit of the estate. No attempt was however made to define "benefit to the estate", as it cannot be defined as observed by their Lordships of the Privy Council in — 'AIR 1917 PC 33 (F)'. After referring to the earlier authorities in — 'Hunooman Persaud Panday v. Mt. Babooee Munraj Koonweree', 6 Moo Ind App 393 (PC) (I), — 'Prosunno Kumari Debya v. Golab Chand', 2 Ind App 145 (PC) (J) and — 'Konwar Doorganath Roy v. Ram Chunder Sen', 2 Cal 341 (PC) (K), Lord Atkinson who delivered the judgment of the Board observed:

> "No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation, affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

The learned Counsel's interpretation of these observations that the act must be of defensive character cannot be accepted. In — 'AIR 1923 Bom 453 (G)', the Court held that the sale by a manager of a joint Hindu family would not be justified merely on the ground that the sale at the time appeared to be advantageous, that is to say, that it was a sale for what appeared to be a good price. In —'Nagindas Maneklal v. Mahomed Yusuf', AIR 1922 Bom 122 (L), it was held that an adult coparcener very properly decided to dispose of the house which was in a dilapidated condition and which the municipal committee wanted to pull down and that the minor coparceners were bound by the agreement.

(26) No doubt, there are rival views as to what is meant by the expression "benefit to the estate". Mulla in his Hindu Law, paragraph 243A has expressed this conflict thus:

> "One view is that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction. Another view is that for a transaction to be for the benefit of the estate it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction."

Their Lordships in — 'Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi', (F), (supra) do not endorse the first view though it was accepted that an act of a defensive character would be for the benefit of the estate. The following observations in — 'Narayan Rao v. Mulchand', AIR 1933 Nag 109 (M), with which I respectfully agree, state the law on the point:

> "If the act for which the character of 'benefit to the estate' is claimed is of a 'defensive nature' it may give rise to a presumption in favour of the act as being beneficial: on the contrary if an act is not of a 'defensive nature', the presumption would be to the contrary so as to call for affirmative evidence to rebut it. The defensive nature of the act is, 'inter alia' a factor but in no event decisive or a 'sine qua non' in the consideration of the question of benefit. The distinction of acts being of 'defensive nature' or otherwise is in substance the outcome of what is conceived to be the rule of evidence drawn from human experience as to how a man with ordinary prudence would act in particular circumstances. In other words, the test to determine whether a transaction is legally necessary or beneficial is to see whether the transaction is fair and proper. In judging the validity or invalidity of alienations made by limited owners the Court has to be satisfied about the propriety of the transactions; 'legal necessity' or 'benefit to the estate' are in reality compendious expressions for a large variety of circumstances which serve to demonstrate the propriety of the transactions."

'Jagat Narain v. Mathura Das', AIR 1928 All 454 (FB) (N), takes the same view.

(27) In order to prevent the property being lost for a very paltry sum and to prevent payment of damages to the persons to whom certain plots were already sold, it was necessary for the defendant to obtain the sanction of the Improvement Trust to the lay-out on the terms of Ex. P-18 and to sell the plots at the best possible market price. The sale of the plot to the plaintiff was, as already shown, on more advantageous terms than the numerous transactions preceding the agreement and the transaction dated 15-10-1940. The sale in dispute is thus for the benefit of the estate. The defendant is backing out of the agree-

ment not because it is not for the benefit of the estate but because the prices of building plots have subsequently increased and the defendant wants to take a dishonest advantage of that increase.

(28) Lastly the learned Counsel argued that the relief of specific performance, which is in the discretion of the Court, should be refused to the plaintiff as

(a) he has waited till almost the last day of limitation,

(b) he has obtained an unfair advantage over the defendant in obtaining the property without payment of the additional charges,

(c) the act of the defendant in agreeing to sell the property without such charges was an imprudent act prejudicial to the interest of the minor, and (d) the plaintiff has obtained an adjudication against the minor's interest without impleading the defendant and without giving him an opportunity to contest the suit.

The learned Counsel invokes S. 22, Specific Relief Act and relies on — 'Dau Alakhram v. Mt. Kulwantin Bai', AIR 1950 Nag 238 (O). The last three contentions are without any substance whatsoever in view of the foregoing discussion and findings.

(29) The suit was instituted on 30-9-43 to enforce the agreement made on 10-10-1940. No time for performance was fixed by the agreement, nor did the defendant give any notice fixing a reasonable time after the expiration of which he would treat the contract as at an end. From the evidence on record it is abundantly clear that the plaintiff made several attempts to get specific performance but the defendant evaded and was demanding an additional price. Plaintiff, therefore, sent a lawyer's notice on 16-4-1942, demanding performance and reiterated the demand on 7-5-42. In view of the findings of fact in this case it is the defendant who committed a breach of the agreement to sell the property to the plaintiff, by his reply Ex. P-3, dated 29-4-1942. The law as to when and under what circumstances the delay is a bar to the legal remedy is very clearly laid down by Sir Barnes Peacock who delivered the judgment of the Judicial Committee in — 'Lindsay Petroleum Co. v. Hurd', (1874) LR 5 PC 221 (P) thus:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material but in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." (pages 239-240)

In — 'Dalton v. Angus', (1881) 6 AC 740 (Q), Lord Penzance observed at page 805:

> "In all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent....."

(30) In his original written statement or in the amended written statement the defendant has not alleged any facts from which the inference of the acquiescence or consent of the plaintiff to the breach of the contract by the defendant could be reasonably drawn. Nor has the learned Counsel been able to draw my attention to any such circumstances. It is clear that the defendant has done nothing since May 1942 to his prejudice regarding the plot in dispute, nor has the plaintiff neglected to do anything which he was bound by law to do, nor did he give any indication leading the defendant to believe that he had abandoned the contract. 'Dau Alakhram v. Mt. Kulwantin Bai', (O), (supra) is not an authority for the proposition that the relief of specific performance, though otherwise good, should be refused merely because a suit was instituted about 15 months after the breach of the agreement by the defendant. In the instant case the plaintiff has alleged and was always ready and willing to carry out the agreement Ex. P-1 read with Ex. D-5. The defendant has not alleged nor has he proved that he was not so ready and willing. Of course, he was not willing to pay the additional charges wrongly demanded by the defendant, but that does not mean that he was not ready and willing to carry out the agreement between the parties. In the case cited by the learned Counsel, the defendant had averred that she was ready and willing all along to sell the property and perform her part of the contract and that it was the plaintiff who avoided the performance of his part thereof. Still the plaintiff did not aver though he filed a further statement that he was ready and willing to perform his part of the contract; nor did he place before the Court any material to prove such readiness and willingness. For the reasons already stated, it would be highly inequitable to refuse the plaintiff in the instant case specific performance of the agreement and to help the dishonest defendant to escape his legal liability.

(31) I therefore uphold the decision of the lower appellate Court and dismiss the appeal with costs. Counsel's fee as certified.

B/R.G.D. Appeal dismissed.

A.I.R. 1954 NAGPUR 71 (Vol. 41, C. N. 29)

SINHA C. J. AND BHUTT J.

M. V. Rajwade I.A.S., Dist. Magistrate, Petitioner v. Dr. S. M. Hassan and others, Respondents.

Misc. Criminal Cases Nos. 35 to 39, 48 and 50 of 1953, D/- 21-8-1953.

(a) Commissions of Inquiry Act (1952), S. 3 — Appointment of Judge challenged — Burden of proof.

Where a party challenges an appointment of a Judge of the High Court on the Commission of Inquiry as being 'ultra vires', it is for it to show a provision of law which inhibits it. AIR 1953 Nag 331, Ref. (Para 6)

(b) **Commissions of Inquiry Act (1952), S. 4 and S. 5(4), (5) — Commission is civil Court for limited purposes.**

Section 4 only clothes the Commission with certain powers of a Civil Court but does not confer on it the status of a Court. It is only under sub-section (4) of S. 5 that the Commission is deemed to be a Civil Court and sub-section (5) imparts to the proceeding before it the character of a judicial proceeding. However, these provisions only create a fiction which cannot extend beyond the purpose for which it is created. AIR 1940 PC 167, Rel. on; AIR 1931 Lah 662, Expl. (Para 8)

(c) **Commissions of Inquiry Act (1952), S. 5(4) — Construction and interpretation of S. 5(4).**

It would not be correct to contend that the expression "the Commission shall be deemed to be a Civil Court" occurring in S. 5(4) is full and complete in itself and what follows it only denotes the limitation on the full-fledged status and powers of a civil Court that the Commission would otherwise have possessed. Regarding the sub-section as a whole, it is clear that under the Commissions of Inquiry Act, 1952, the Commission is fictionally a Civil Court only for limited purposes enumerated in the sub-section. (Para 10)

(d) **Commissions of Inquiry Act (1952), S. 3 — Nature and function of Commission.**

The Commission governed by the Commissions of Inquiry Act, 1952 is appointed by the State Government "for the information of its own mind", in order that it should not act, in exercise of its executive power, "otherwise than in accordance with the dictates of justice & equity" in ordering a departmental enquiry against its officers. It is, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. 32 Cal 1 (PC), Foll. (Para 12)

(e) **Contempt of Courts Act (1952), S. 3 — Meaning of 'Court' — Commission of Inquiry is not Court — (Commissions of Inquiry Act (1952), S. 3) — (Words and Phrases — "Court") — (Special Tribunal).**

The term "Court" has not been defined in the Contempt of Courts Act, 1952. The Act, however, does contemplate a "Court of Justice" which as defined in S. 20, Penal Code, 1860 denotes "a Judge who is empowered by law to act judicially." (Para 13)

The least that is required of a Court is the capacity to deliver a "definitive judgment", and unless this power vests in a tribunal in any particular case, the mere fact that the procedure adopted by it is of a legal character and it has the power to administer an oath will not impart to it the status of a Court. AIR 1935 Mad 673; AIR 1940 Cal 286; AIR 1950 Assam 25, Rel. on; AIR 1953 All 419, Expl. (Para 14)

Judged by this standard, a fact finding Commission appointed by the Government and governed by the provisions of the Commissions Inquiry Act, 1952, is not a Court, within the meaning of the Contempt of Courts Act, 1952. (Para 15)

In No. 35 of 1953:

M. Adhikari with K. K. Thakur, for Applicant; R. M. Hajarnavis (for No. 1), C. B. Parakh and S. C. Ghosh (for Nos. 2 to 4) and R. V. S Mani (for Nos. 5 and 6), for Non-Applicants.

In No. 36 of 1953:

L. D. Trivedi, for Non-Applicant.

In No. 37 of 1953:

R. V. S. Mani (for Nos. 1, 5 and 6) and C. B. Parakh and S. C. Ghosh (for Nos. 2 to 4), for Non-Applicants.

In No. 38 of 1953:

B. L. Gupta, for Non-Applicants.

In No. 39 of 1953:

K. S. Mishra (for No. 1) and R. V. S. Mani (for Nos. 2 and 3), for Non-Applicants.

In No. 50 of 1953:

M. L. Shrivastava, for Non-Applicants.

In No. 48 of 1953:

H. L. Khaskalam and S. P. Pathak (for No. 1) and R. S. Ruikar and P. K. Tare (for No. 2), for Non-Applicants and T. L. Shevde, Advocate General, for the State.

CASES REFERRED:

(A) ('53) AIR 1953 Nag 331: (Misc. Petn. No. 96 of 1953 (Nag)) (Pr 6)
(B) ('40) AIR 1940 PC 167: ILR (1940) 2 Cal 493 (PC) (Pr 9)
(C) ('31) AIR 1931 Lah 662: ILR (1931) 12 Lah 391: 32 Cri LJ 1252 (Pr 11)
(D) ('05) 32 Cal 1: 31 Ind App 239 (PC) (Pr 12)
(E) ('35) AIR 1935 Mad 673: 58 Mad 954: 36 Cri LJ 895 (Pr 14)
(F) ('40) AIR 1940 Cal 286: 41 Cri LJ 662 (Pr 14)
(G) ('50) AIR 1950 Assam 25: 51 Cri LJ 247 (Pr 14)
(H) ('53) AIR 1953 All 419: 1953 Cri LJ 943 (Prs 15, 16)
(I) ('53) AIR 1953 All 342: 1953 Cri LJ 733 (Pr 16)

ORDER: This order shall govern the disposal of the following Miscellaneous Criminal Cases:

No. 35/53: Shri M. V. Rajwade v. Dr. S. M. Hasan and others.

No. 36/53: Shri M. V. Rajwade v. Shri Abhilas Chandra.

No. 37/53: Shri M. V. Rajwade v. Dr. N. B. Khare and others.

No. 38/53: Shri M. V. Rajwade v. Swami K. N. Sokhta and another.

No. 39/53: Shri M. V. Rajwade v. Shri R. K. Shukla and others.

No. 50/53: Shri M. V. Rajwade v. Thakur Pyarelal Singh and another.

No. 48/53: In re Shri Ramgopal Maheshwari & another.

(2) Shri M. V. Rajwade, I.A.S., who is the petitioner in the first six cases is the Deputy Commissioner, Durg. The last case was registered on a petition filed by the Deputy Registrar, High Court of Judicature at Nagpur. These petitions were filed under Section 3 of the Contempt of Courts Act, 1952, for taking action against the alleged contemners in respect of certain publications.

(3) Respondents in these cases are the authors and/or publishers of the impugned articles.

(A) The authors concerned are—

(1) Dr. S. M. Hasan, Ex-Minister of the State, Nagpur. (Respondent 1 in M. Cr. C. 35/53).

(2) Dr. N. B. Khare, President, Civil Liberties Union, Nagpur. (Respondent 1 in M. Cr. C. 37/53).

(3) Shri R. K. Shukla, M. L. A. and President, Bar Association, Rajnandgaon. (Respondent 1 in M. Cr. C. 39/53).

(4) Shri M. R. Awari, M. L. A., Nagpur. (Respondent 2 in M. Cr. C. 39/53).

(5) Thakur Pyarelal Singh, M. L. A., Raipur. (Respondent 1 in M. Cr. C. 50/53).

(B) The newspapers concerned are—

(1) The "Nagpur Times", Nagpur, which is an English Daily. Shri P. Y. Deshpande, Shri K. P. Narayanan and Shri A. G. Sheorey, are respectively the Managing Editor, Editor, and Printer and Publisher of the paper and are respondents 2-4 in M. Cr. Cases 35 and 37 of 1953.

(2) The "Hitavada", Nagpur, which is also an English Daily. Shri A. D. Mani and Shri K. S. Bharadwaj are respectively the Managing Editor, and Printer and Publisher of the paper and are respondents 5 and 6 in M. Cr. Cases 35 and 37 of 1953, and respondents 2 and 3 in M. Cr. C. 39 of 1953.

(3) The "Yugsandesh", Nagpur, which is a Hindi Weekly. The respondent in M. Cr. C. 36 of 1953, Shri Abhilash Chandra, is its Editor, and also Printer and Publisher.

(4) The "Nayakhun", Nagpur, which is also a Hindi Weekly. Respondents in M. Cr. C. 38 of 1953, Shri K. N. Sokhta and Shri Madanlal Paliwal, are its Editor and Co-Editor, respectively.

(5) The "Nava Bharat", Nagpur, which is a Hindi Daily. Respondent 1 in M. Cr. C. 48 of 1953, Shri Ramgopal Maheshwari, is its Editor and also Printer and Publisher.

(6) In M. Cr. C. 50 of 1953 respondent 2, Shri Kanhaiyalal Agarwal, is the Printer, Bharti Press, Rajnandgaon, which had printed the impugned pamphlet.

(4) There was considerable public agitation in Chhuikhadan, in the State of Madhya Pradesh, over the Government's decision to abolish and close the Tahsil. On the 9th January 1953, while the treasury and records were being removed from the Tahsil building, the Police opened fire on a mob, as a result of which 5 persons died and several persons were injured. The Government of Madhya Pradesh accordingly appointed a Commission of Inquiry under the Commissions of Inquiry Act, 1952, with the Honourable Shri Justice B. K. Choudhuri of the Nagpur High Court as the sole member. A notification to that effect was published in the Madhya Pradesh Gazette, Extraordinary, dated the 14th January 1953. The Commission was asked to enquire and report whether—

(i) the firing was justified;

(ii) excessive force was used; and

(iii) after the firing adequate action was taken to maintain peace and order, to prevent recrudescence of trouble and to give adequate medical and other aid to the injured.

Government were also pleased to direct that "all the provisions of the Commissions of Inquiry Act, 1952, shall apply to the proceedings of the Commission."

(5) The impugned publications refer to the Police action of the 9th January 1953 and to the appointment of the Commission. The details of the publications, briefly are these:

(1) M. Cr. C. 35 of 1953—This relates to the statement of Dr. S. M. Hasan, Ex-Minister of the State, which was published in the issue of "Nagpur Times", dated the 28th January 1953, under the caption "Chhuikhadan Tragedy and After", and with slight variations in the issue of "Hitavada", dated the 29th January 1953, under the heading "The Chhuikhadan Tragedy". In this statement Dr. S. M. Hasan first described the interview that he had with the injured men and women in the Khairagarh Hospital and later gave the gist of the speeches delivered by some leaders, including himself, in the meeting held at Chhuikhadan to commemorate the 13th day ceremony of the persons who died as a result of the firing. Reading the two publications together, the firing has been described as an "outrage", "inhuman", "indiscriminate", and as "killing of the innocent" by the Police. In the publication in "Nagpur Times" particular reference has been made to shooting by ·303 rifles which has been described as an act done under the influence of liquor or insanity, amounting to shooting of human beings as "wild beasts of prey".

(2) M. Cr. C. 36 of 1953—This refers to an article in "Yugsandesh" in the issue of the 25th January 1953, under the head lines "what is the Good, if OH unjust. (you) strike any helpless person". In this article the incident has been described as "holi with blood", no like example of which "can be found in history even on search". Particular reference is made to Shri Awasthi who, being annoyed with the show of black flags on his visit to Chhuikhadan, is said to have met the Chief Minister and returned to the spot with the Deputy Commissioner Shri Rajwade and a posse of Police Constables.

The firing has been described as "indiscriminate", and directed against "poor, inactive and innocent persons", particular reference being made to the shots having been fired at the delicate parts of some "fleeing women". On the same page of the issue, under the caption "Some things to be known in respect of Chhuikhadan firing (chapter)", reference is made to the firing having been resorted to outside the area covered by the order under Section 144, Criminal Procedure Code, and directed against innocent persons engaged in lawful avocation, and also to the neglect of the Civil Surgeon, Raipur, and the matron Shrimati Nulkar who had accompanied him, to attend to the injured persons.

(3) M. Cr. C. 37 of 1953—This relates to the publication of a resolution of the Executive Committee of the Civil Liberties Union, which was passed in an extraordinary meeting held on the 2nd February, 1953, under the presidentship of Dr. N. B. Khare. The resolution was published in the issue of "Hitavada", dated the 3rd February 1953, and of "Nagpur Times", dated the 5th February 1953. It was stated in the resolution that from all accounts

> "this Union has come to the view that the shooting to death of Ramsir Bai by a Sub-Inspector of Police at point blank range is an incident entirely unconnected with, and independent of, the firing episode at Chhuikhadan and amounts to a deliberate man-slaughter."

(4) M. Cr. C. 38 of 1953—This relates to an article published in the issue of "Nayakhun", dated the 16th January 1953, under the head lines "Chhuikhadan firing the climax of Congress Ministry's hostile attitude towards the public". In this article the firing at Chhuikhadan has been compared with that at Jaliyanwala Bagh and has been described as "indiscriminate", "reckless" and "wrongful".

(5) M. Cr. C. 39 of 1953—This relates to the statement of Shri R. K. Shukla, M. L. A., which was published in the issue of "Hitavada", dated the 21st January 1953, under the caption "Democracy shot dead". It was stated by him that the firing appeared from certain facts to be "indiscriminate" and that "Persons actually running away" had been shot, and it was asked whether it was an act of revenge since it was reported that "Shri H. S. Awasthi told the people before firing that you showed black flags to me the other day and today I shall show you to the red flag." Reference was also made to Ramsir Bai who is said to have been shot while protesting against the act of a Constable who was kicking with his boots the chest of a fallen woman. It was further alleged that the authorities were callous in making arrangements for first-aid and there was "wanton neglect" on their part in the disposal of the dead bodies.

(6) M. Cr. C. 48 of 1953—This relates to the publication of the gist of a letter written by Shri M. R. Awari, M. L. A., in the issue of "Nava Bharat", dated the 3rd February 1953. Correctness of the gist is denied by the author. At his instance Shri Ramgopal Maheshwari, Editor and Publisher of the paper, was asked to produce the original letter which could not, however, be produced as it was said to be lost. In the gist as published, it is stated that the former "Ruler of Khairagarh", who is a Deputy Minister of the State, is "concerned with the case of the inquiry". Reference was also made to a report "that the Hon'ble Shri Justice Choudhuri has been selected for the Inquiry Commission" for the reason "that his father had been a former Diwan of Khairagarh". It was further stated that "Shri Awari has asked for appointment of an impartial and independent Judge on the Inquiry Commission."

(7) M. Cr. C. 50 of 1953—This relates to the publication of certain pamphlets under the signature of Thakur Pyarelal Singh, M. L. A., and others, appealing to the people of Madhya Pradesh to observe "Chhuikhadan Martyrs' Day" on the 9th March 1953. In these pamphlets reference was made to the death of Ramsir Bai who is said to have been shot thrice on her bosom when she protested against a Sub-Inspector kicking with his boots the chest of a "young sister". It was also alleged that several persons who were witnessing the scene from a distance and "some mothers, sisters and persons" who were engrossed in their "respective works" were all "marked as targets of shots", and that "the officers came running, leaving the injured persons to their fate". The incident has been described as "inhuman massacre" and as "murderers playing Holi thus shamelessly with the blood of innocent mothers and sisters."

(6) Before we take up other points urged in these cases, we shall first dispose of an argument that Shri C. B. Parakh, learned counsel for Dr. S. M. Hasan, addressed to us regarding the validity of the appointment of Shri Justice B. K. Choudhuri on the Commission of Inquiry. It was contended that his appointment was 'ultra vires' of the Constitution of India, and, therefore, as the Commission of Inquiry was not validly constituted, the writings cannot amount to contempt of Court. The question of the validity of Shri Justice B. K. Choudhuri's appointment was already raised and decided in — 'Samaruram Holiram v. B. K. Choudhuri', AIR 1953 Nag 331 (A) by a Division Bench of the High Court, to which one of us (Bhutt J.) was a party. It was contended by Shri Parakh that the decision in that case was not based on a correct approach to the problem, in so far as while a search ought to have been made to find out if there was any provision in the Constitution under which Shri Justice B. K. Choudhuri could accept the appointment, the question was decided negatively on the ground that there was no prohibition in the Constitution to his doing so. So far as this argument is concerned, we do not see any force in it. Where a party challenges an appointment, it is for it to show a provision of law which inhibits it. Other points urged were already considered in — 'AIR 1953 Nag 331 (A)', and nothing has been shown which may throw doubt on the view that was taken in it. We, therefore, hold that Shri Justice B. K. Choudhuri was validly appointed as the sole member of the Commission of Inquiry.

(7) The question of contempt in the proceedings before us depends on the answers to the following points:

(1) Whether the Commission of Inquiry was a Court within the meaning of the Contempt of Courts Act, 1952;

(2) Whether the proceedings before the Commission of Inquiry were judicial proceedings; and

(3) Whether the publications constitute contempt of Court punishable under the Contempt of Courts Act, 1952.

(8) The first two questions depend mainly upon the interpretation of Section 4 and sub-sections (4) and (5) of Section 5 of the Commissions of Inquiry Act, 1952, which are reproduced below:

"4. The Commission shall have the powers of a Civil Court, while trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

5. (4) The Commission shall be deemed to be a civil Court and when any offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (Act XLV of 1860) is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1898 (Act V of 1898), forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case had been forwarded to him under Section 482 of the Code of Criminal Procedure, 1898.

(5) Any proceedings before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code (Act XLV of 1860)."

It would appear from Section 4 that it only clothes the Commission with certain powers of a Civil Court but does not confer on it the status of a Court. It is only under sub-section (4) of Section 5 that the Commission is deemed to be a Civil Court and sub-section (5) imparts to the

proceeding before it the character of a judicial proceeding. However, these provisions only create a fiction which cannot extend beyond the purpose for which it is created.

(9) In — 'Radha Kissen v. Durga Prosad', AIR 1940 PC 167 (B) the question that was mooted was the right of an attaching decree-holder to adjust the decree with the judgment-debtors for a sum smaller than the amount of the decree. This involved the interpretation of Order 21, Rule 53 (3) of the Code of Civil Procedure, 1908, read with Section 19(3) of the Public Demands Recovery Act, 1913. Order 21, Rule 53 (3) is in these terms:

> "The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

Sub-section (3) of Section 19 of the Public Demands Recovery Act, 1913, is in similar terms. Nasim Ali J. who delivered the judgment of the High Court held that the meaning of the words "representative of the holder of the attached decree", occurring in these provisions, is limited by the words immediately following and that the rule meant that the attaching decree-holder was deemed to be such representative for the limited purpose of executing the decree and not for all purposes. This interpretation was accepted by their Lordships of the Privy Council, and it was held that the attaching creditor was not entitled to adjust the decree for a sum smaller than the amount due under it. Referring to clause (3) of Rule 53, Order 21, of the Code of Civil Procedure, 1908, in this connection their Lordships of the Privy Council observed:

> "It does not say that the attaching decree-holder will be 'deemed to be' the 'holder of the attached decree'. This would certainly have been a simpler way of stating the intention of the Legislature if it was to clothe the attaching decree-holder with all the rights of the holder of the attached decree as if he was his assignee."

In support of this view their Lordships also relied on the antecedent history of Order 21, Rule 53 of the Code of Civil Procedure, 1908, and referred to clause (1) (b) (ii) of the said rule and to sub-section (2) of Section 19 of the Public Demands Recovery Act, 1913, which gave right to the holder of the attached decree to intervene in execution proceedings. This, however, was adverted to only as an additional ground and does not affect the question of interpretation. The purpose for which the fiction has been created is, therefore, to be gathered from what follows after the words which create the fiction.

(10) Applying this test to the instant case, it would appear that the purpose for which the fiction is created in sub-section (4) of Section 5 of the Commissions of Inquiry Act, 1952, is to be inferred from the words that follow the expression "the Commission shall be deemed to be a civil Court." It would not be correct to contend that the above expression is full and complete in itself and what follows it only denotes the limitation on the full-fledged status and powers of a civil Court that the Commission would otherwise have possessed. If that was the intention of the Legislature, the sentence would have been completed after the words "civil Court" and what follows it would have been the subject of a separate sub-section or sentence. It is, therefore, clear that under the Commissions of Inquiry Act, 1952, the Commission is fictionally a civil Court only for the purpose of the contempts punishable under Sections 175, 178, 179, 180 and 228 of the Indian Penal Code, 1860, subject to the condition that it has not the right itself to punish the contemners, a right which other Courts possess under Section 480 of the Code of Criminal Procedure, 1898. Similarly it follows that the fiction relating to the proceedings before the Commission is confined to offences that are punishable under Sections 193 and 228 of the Indian Penal Code, 1860, referred to in sub-section (5) of the Act, and does not extend beyond this limit.

(11) In — 'M. M. Khan v. Emperor', AIR 1931 Lah 662 (C), it was held that the Special Commissioners appointed under the Public Servants (Inquiries) Act, 1850, constitute a "Court" within the meaning of Section 195 of the Code of Criminal Procedure 1898, and the fact that they did not give any final decision did not detract from their status as a Court. An analogy was drawn in this connection from their Lordships of the Privy Council, who only advised His Majesty and did not deliver any judgment themselves. Irrespective of whether the analogy is appropriate, it is clear from the provisions of the Public Servants (Inquiries) Act, 1850, that the inquiry contemplated thereunder is of a judicial nature, on the result of which the Government, under Section 22, is required to pass orders one way or the other.

Under this Act, the Government acts virtually as an appellate Court with power to affirm, reverse or modify the recommendations of the Special Commissioners. So far as the enquiry itself is concerned, it has all the attributes of a criminal trial except that the case can be proceeded with 'ex parte' and the Commissioners can only recommend but not take any final decision. There is, however, no doubt that the enquiry furnishes the basis to determine the guilt of the "accused", as the public servant concerned is described in the Act, and to that extent forms a step towards the making of a final decision. It is in fact a judicial enquiry into the guilt of an accused, and this position is not affected by the fact that the final judgment is delivered by another authority.

(12) An enquiry under the Commissions of Inquiry Act, 1952, on the other hand, is of wholly different character. There is no accuser, no accused and no specific charges for trial; nor is the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission. 'In re Maharaja Madhava Singh', 32 Cal 1 (PC) (D), was a case of the Commissioners appointed by the Viceroy and Governor-General in Council for the purpose of enquiring into the truth of a certain imputation against the Maharajah, in which their Lordships of the Privy Council observed:

> "It is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council."

The 'ratio decidendi' in this case was that the Commission was not a Court. So far as the question regarding the maintainability of an appeal to His Majesty in Council was concerned, the answer thereto followed from the main decision.

These observations apply 'mutatis mutandis' to

the instant case. The Commission in question was obviously appointed by the State Government "for the information of its own mind", in order that it should not act, in exercise of its executive power, "otherwise than in accordance with the dictates of justice and equity" in ordering a departmental enquiry against its officers. It was, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. The two cases are parallel, and the decision must be, as in — 'In re Maharaja Madhava Singh (D)', that the Commission was not a Court.

(13) The term "Court" has not been defined in the Contempt of Courts Act, 1952. Its definition in the Indian Evidence Act, 1872, is not exhaustive and is intended only for purposes of the Act. The Contempt of Courts Act, 1952 however, does contemplate a "Court of Justice" which as defined in S. 20, Penal Code, 1860 denotes "a Judge who is empowered by law to act judicially". The word "Judge" is defined in Section 19 as denoting every person—

> "Who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive x x x".

The minimum test of a "Court of Justice", in the above definition, is, therefore, the legal power to give a judgment which, if confirmed by some other authority, would be definitive. Such is the case with the Commission appointed under the Public Servants (Inquiries) Act, 1850, whose recommendations constitute a definitive judgment when confirmed by the Government. This, however, is not the case with a Commission appointed under the Commissions of Inquiry Act, 1952, whose findings are not contemplated by law as liable at any stage to confirmation by any authority so as to assume the character of a final decision.

(14) A "Court" is defined in Coke on Littleton and by Stroud as a place where justice is judicially administered. According to Stephen (Stephen's Commentaries on the Laws of England, 6th Edn., page 383)—

> "In every Court, there must be at least three constituent parts—the 'actor', 'reus' and 'judex': the 'actor' or plaintiff, who complains of an injury done; the 'reus' or defendant, who is called upon to make satisfaction for it; and the 'judex' or judicial power, which is to examine the truth of the fact, and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy."

In — 'Mahabaleswarappa v. Gopalaswami', AIR 1935 Mad 673 (E), Curgenven J., after reviewing several authorities, observed:

> "To summarise the effect of these decisions it would seem that we have to look, not to the source of a tribunal's authority, or to any peculiarity in the method adopted of creating it (though it is undoubtedly a consideration that it derives its powers mediately or immediately from the Crown) but to the general character of its powers and activities. If it has power to regulate 'legal rights by the delivery of definitive judgments', and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a Court." (Underlining (here in single quotation) is ours).

These observations were approved in — 'Hari Charan v. Kaushi Charan', AIR 1940 Cal 286 (F) and also in — 'Deputy Commr., Goalpara v. Upendra Saran', AIR 1950 Assam 25 (G). The least that is required of a Court is the capacity to deliver a "definitive judgment", and unless this power vests in a tribunal in any particular case, the mere fact that the procedure adopted by it is of a legal character and it has the power to administer an oath will not impart to it the status of a Court.

(15) In — 'Satdeo v. Baba Raghav Das', AIR 1953 All 419 (H), on a difference having arisen between the Honourable Judges composing the Bench on the question whether the Court of an Assistant Collector, First Class, under the Land Revenue Act was subordinate to the High Court for the purposes of Section 2(1) of the Contempt of Courts Act, 1926, the matter was referred to Wali Ullah J. who observed as below:

> "In the present case, the whole difficulty has arisen with regard to the proper interpretation of the expression 'Courts subordinate to them' in sub-section (1) of Section 2. The 'Court' of an Assistant Collector of the First Class, obviously, as its name indicates, is a 'Court'. It is a Court as understood in the Contempt of Courts Act where the term has been used in a wide sense, as including a tribunal, legally authorised to deal with particular matter judicially. The Assistant Collector is undoubtedly entrusted with certain 'judicial functions'; such judicial functions include the function of 'deciding litigated questions according to law'—deciding them not arbitrarily, but according to certain rules and procedure which ensure that the person called upon to decide them acts with fairness and impartiality."

Although in the above observations it is stated that the term "Court" in the Contempt of Courts Act, 1926, is used in a wide sense and includes a tribunal, it is nevertheless pertinent that the tribunal, in order to claim protection under the Act, should be legally authorised to deal with any particular matter judicially. This is, in substance, the least attribute of a tribunal which would make it a Court within the meaning of the Contempt of Courts Act of 1926 or 1952. This implies that the matter decided by the tribunal should constitute a judgment which is either definitive in itself or, as contemplated by the Indian Penal Code, would be definitive if confirmed by some other authority. Judged on this standard, we have no hesitation in holding that the Commission, presided over by the Honourable Shri Justice B. K. Choudhuri, was not a Court within the meaning of the Contempt of Courts Act, 1952.

(16) In the view we have taken, we need not consider the further questions, viz., whether the Commission was subordinate to the High Court within the meaning of the Contempt of Courts Act, 1952, and whether the publications are indictable as contempt or privileged under Article 19 of the Constitution of India. We may only mention that the meaning of the words "subordinate to the High Court" has been considered in — 'Satdeo v. Baba Raghav Das (cit. sup.) (H)' and the other question has been the subject of decision in — 'Lakhan Singh v. Balbir Singh', AIR 1953 All 342 (I) with which, as at present advised, we are in respectful agreement.

(17) We would like to mention that we are alive to the duty of the Press and the public men towards the people. At the same time it is also their duty to properly instruct and guide public opinion, particularly in matters of grave public

importance. If authorities charged with any public duty or function are maligned and an atmosphere is created, which is likely to prejudice mankind against them, then, irrespective of whether the matter is indictable, we would expect the Press and the public men to act with the greatest caution before publishing any such inflammatory statement or narration. In this context we appreciate the apologies, in some cases wholly unconditional, which have been tendered by most of the respondents including all the newspapers concerned. We trust that the Press and public men will always endeavour to exercise moderation and while upholding the privileges of the public, not act in a manner which may shake public confidence in the Courts, Tribunals or authorities functioning within the State. We also trust that all those who are charged with public duty, whatever the domain of their service, will act with large-hearted sympathy and understanding and make this great country a haven of peace, amity and concord.

(18) The Rules in all the cases are discharged. There will be no order as to costs.

A/V.S.B. Rule discharged.

A.I.R. 1954 NAGPUR 77 (Vol. 41, C. N. 30)

HIDAYATULLAH J.

Gangaram Ramnarayan, Plaintiff-Appellant v. Tulsiram Ramlal and others, Defendants-Respondents.

Second Appeal No. 823 of 1947, D/- 13-4-1953, from appellate decree of Addl. Dist. J., Basim, D/- 22-8-1947.

Civil P. C. (1908), Ss. 70 and 66 — Jurisdiction of Collector and Civil Court.

After C form is sent by civil Court to Collector the entire execution is carried on by the Collector. Collector has not only power to hold sale and issue certificate to purchaser but also has power under O. 21, R. 95 to deliver possession. Collector though not a Court for all purposes acts as executing Court and the civil Court has no right to question his decision. Therefore a certificate holder from the Collector is protected by S. 66 from a suit to recover property from him on the ground that he was a benamidar for the plaintiff.

(Paras 4, 5, 6)

Anno: C. P. C., S. 70 N. 2; S. 66 N. 17.

J. N. Chandurkar, for Appellant; S. N. Kherdekar, for Respondents 1 to 3.

JUDGMENT: This appeal is by the first plaintiff in the case. The second appellant has been transposed as a respondent during the pendency of this appeal. The suit was filed to recover a field from the defendants of whom the first two respondents represent one Nandlal who purchased the field at an auction held by the Collector in execution of a civil Court decree. The contention of the plaintiff is that Nandlal was a 'benamidar' for him. Various other allegations were made about dispossession etc., but I am not concerned with those at this stage nor with an agreement which was supposed to have been entered into by Nandlal to reconvey the field to the plaintiff. Both the Courts below have dismissed the suit, and hence the present appeal.

(2) The main question that is argued in the case is whether S. 66, Civil P. C. was rightly held by the Courts below to bar the suit of the plaintiff.

(3) It is contended that this was not a sale by the civil Court but by the Collector, and S. 66, Civil P. C. does not in terms apply because Nandlal was not certified as the purchaser by the "Court". It is argued that the Collector who executes decrees on behalf of the civil Court is not a "Court", and S. 66 does not apply as between such a certificate-holder, if a 'benamidar', and his principal. No authority has been cited in support of this contention, nor has any clear authority been brought to my notice on the other side. The matter has, therefore, to be decided on general principles.

(4) The transfer of decrees to the Collector for execution is by virtue of S. 68 of the Code. For this purpose the Code authorises the Government of the State to frame rules and 'inter alia' gives the power to the State Government to invest the Collector with all the powers of a civil Court executing decree. After the C form is sent to the Collector, the entire execution (barring the decision of certain objections) is carried on by the Collector who issues the certificate in favour of the purchaser at a sale held by him. The Collector not only possesses the power to hold the sale and issue the certificate but on rulings of undoubted authority has powers under R. 95 of O. 21, Civil P. C. to deliver possession. The Collector may not be a "Court", but for all intents and purposes he acts as the executing Court and the civil Court has no right to question his decision, as the appeals are, under the rules, taken to superior revenue tribunals. The Collector is not a mere ministerial officer but acts for himself and executes the decrees as would be done by the civil Court. To say, in the circumstances, that the certificate granted by the Collector is not a certificate granted by the "Court" is to be very technical.

(5) The object of S. 66 was to clear titles and to avoid disputes. The section was framed to discourage 'benami' transactions and to invest the auction-purchaser with a title free from controversy. The creation of the Collector procedure was merely in the interests of land-holders and was designed to save the land as far as may be practicable. It was thought that the Collector would be in a better position to judge whether the property should be sold or was sufficiently remunerative to be leased out. For this purpose the Collectors were invested with powers of the civil Court and were made to deal with executions in respect of revenue paying property to the exclusion of the civil Court. The Collector, when he dealt with the cases, acted as "Court" for certain purposes because he had the power which the executing Court possessed in delivering and restoring possession. It cannot be argued that wherever the word "Court" is mentioned, the Collector was powerless. The law contemplated that the Collector should have analogous powers except where the rights of third parties were involved.

(6) I am, therefore, satisfied that the certificate-holder from the Collector is protected by S. 66 and, indeed, if the certificate-holder from the Collector was not so protected, I should have expected a spate of decisions in which such claim, as is now mooted, would have been put forward. The learned Judge of the lower appellate Court has referred to many cases in which, though the sale was held by the Collector, no question was raised that the real purchaser was only the 'benamidar' for another person. They are not direct authorities for the proposition I have decided, but they do lend support to it because if there had been any substance in the contention it would

assuredly have been raised before those Courts. One of such cases is from this Court which went before the Privy Council and it is impossible to think that the point would not have been taken if it had any substance in it.

(7) I am satisfied, therefore, that regard being had to the powers invested in the Collector and the totality of execution with which he used to deal, the Collector's certificate must be taken to be included in the provisions of S. 66, Civil P. C. That it is not a certificate by a "Court" is not of any consequence because the section is attracted as the Collector does not act under the "Court" but on behalf of the Court to the exclusion of the Court itself. For these reasons and the reasons given by the lower appellate Court, which I need not repeat, I do not see any force in this appeal which must fail. It is accordingly dismissed with costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 NAGPUR 78 (Vol. 41, C. N. 31)

CHOUDHURI J.

Mansaram, Decree-holder, Appellant v. Kamarali and others, Judgment-debtors, Respondents.

Misc. Second Appeal No. 196 of 1946, D/- 10-3-1952, from order of Addl. Dist. J., Narsimhapur, D/- 6-8-1946.

Civil P. C. (1908), O. 21, R. 22 — Failure to issue notice — Reasons for dispensing notice must be recorded — Reasons not recorded — Proceedings are void and without jurisdiction. Case law discussed. **(Paras 22, 23)**

Anno: Civil P. C., O. 21, R. 22 N. 3, 5, 16.

S. C. Dube, for Appellant; N. L. Abhyankar and A. P. Sen, for Respondents.

CASES REFERRED

(A) ('48) AIR 1948 Cal 165: 52 Cri LJ 278 (Prs 7, 17)

(B) ('36) AIR 1936 Pat 37: 37 Cri LJ 319 (Prs 8, 22)

(C) ('01) 25 Bom 337: 27 Ind App 216 (PC) (Pr 21)

(D) ('14) AIR 1914 PC 129: 42 Cal 72 (PC) (Pr 21)

(E) ('24) AIR 1924 Mad 431: 47 Mad 288 (FB) (Pr 21)

(F) ('29) AIR 1929 Rang 161: 7 Rang 110 (Pr 22)

(G) ('28) AIR 1928 Cal 60: 55 Cal 96 (Pr 22)

(H) ('36) AIR 1936 Mad 205: 59 Mad 461 (FB) (Pr 22)

(I) ('32) AIR 1932 Bom 509: 141 Ind Cas 485 (Pr 23)

(J) ('29) AIR 1929 Mad 718: 119 Ind Cas 43 (Pr 23)

(K) ('31) AIR 1931 Cal 443: 32 Cri LJ 886 (Pr 23)

JUDGMENT: This is a Second Appeal filed by the decree-holders against the appellate order dated 6-8-1946 of the Additional District Judge, Narsimhapur, in execution case arising out of Civil Suit No. 256 of 1927.

(2) Dhannalal and his son Mansaram obtained a decree for Rs. 702-14-9 against one Rahamatali on 30-4-1929 in Civil Suit No. 256 of 1927. The first execution application was filed on 7-7-1933 against Kamarali, Ahmedali and Ramzanali sons of Rahamatali, and Mst. Sultanbi, his widow, as Rahamatali died after the decree was passed. The sons and widow were brought on record as his legal representatives. The execution application was dismissed on 10-3-1934 as the decree-holders did not wish to proceed any further then.

(3) The decree-holders again started execution proceedings against the judgment-debtors, a second time. The date of filing this execution application is in dispute. According to the judgment-debtors, it was filed on 16-3-1937 i.e. more than three years after the dismissal of the first execution application. According to the decree-holders, the second execution application was filed on 10-3-1937. This application was dismissed on 3-7-1937, as process for attachment of the movables was not paid though there was an order of the Court on 19-3-1937 to issue a warrant of attachment of movables. A third execution application was filed on 17-6-1940 against these judgment-debtors. It was also dismissed on 16-8-1940 as infructuous as the decree-holders did not pay process for issuing warrant of attachment of the immovable property. Then a fourth execution application was filed by the decree-holders on 28-4-1941 and it was disposed of on 19-3-1942 as a compromise was effected between the decree-holders and the judgment-debtors to the effect that the decretal amount with costs shall be paid by instalments at Rs. 5/- per month.

(4) Subsequently Kamarali, one of the judgment-debtors raised an objection on 24-6-1944 contending that the second execution application was filed on 16-3-1937 and was barred by time and therefore the Court had no jurisdiction to proceed with the execution application which was filed on 28-4-1941. It was stated that the judgment-debtors were not noticed and therefore could not raise the objection in the previous application. The decree-holders contended that the first application for execution was struck off on 10-3-1934 after bringing the legal representatives of the deceased Rahamatali on record. The second execution application was filed on 10-3-1937 and not on 16-3-1937 as alleged by the judgment-debtors. The decree-holders stated that forgeries have been committed in altering the date 10-3-1937 to 16-3-1937 wherever they have occurred in the second execution application and subsequent applications.

(5) The trial Court held that the second execution application was filed on 16-3-1937 and as such it was barred by time. The trial Court therefore dismissed the execution application filed by the decree-holders on 28-4-1941. The order of the trial Court was upheld by the lower appellate Court. Hence the decree-holders have come up in appeal. One of the decree-holders Dhannalal died during the pendency of the appeal.

(6) The only question for determination in this appeal is whether the second execution application was filed by the decree-holders on the 10-3-1937 and not on the 16-3-1937 as the altered dates indicate.

(7) It was argued on behalf of the appellant that there is no evidence on record to support the concurrent finding that the second execution application was filed on 16-3-1937. It was pointed out that the second execution application was reported to be correct by the clerk on 19-3-1937, & the presiding Judge ordered the attachment of the movables belonging to the judgment-debtors. It was argued that even though the execution of a decree may have been actually barred by time at the date of the application made for its execution, yet as an order for the execution was made by a competent Court having jurisdiction to try whether it was barred by time or not, such order even though erroneous must if unreversed be treated as valid. Reliance was placed on a decision in — 'Aswini Kumar v. Karamat Ali', AIR

1948 Cal 165 (A), in which it was held as follows:

(i) The order in the first execution implied an adjudication that the decree was executable and as this order had stood unchallenged either by way of review or by way of appeal, the judgment-debtor was precluded from raising the plea of limitation.

(ii) The fact that the execution case was dismissed for default of decree-holder at a later stage did not matter.

(iii) Absence of attachment was not material in determining the question whether or not the order directing execution to proceed involved an adjudication that the decree was executable.

(8) It was also argued on behalf of the appellant that failure to give notice under O. 21, R. 22, Civil P. C., was a mere irregularity and not an illegality and as such the executing Court had jurisdiction to proceed with the execution. Reliance was placed on — 'Bechan Mahton v. Emperor', AIR 1936 Pat 37 (B).

(9) The learned Counsel for the respondents relied on the provisions of O. 21, R. 22, Civil P. C. and stressed that the issue of the notice is a condition precedent to the validity of the execution proceedings.

(10) It was also submitted on behalf of the respondents that the question regarding the limitation has been finally concluded by the concurrent findings of both the Courts below that the second execution application was filed on 16-3-1937 and not on 10-3-1937 i.e., more than three years after the disposal of the first execution application which was struck off on 10-3-1934.

(11) The burden lay on the appellant to show that the second execution application was filed on 10-3-1937. Two witnesses were examined in this connection. One was Dhannalal (decree-holder No. 1) himself and the other was Shri C. T. Bhanagay who is a document expert. Dhannalal's evidence has not been accepted by both the Courts below. I have examined the second, third and fourth original execution applications filed by the decree-holders, and find that the figure "16" appearing in the dates 16-3-1937 in all the three applications has been altered apparently from "10" to "16". Shri C. T. Bhanagay was not asked whether these alterations were made by the judgment-debtors as under the circumstances of the case they were the persons who were to be benefited by the alterations. The decree-holders in their statement dated 3-3-1945 have stated that they believe that forgeries have been committed by altering the date "10" to "16" in the execution applications and ordersheet. The second execution application in which the date of its filing has been challenged was filed by Mansaram. There is no doubt that the alterations were already there when Shri Ayachit, Additional District Judge, delivered the order on 24-9-1942 in Civil Appeal No. 14-B of 1942. This order was passed in appeal filed by the judgment-debtors against the order of the executing Court recording a compromise on 19-3-1942 in these execution proceedings. In this compromise, the judgment-debtors were represented by their Counsel Shri S. D. Tiwari who agreed to pay the decretal amount with costs by monthly instalments of Rs. 5/- from 10-4-1942.

(12) The record of the fourth execution application shows that after the order dated 19-3-1942 recording the compromise, the judgment-debtors filed an appeal (Civil Appeal No. 14-B of 1942) on 20-4-1942 proving that the compromise recorded by the executing Court be set aside as their pleader was not authorized to effect it on their behalf. The appellate order was passed on 24-9-1942 to the following effect:

> "The order of the lower Court is, thus, modified by setting aside the compromise so far as appellants 4 and 5 are concerned. As regards appellants 1 to 3, the appeal is dismissed as not maintainable. Parties shall bear their own costs."

The compromise recorded by the executing Court on 19-3-1942 was subsequently set aside on 13-3-1943 as would be clear from the order-sheet in Miscellaneous Case No. 23 of 1942 on an application filed by the judgment-debtors on 14-7-1942. This application was filed before Civil Appeal No. 14-B of 1942 was decided.

(13) It is further clear from the records of the execution proceedings that the judgment-debtors on 30-7-1941 had filed an objection under S. 47, Civil P. C. against the attachment of the immovable property consisting of a Malik Makbuza field No. 152/2. This objection was withdrawn by them on 19-3-1942. Another objection application under O. 21, R. 58, Civil P. C. was filed by the judgment-debtors Shafkatali and Khurshedali minors on 16-8-1943 praying that their 1/4th share in the above-mentioned field be released from attachment. This application was kept pending till the dismissal of the original execution application itself. It is clear from the applications mentioned above that although the judgment-debtors raised all possible objections since the time the fourth execution application was filed on 28-4-1941 they never contended till 24-6-1944 that the second execution application was time-barred. From the certified copies of civil suit register and execution application dated 5-7-1933 which the judgment-debtors have filed, it appears that they had applied for the copies on 12-4-1944 and the copies were given to them on the next day. In my opinion, the alterations in the dates must have been effected sometime before 24-9-1942 on which date the order in Civil Appeal No. 14-B of 1942 was passed.

(14) Judgment-debtor No. 1 Kamarali is a peon and was attached to the Court of Civil Judge, Class II, Sohagpur during the execution proceedings. The order-sheet in Miscellaneous Case No. 49 of 1941 shows that the presiding Judge had made a reference on 13-11-1941 to the District Judge whether he should proceed with the case as the judgment-debtor was his orderly peon. By memo dated 19-11-1941 from the Office of the District Judge, Hoshangabad, the presiding Judge was directed to proceed with the execution case.

(15) Decree-holder Dhannalal has deposed to the effect that the second execution application was given to the execution clerk on 10-3-1937. He says that the date "10-3-1937" is in his hand-writing and he did not alter the figure "10" to "16" in this date. There is no doubt that the figure "10" in the date 10-3-1937 has been altered to "16" in the ordersheet of the second execution application as well as in the execution application itself which is in vernacular. In the third as well as fourth execution applications, this alteration appears in column No. 6. After the presentation of the second execution application, the decree-holder was directed to appear on 19-3-1937. On 19-3-1937, the ordersheet was recorded as follows:

> "D. H. No. 1 in person. Application is reported to be correct. It be registered. Movables of

the J. Ds. except livestock be attached. P. F. in 3 days. Case for 1-5-1937".

If this application had been time-barred, the execution clerk would have certainly reported it to be so on 19-3-1937, but he reported that the application was correct. The inference therefore is that after the disposal of the first execution application on 10-3-34, the second execution application must have been filed within three years i.e., on 10-3-1937 and not on 16-3-1937. There is not the least doubt that the corrections in the second, third and fourth execution applications must have been made at one and the same time by a person who was interested in showing the second execution application as timebarred. If the second execution application was really filed on the 16th March and not on 10-3-1937, then the decree-holder would have mentioned "16-3-1937" as the date of institution in his third execution application as well as in the fourth execution application in column No. 6 instead of repeating the date 10-3-1937 therein and then correcting it subsequently. Both the Courts below have failed to examine this aspect of the case. It was rightly urged on behalf of the decree-holder that by the above alteration the judgment-debtors were to be benefited and not the decree-holder and there was a strong presumption that the judgment-debtors must have manipulated the alterations in the execution application and the ordersheet of the second execution application.

(16) The learned Counsel for the respondents urged that the concurrent finding of fact in both the Courts that the second execution application was filed on 16-3-1937 should be accepted and it was the appellants' duty to show that he had filed this application on 10-3-1937. The circumstances relating to the changes made in the dates on the second, third and fourth execution applications are so strong that it is difficult to accept the finding of fact of the Courts below in this Miscellaneous Appeal. None of the judgment-debtors has gone in the witness-box to rebut the evidence of decree-holder Dhannalal. It is significant to note that the plea of limitation was not raised by the judgment-debtors till 24-6-1944 although they had raised objections to the attachment of their immoveable property in the year 1941 and to the compromise effected by their pleader in the year 1942. Decree-holder Dhannalal has deposed that Kamarali, judgment-debtor No. 1 was a peon of Shri Madura who was then the presiding Judge at Sohagpur in whose Court the execution proceedings were pending. He was also posted for sometime in the Record Room Section. This has not been denied. It is also clear from the records of the execution case that Kamarali, judgment-debtor No. 1 was attached to this Court as a peon during the execution proceedings as I have already mentioned earlier. From the circumstances of the case and the evidence of the decree-holder Dhannalal. I am satisfied that the alteration in the date of the filing of the second execution application must have been manipulated by the judgment-debtors as they were definitely to be benefited by showing the execution application as timebarred. Why should a decree-holder effect a change of the date of presentation of his execution application in a manner detrimental to his own interest? There would have been force in the defence, had the judgment-debtors alleged that the date of presentation was 16th and it was altered to 10-3-1937 to bring it within limitation. I hold that the second execution application was filed on 10-3-1937 and not on 16th as alleged by the judgment-debtors.

(17) The learned Counsel for the appellant had relied on — 'AIR 1948 Cal 165 (A)', in support of the contention that even if the second execution application was timebarred, the order of the executing Court for attachment of the moveables of the judgment-debtors implied an adjudication that the decree was executable and as this order had stood unchallenged, the judgment-debtors were precluded from raising the plea of limitation. In that case, a notice under O. 21, R. 22, Civil P. C., was issued to the judgment-debtors, but they did not appear to show cause why the decree should not be executed against them and hence they were subsequently precluded from raising the question of limitation. In the present case, no notice under O. 21, R. 22, Civil P. C. was issued to the judgment-debtors although the execution application was filed more than one year after the disposal of the first execution application. The case relied on by the learned Counsel for the appellant has therefore no application to the facts of the present case.

(18) It was urged on behalf of the respondents that it was essential for the executing Court to issue a notice to the judgment-debtors under O. 21, R. 22, Civil P. C. as the second execution application was filed more than one year after the decree as well as the first execution application, and therefore, the proceedings were null and void. As against this, it was contended on behalf of the appellant that the failure to give notice under O. 21, R. 22, Civil P. C. was a mere irregularity and not an illegality, and therefore, the proceedings were not invalid.

(19) It is clear that the provisions of rule 22 as to notice are not applicable to the first execution application but are applicable to every subsequent application also. The only exception in the latter case is as laid down in the proviso. It is clear that if the subsequent execution application is presented more than one year after the decree and after the last order against the judgment-debtor made on an application for execution, notice will be necessary. The amendment substituting three years in place of one year wherever they occur in the rule was made by the Nagpur High Court in the year 1943. The amendment therefore does not apply to the present proceedings.

(20) The first execution application was "struck off as wholly infructuous" after recording the names of the legal representatives of the deceased judgment-debtor on 10-3-1934, as the decree-holder did not wish to proceed further. The rule therefore will apply to the second execution application which was filed on 10-4-1937.

(21) Before the decision in — 'Malkarjun v. Narhari', 25 Bom 337 (PC) (C), there was a conflict of authorities whether omission to give notice under this rule rendered the sales held in execution absolutely void or only voidable, that is, whether the absence of notice amounted only to a material irregularity or rendered the proceedings null and void. In — 'Malkarjun v. Narhari', (C), a notice under the rule was issued and served on a person as the legal representative of the judgment-debtor. On his objection, the Court decided that he was the legal representative and proceeded with the execution. The properties of the judgment-debtor were sold in court auction. Subsequently it was found that the person to whom the notice was sent, was not the proper legal representative. Their Lordships decided that the Court had jurisdiction to decide whether a person was a legal representative of a party or not and having decided it in a particular manner, the decision could not be said to be without jurisdiction,

and therefore, it was a case of only a material irregularity in the exercise of the jurisdiction and the sale was not void. The above decision of the Privy Council came to be regarded as laying down the law that even in the absence altogether of any notice, there was only a material irregularity and not a want of jurisdiction. In a later decision in — 'Raghunathdas v. Sundardas Khetri', AIR 1914 PC 129 (D), their Lordships of the Privy Council distinguishing — 'Malkarjun v. Narhari', (C), (cit. sup.) held that a notice under the rule was necessary in order that the Court should obtain jurisdiction to sell the property. This decision is being followed in all the High Courts in India except in some cases in Madras where the matter came up before the Full Bench in —'Rajagopala Aiyar v. Ramanujachariar' AIR 1924 Mad. 431 (FB) (E), which finally laid down as follows:

"Where on an application for execution falling under O. 21, R 22, to which Cl. (2) of that rule is not applied, a sale in execution is held without issuing the notice provided for in cl. (1), the sale is absolutely void and not merely voidable as against the person to whom notice should have been but was not issued."

It is clear that in general where the Civil Procedure Code prescribes for the issue of a notice and particularly where it uses mandatory language it does not envisage the possibility of its directions being disregarded except when it makes express provisions in that behalf. In the present case, therefore, the failure to issue notice under O. 21, R. 22, Civil P. C. renders the proceedings null and void.

(22) The next question for consideration is whether Cl. (2) of O. 21, R. 22, Civil P.C. could cure the defect. This sub-rule gives a discretion to the Court to dispense with the notice under certain circumstances. If such notice is dispensed with, the reasons should be recorded. The mandatory character of the rule is not in any way abrogated by sub-rule 2. In —'Ramdas v. Kannamal', AIR 1929 Rang. 161 (F), it was held as follows:

"Where an application for execution is made more than a year after the date of the decree, the Court must issue notice to the judgment-debtor to show cause before ordering his arrest, under the provisions of O. 21, R. 22 (1). If the Court dispenses with the notice under sub-rule 2, its reasons must be recorded. Failure to observe these rules is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction."

Also see —'Monmotha Nath v. Luchmi Debi' AIR 1928 Cal. 60 (G) and —'Kanchamalai Pathar v. Shahaji Rajah Sahib', AIR 1936 Mad 205 (FB) (H). The decision in —'AIR 1936 Pat. 37 (B)', relied on by the appellant's Counsel is not followed.

(23) In — 'Yakub v. Mahadev', AIR 1932 Bom 509 (I); — 'Somu v. Chelliah', AIR 1929 Mad 718 (J) and — 'Rajanikanta v. Emperor', AIR 1931 Cal. 443 (K), the failure of the presiding Judge to record reasons for not issuing notice under sub-rule 2 was held to be a mere irregularity which did not render the order for execution void. In the Calcutta case, the presiding Officer had issued the required notice under sub-rule 2 simultaneously with a warrant of arrest of the judgment-debtor. In the other two cases, the records showed that the Judge had considered the application of the decree-holder to dispense with the notice on its merits. Those decisions therefore do not apply to the facts of the present case. In the second execution application which was filed on 10-3-1937, the decree-holders did not make any request for dispensing with the notice under sub-rule (1) nor does the order sheet dated 19-3-1937 show that the executing Court had intended to issue warrant of attachment without noticing the judgment-debtors on the grounds that such notice if issued would cause unreasonable delay or defeat the ends of justice. I am of opinion that the omission to record reasons is not a mere irregularity but a defect which renders the proceedings void for want of jurisdiction.

(24) The appeal therefore fails and is dismissed with costs.

B/K.S. Appeal dismissed.

A.I.R. 1954 NAGPUR 81 (Vol. 41, C.N. 32)

SINHA C. J. AND BHUTT J.

Nathu Balaji, Applicant v. Mahadeo Sitaram and another, Non-applicants.

Misc. Petn. No. 315 of 1952, D/- 9-7-1953, to quash order of the Board of Revenue, D/- 14-11-52.

(a) Berar Patels and Patwaris Law (1900), S. 17 (2) (a) and (b) — Effect of clauses.

The effect of clause (a) of sub-section (2) of S. 17 is that in the case of a judgment of reversal the Board of Revenue has the same powers as the two Courts below, that is to say, to decide the case as if it was at large. Clause (b) of that sub-section would come in only if the two Courts below had concurred in their decision. In that case the power of interference of the Board of Revenue is confined to the three grounds contemplated by that clause. (Para 4)

(b) Constitution of India, Art. 226 — Extent of High Court's jurisdiction under Article.

The High Court sitting under Art. 226 cannot function as a Court of appeal and thus look into the correctness of the decisions of the Courts particularly created by the statute. Its jurisdiction extends only to seeing that the statute is being properly administered and that the Courts created by the statute did not exceed their powers. (Para 6)

G. R. Mudholkar, for Applicant; N. L. Abhyankar and D. V. Shidore, for Non-Applicant No. 1.

CASES REFERRED:

(A) ('53) AIR 1953 Nag 1: 1953 Nag LJ 7 (Pr 3)
(B) ('53) 1953 Nag LJ 297 (Pr 3)
(C) ('35) 18 Nag LJ 21 (Pr 3)
(D) ('37) 20 Nag LJ 220 (Pr 3)

ORDER: The only substantial question for determination in this application under Article 226 of the Constitution is whether non-applicant No. 2—President, Board of Revenue, Madhya Pradesh — has jurisdiction to interfere with the decision of the appellate revenue authority in the matter of appointment of a patel.

(2) It appears that there was a dispute between the petitioner and non-applicant No. 1 about the 'patelki' rights, to which is attached the 'watan' of Khanpur, taluq Daryapur. The two branches of the family along with another branch have been interested in these rights since before 1865. These disputes occurred before also in the last century, and the matter was decided on a certain genealogical table. After going into all the relevant matters the Court of first instance decided in favour of non-applicant No. 1. On appeal by the petitioner the Deputy Commissioner decided

the matter in favour of the petitioner. On second appeal by non-applicant No. 1 the President, Board of Revenue, has reversed the decision of the appellate authority and restored that of the Court of first instance.

(3) We are not here concerned with the merits of the controversy because we are not functioning as an appellate Court. We have only to see whether the President, Board of Revenue, has exercised the jurisdiction vested in him by law or has exceeded his jurisdiction in interfering with the order of the appellate authority on a question which is not entirely of law. It has been argued vehemently on behalf of the petitioner by Shri Mudholkar that the Board of Revenue could not interfere with the decision of the appellate authority except upon a question of law. Reliance was placed upon a number of decisions reported in — 'Gabdoo v. S. Rajan', AIR 1953 Nag 1 (A); — 'Awachitrao v. Umrao', 1953 Nag LJ 297 (B); — 'Bakaram v. Mahadeo', 18 Nag LJ 21 (C) and — 'Mt. Savitribai v. Sheonarayanlal', 20 Nag LJ 220 (D). But in our opinion none of those decisions are of any assistance to the petitioner, because those are all cases of concurrent decisions of the first two Courts and naturally, therefore, when the matter was brought in second appeal it was held that interference could be only on a question of law, as laid down in the relevant statutes then under consideration

(4) It appears that the present controversy is governed by the provisions of section 17 (2) of the Berar Patels and Patwaris Law, 1900, which is in these terms:

> "A second appeal from an appellate order passed by an officer specified in clause (a) of sub-section (1) shall lie to Provincial Government—
>
> (a) If the original order has in appeal been varied or reversed, otherwise than in a matter of costs, or
>
> (b) on any of the following grounds and no other, namely:—
>
> (i) that the order is contrary to Law or usage having the force of law;
>
> (ii) that the order has failed to determine some material issue of Law or usage having the force of Law;
>
> (iii) that there has been a substantial error or defect in the procedure as prescribed by this Law, which may have produced error or defect in the decision of the case upon the merits."

It has been argued that though the order of the appellate authority had the effect of reversing the decision of the trial Court, even then interference by the Board of Revenue could be only on one of the grounds contemplated in clause (b) of sub-section (2) of Section 17. We cannot accede to this contention because it will amount to ignoring the provisions of Clause (a) of that sub-section, which in terms gives unlimited powers of interference to the 'Board of Revenue', which now performs the functions of the Provincial Government or the State Government as it now is. The effect of clause (a) of sub-section (2) of Section 17 is that in the case of a judgment of reversal the Board of Revenue has the same powers as the two Courts below, that is to say, to decide the case as if it was at large. Clause (b) of that sub-section would come in only if the two Courts below had concurred in their decision. In that case the power of interference of the Board of Revenue is confined to the three grounds contemplated by that clause.

(5) In the instant case it is not disputed that the judgment of the Deputy Commissioner was one of reversal. That being so, the Board of Revenue had the same powers as the two Courts below in determining the controversy before it. Hence, if the President, Board of Revenue, has interfered even on questions of fact he has not exceeded his jurisdiction.

(6) It was then argued that there were certain pieces of evidence which were not evidence strictly according to the Evidence Act. But that is a point which was not raised before the Courts below, and therefore we cannot look into that for the first time at this stage. It was also attempted to be shown that on merits the decision of the President, Board of Revenue, was not correct. As we have already indicated, this Court sitting under Article 226 of the Constitution cannot function as a Court of appeal and thus look into the correctness of the decisions of the Courts particularly created by the statute. This Court's jurisdiction extends only to seeing that the statute is being properly administered and that the Courts created by the statute did not exceed their powers. As we have found that there has been no excess of jurisdiction, the application must be dismissed with costs. Hearing fee Rs. 50/-. The petitioner is entitled to a refund of the outstanding amount of his security, after paying non-applicant No. 1's costs.

A/V.R.B. Application dismissed.

A.I.R. 1954 NAGPUR 82 (Vol. 41, C.N. 33)

SINHA C. J. AND BHUTT J.

Gram Panchayat, Vidul of Vidul, Petitioner v. Multi Purpose Co-operative Society of Vidul and another, Non-applicants.

Misc. Petn. No. 257 of 1952, D/- 9-7-1953, to quash order of Sub-Divisional Officer, Darwha-Pusad, D/- 9-12-1951.

(a) C. P. and Berar Panchayat Rules (1948), Cl. 25, R. 5 — Appeal or revision.

There is no rule in Clause 25 which provides for an appeal or revision from an order of the Gram Panchayat levying the fine under Rule 5. There is also no provision in the C. P. & Berar Panchayats Act providing for an appeal or revision against an order passed under Rule 5. An appeal being incompetent under the law, the order of the Sub-Divisional Officer reducing the amount of fine in appeal is consequently 'ultra vires'. (Para 8)

(b) Constitution of India, Art. 226 — Error of law — (C. P. and Berar Panchayat Rules (1948), Cl. 25, R. 5).

The extraordinary powers under Article 226 of the Constitution are intended to be exercised in grave cases of manifest injustice. It is not obligatory on a High Court to act under the Constitution in every case where there has been an error of law. Even if an order may be erroneous, if it has set right a grave miscarriage of justice, it would not be proper to interfere under the special powers under the Constitution. It is true that so far as Rule 5 of clause XXV of the C. P. and Berar Panchayat Rules is concerned, no procedure has been prescribed. Nevertheless that rule is of a punitive nature and before any action could be taken under it, it is incumbent on the Gram Panchayat to specify the charge and serve a notice on the society to show cause

against the action that is proposed to be taken. If due opportunity is not given to the Society to state its case, the order of the Gram Panchayat imposing fine offends against the canons of natural justice and even though the order of the Sub-divisional Officer is void to the extent that it reduced the amount of the fine in revision which is incompetent, interference with it under the Constitution would not be justified as it has rectified, even if partially, the manifest injustice that the Gram Panchayat has done to the Society. AIR 1952 SC 192, Foll. (Paras 9, 10)

A. S. Bobde, for Applicant; N. L. Abhyankar, for Non-Applicant No. 1.

CASE REFERRED:

(A) ('52) AIR 1952 SC 192: 1952 SCR 583 (SC) (Pr 10)

ORDER: This application under Article 226 of the Constitution of India is directed against the order of the Sub-Divisional Officer, Darwha-Pusad, by which the amount of the fine of Rs. 50/- imposed by the petitioner on respondent No. 1 under Rule 5 for breach of Rule 1 of Clause XXV of the Central Provinces and Berar Panchayat Rules, 1948, (hereinafter called the Rules), was reduced to Rs. 5/-.

(2) The petitioner is a Gram Panchayat at Vidul in taluq Pusad of Yeotmal district, which is constituted under the Central Provinces and Berar Panchayats Act, 1946, (hereinafter called the Act). Respondent No. 1 is the Multi-Purpose Co-operative Society at Vidul within the Gram Panchayat area. Under Section 41 (2) of the Act, the Gram Panchayat was entitled to require every person practising the calling of buyer, broker, commission agent, weigher or measurer within its area to take out a licence and to levy such fee therefor as may be prescribed. In pursuance of this authority read with Rule 1 of Clause XXV of the Rules the petitioner Gram Panchayat in a meeting held on the 3rd May 1950 passed a resolution directing issue of notices to persons who had not obtained the requisite licence.

Accordingly a notice dated the 12th May 1950 was served on the Manager of the respondent Society calling on him to obtain a licence on payment of the prescribed fee of Rs. 4/-. To this notice the Society sent a reply dated the 14th May 1950 challenging the right of the Gram Panchayat to levy the licence-fee and intimated that recovery proceedings be stayed till the decision of the appeal that it intended to file in the matter.

(3) Action on the notice dated the 12th May 1950 was not taken until on the 19th June 1950 a notice was again sent to the Society requiring it to pay the licence-fee within 3 days, and failing payment to show cause why a fine of Rs. 10/- should not be levied in accordance with Sec. 47 of the Act. To this notice a reply was sent by the Society on the 20th June 1950 intimating that it had filed an appeal to the Deputy Commissioner, Yeotmal, against the proposed levy of licence-fee, and that action be stayed until the decision of the appeal.

(4) The Gram Panchayat, on receipt of the report of its peon Dhondu Narayan, dated the 6th November 1950, sent a notice on the 9th November 1950 to its members of a special meeting to be held on the 10th November 1950. In the report it was alleged that the Society purchased cotton from Jalba Mahadu and Ramkrishna Ganpat, of Vidul, Datta Bapuji Gurav and several others without taking out a licence. Amongst the members of the Gram Panchayat are Shri Shankar Gopal Deshmukh and Shri Umakant Krishnappa Komti who are the office bearers of the Society. The notice dated the 9th November 1950 does not bear the signature of these two members. The case of the Gram Panchayat was that this notice was served on them, whereas the Society alleged that it was not sent to them at all and that no meeting was really held on the 10th November 1950. In the view we take of the case, it is not necessary to consider this point and we shall assume that the notice was duly served and the meeting was held as alleged by the Gram Panchayat.

(5) The notice dated the 9th November 1950 contained the agenda of the meeting to be held on the 10th November 1950. The relevant subjects for consideration were stated in the following terms, viz.,

"(1) x x x x

(2) To consider (the report) made by the peon of the Village Panchayat that the Manager of the Co-operative Society of this place purchased cotton without a licence,

(3) To give notices to the persons not taking licenses."

In the meeting held on the 10th November 1950 appearance was not put in by Shri Shankar Gopal Deshmukh and Shri Umakant Krishnappa Komti and the following resolution was passed in the presence of other members:

"The village Panchayat gave a notice to the Society according to the Resolution No. 2 of the meeting dated the 3rd May 1950, but the Society made an appeal in respect of license-fee on the ground that it did not at all do the business of purchases.

That appeal has not been decided as yet. Now the Society has re-started the business of purchasing cotton without a license. The persons whose names have been supplied by the peon have also admitted to have sold cotton (to the Society). From this (it is clear that) the Society deliberately and completely committed breaches of Rule 1 of Clause XXV by not taking a license from the village Panchayat.

On a perusal of all the previous proceedings of the village Panchayat (in connexion with the matter) (and from the fact that) on the one hand (the Society) states in the appeal before the Deputy Commissioner that it does not do the business of purchases and in fact (on the other hand) it does the business without taking a license it is clear that deliberately with a view to troubling the village Panchayat (the Society) by starting the business without taking a license in spite of knowing the law fully, has completely broken the above rule. The result of this in the entire village is this: The Co-operative Society, being a Government body, does not at all care for the village Panchayat.

Therefore, we unanimously fine the Manager of the Multi-purposes Co-operative Society Rs. 50/- under rule 5 for his having completely broken rule 1 of Clause XXV of the Village Panchayat Rules. He shall pay the same within three days."

(6) In the meantime, on the 11th November 1950, the Society sent an application to the Gram Panchayat requesting that a licence be issued to it on payment of the prescribed fee of Rs. 4/-. This application was made after the dismissal of the appeal preferred by the Society against the levy of the licence-fee. On the 15th November 1950, however, the Gram Panchayat again sent a notice of demand for payment of the fine. Later

a reply to the application was sent on the 21st November 1950 intimating that the Gram Panchayat had resolved that the licence should be granted only after payment of the fine. The fine was recovered on the 24th December 1950 and the licence was issued on the 9th January 1951.

(7) On the 15th December 1950, that is, prior to the recovery of the fine and the issue of the licence, the respondent Society preferred an appeal to the Deputy Commissioner, Yeotmal, against the order of the Gram Panchayat, dated the 10th November 1950, imposing the fine of Rs. 50/-, and also against its decision to refuse to issue a licence without payment of the said amount. This appeal was treated as a revision which was registered as Revision Case No. 5/57 R/1950-51, and was decided by the Sub-Divisional Officer, Darwha-Pusad, on the 9th December 1951. This is the order that is impugned in these proceedings. The Sub-Divisional Officer held in the impugned order that there was no evidence except the report of the peon that the Society actually dealt in cotton.

He further held that the grant of licence could not be deferred until payment of the fine and that the proceedings relating to the levy of the fine were defective. He accordingly reduced the amount of fine from Rs. 50/- to Rs. 5/- and directed the Gram Panchayat to grant a licence to the Society on payment of the prescribed fee of Rs. 4/-. With the latter part of the order we are not concerned in these proceedings as the licence was already issued on the 9th January 1951.

(8) Rule 5 of Clause XXV of the Rules provides that breach of Rule 1 shall be punishable with a fine which may extend to Rs. 50/-, to be levied by an order of the Gram Panchayat. Rule 1 is in terms of Section 41 (2) of the Act and is to the following effect:

> "No person shall practise the calling of a buyer, broker, commission agent, weigher or measurer within the Gram Panchayat area without a licence from the Gram Panchayat under these rules."

There is no rule in Clause XXV which provides for an appeal or revision from an order of the Gram Panchayat levying the fine under Rule 5. There is also no provision in the Act providing for an appeal or revision against an order passed under Rule 5. Rule 4 only provides for an appeal against an order of the Gram Panchayat refusing to issue a licence. The appeal which was registered as Revision Case No. 5/57 R/1950-51, so far as it related to the levy of fine, was not, therefore, competent under the law and the order of the Sub-Divisional Officer reducing the amount of fine is consequently 'ultra vires'.

(9) We have, however, no manner of doubt that the proceedings leading to the resolution of the Gram Panchayat to levy the fine offend against the principles of natural justice. It is true that so far as rule 5 of Clause XXV of the Rules is concerned, no procedure has been prescribed as in the case of evasion of the payment of tax, toll, fee or rate which is punishable under Section 47 of the Act read with Rules 1 and 2 of Clause XXXVI of the Rules, and since non-payment of tax, toll, fee or rate is distinct from the practising of the calling of buyer, broker, commission agent, weigher or measurer, the procedure laid down in Clause XXXVI of the Rules cannot be applicable to the instant case. Nevertheless rule 5 of Clause XXV of the Rules is of a punitive nature and before any action could be taken under it, it was incumbent on the Gram Panchayat to specify the charge and serve a notice on the Society to show cause against the action that was proposed to be taken.

As the matters stand, the notice dated the 19th June 1950 was not acted upon and irrespective of whether the notice dated the 9th November 1950 was served on Shri Shankar Gopal Deshmukh and Shri Umakant Krishnappa Komti, it was not a notice to the Society as such, nor did it state the action that was proposed to be taken against it. It is not, therefore, possible to hold that due opportunity was given to the Society to state its case, so as to make the decision of the Gram Panchayat binding on it.

(10) The extraordinary powers under Article 226 of the Constitution are intended to be exercised in grave cases of manifest injustice. (See — 'Veerappa v. Raman and Raman Ltd.', AIR 1952 SC 192 (A)). It is not obligatory on a High Court to act under the Constitution in every case where there has been an error of law. Even if, therefore, an order may be erroneous but if it has set right a grave miscarriage of justice, it would not be proper to interfere under the special powers under the Constitution. The order of the Gram Panchayat offends against the canons of natural justice and even though the impugned order is void to the extent that it reduced the amount of the fine, interference with it under the Constitution would not be justified as it has rectified, even if partially, the manifest injustice that the Gram Panchayat had done to the Society.

(11) Consistently with the above, we cannot also maintain the fine of Rs. 5/- that has not been remitted by the Sub-Divisional Officer. We accordingly set aside both the order of the Gram Panchayat, dated the 10th November 1950, imposing the fine of Rs. 50/-, and the order of the Sub-Divisional Officer, dated the 9th December 1951, so far as it maintained the fine to the extent of Rs. 5/-. In the circumstances of the case, we order that the parties do bear their own costs of the present proceedings. The amount of security be refunded to the petitioner.

A/D.H.Z. Order accordingly.

A.I.R. 1954 NAGPUR 84 (Vol. 41, C.N. 34)

HIDAYATULLAH AND V. R. SEN JJ.

Dadoo Vithoba and others, Appellants v. Venkatrao Tukaram and others, Respondents.

First Appeal No. 59 of 1945, D/- 24-11-1952, from decree of 1st Addl. Dist. J., Nagpur, D/- 2-2-1945.

(a) Contract Act (1872), S. 62 — Accord and satisfaction — Discharge of mortgage debt by novated agreement — (Transfer of Property Act (1882), S. 60).

An accord without satisfaction has no legal effect in discharging a debt. The original cause of action is not discharged so long as the satisfaction agreed upon remains executory. A tender of performance of the consideration is not sufficient, unless it can be shown that what the creditor accepted in satisfaction was the debtor's promise, and not the performance of that promise. Whether there has been accord and satisfaction is a question of fact. 1918 AC 1, Ref. (Paras 30, 40, 41)

A mortgage debt or security can be discharged either by the payment of the mortgage debt or by such other satisfaction as the mortgagee may by a novated agreement allow to the debtor.

Where all that the mortgagee had agreed to accept in satisfaction of his mortgage debt was the conveyance of certain lands to him by the mortgagor and not merely the promise to convey the lands:

Held that the mortgage security or debt was not discharged and remained till either payment in redemption was made or lands were transferred to the mortgagee: AIR 1937 Mad 293, Foll.; AIR 1937 Mad 261 and AIR 1916 PC 68, Ref. (Para 42)

Anno: Contract Act, S. 62 N. 2; T. P. Act, S. 60 N. 22, 24.

(b) Transfer of Property Act (1882), S. 60 — Redemption piecemeal of mortgaged property.

Where the integrity of the mortgage is not broken the mortgage cannot be redeemed in parts unless the mortgagee agrees. (Para 42)

Anno: T. P. Act, S. 60 N. 41.

M. R. Bobde and D. B. Najbile, for Appellants; D. T. Mangalmoorti and N. R. Raut, (for Nos. 1 and 2), G. J. Ghate (for No. 5), for Respondents.

CASES REFERRED:

(A) (1918) 1918 AC 1: 87 LJKB 145 (Pr 31)
(B) (1912) 1912-1 KB 384: 81 LJKB 382 (Pr 31)
(C) ('37) AIR 1937 Mad 261: 168 Ind Cas 699 (Pr 32)
(D) ('37) AIR 1937 Mad 293: 169 Ind Cas 244 (Pr 35)
(E) ('16) AIR 1916 PC 68: 39 All 178 (PC) (Pr 40)

JUDGMENT: This appeal is against a preliminary decree for foreclosure. The appellants are the first 5 defendants in the case. The following genealogy shows their relationship:

VITHOBA

Tukaram	Daryaji (Separate)	Dadoo (Deft. 1)
Chandrabhan (d. 1924) =Narbadabai	Ramrao (Deft. 2)	Ajabrao (Deft. 3)
Nathu (Deft. 5) (Born posthumous on 1-12-1924)		Gujaba (Deft. 4)

(2) The suit was brought by Vyankatrao and Bhaurao sons of Tukaram on foot of a mortgage (Ex. P-31) dated the 6th February 1929. The sum secured, namely, Rs. 12,700/- was made up of certain antecedent debts and was payable in 3 years with interest. In default of payment, the property, which was mortgaged, was to be foreclosed. On the date of the suit the amount came to Rs. 26,035/- but the present claim was limited to Rs. 23,000/-.

(3) The mortgage was executed by Dadoo, the first appellant, for himself and as guardian of his minor sons, by Ramrao son of Dadoo and by Tukaram, paternal grand-father of Nathu.

(4) The amount of the mortgage was not repaid and hence the suit. The claim as laid was simple enough but the defendants contested that the suit did not lie. According to them, Dadoo, Ramrao and Nathu (through his mother Narbada) had applied to the Debt Conciliation Board in 1937 and 1938. Since the liabilities of these debtors exceeded the statutory limit, the mortgagees in the present suit were induced to give up their rights under the mortgage and accept certain fields and a share in a village as payment. According to them, there was an agreement in 1939 by which it was settled that the present plaintiffs would receive those lands 'as' satisfaction of their mortgage and the debt and security were discharged. The defendants aver that Vyankatrao also made a statement to this effect before the Debt Conciliation Board.

(5) The defendants further allege that in 1943 there was yet another agreement to the same effect and a sale-deed was also executed by all the defendants except Nathu, who having become major by that time did not sign the agreement or the sale-deed. The defendants contend that the rights under the mortgage were superseded by the agreement and the remedy of the mortgagees was to compel the performance of the novated agreement.

(6) Since some dispute took place about the nature of the pleas in the case, it is convenient to reproduce some of the main pleadings on behalf of the parties on this point. The plaintiffs stated in their plaint that the mortgagor (the first defendant) had applied to the Debt Conciliation Board, Katol, and Ramrao and Nathu had also made similar applications. All these applications were decided on the 4th July 1939. The plaintiffs state that—

> "in these proceedings the above said defendants admitted their liability to pay the suit debts and they during the pendency of these proceedings had proposed to settle the claim under the mortgage by executing a conveyance of 27 acres of their absolute occupancy and 'malik makbuza' lands together with a four annas village share of their mouza Sipikhapa tahsil Katol district Nagpur in full satisfaction of the mortgage claim in suit and the plaintiffs were willing to settle the matter as proposed. But this proposal was not given effect to as the defendants failed to execute a conveyance in favour of the plaintiffs and the claim under the mortgage continued to subsist. Subsequently as the mortgage amount was not paid by any of the mortgagors, the mortgagees served the defendants Nos. 1 to 8 with a notice dated 26-9-1941 claiming the amount of the mortgage claim from them. The defendants Nos. 1 to 4 accepted the notice and by their reply notice dated 18-10-1941 admitted their liability to pay the mortgage debt. They further expressed their willingness to pay the amount or to settle the claim with a request to reduce the same.
>
> The defendants Nos. 5 to 8 refused to accept service of the abovesaid notice on them.
>
> Later on the defendants 1 to 5, with a view to satisfy the mortgage claim, made a proposal, for the second time to settle the claim under the mortgage by executing a conveyance of their property and the plaintiffs by an agreement dated 21-2-1943 expressed their willingness to settle the matter as proposed. Actually a deed of conveyance was, accordingly, scribed on the requisite stamp paper but the defendant No. 5 resiled back from this settlement and refused to sign the document. Thus this settlement also fell through and the mortgage liability remained subsisting as against the defendants."

According to the plaintiffs, this agreement did not supersede their rights as mortgagees and they were entitled to enforce it.

(7) The fifth defendant (Nathu) denied all the agreements as also the authority of his mother to bind him. He has stated that on attaining majority on 1-12-1942 he repudiated her action. In the alternative, he pleaded that the debt as well as the security had been discharged by an adjustment and compromise.

(8) The first two defendants raised detailed objections to the maintainability of the suit and pleaded as follows:

"It is admitted that the defendants had filed an application for conciliation of their debts before the D. C. Board, Katol. That they had shown the plaintiffs as their creditor in the application and had also shown their debts including the debt in question and had prayed for the conciliation of all the debts of the plaintiffs' also. So far as the plaintiffs were concerned, they had two debts against the defendants, one was the mortgage debt in suit and the other was the money debt under a decree. During the pendency of the Debt Conciliation Board proceedings there was a settlement of both these debts out of court between the parties. As per this agreement the plaintiffs agreed to take 27 acres of absolute occupancy and 'malik makbuza' land plus -/4/- annas share of Tukaram in Sipikhapa in full satisfaction of both the debts of the plaintiffs. Excepting this property they released all lien over the other property contained in the mortgage and the plaintiff Venkatrao accordingly made a statement on the 23rd June 1939 before the Sub-Divisional Officer Katol to that effect. He also made a statement before Debt Conciliation Board, Katol on the 30th June 1939 stating that the debts of the plaintiffs were adjusted out of court and that they had nothing to realise from these defendants on account of the debts in question and further no debt remained to be conciliated by the Board. It is thus denied that this settlement was not final. It was actually acted upon. It is submitted that this new contract terminated the mortgage debt and other debt also and no suit can be based on the mortgage bond in the suit. The suit, therefore, as brought is not tenable and therefore should be dismissed."

They further contended that the agreement was not merely a proposal but was a complete contract extinguishing the old contract and bringing into existence a new contract. They pleaded that the plaintiffs were estopped from enforcing their rights as mortgagees because on the faith of this agreement the defendants had transferred certain of the mortgaged property to others. They also submitted that the second agreement, which was written in 1943, was not a new contract but even if it was, it was final and extinguished the claim under the mortgage. They urged that the plaintiffs having admitted the new contract, their remedy was to enforce specifically the novated agreement against the defendants and not to sue on the original mortgage.

(9) On these pleas the Court below framed the following issues which also represent the points in controversy in this appeal:

"(1) Was there any final settlement before the Debt Conciliation Board between the mortgagors and the mortgagees regarding the mortgage in suit? Was the settlement acted upon by the parties to it?

(2) Has the settlement as alleged put an end to the liability under the mortgage in suit and is the plaintiffs' remedy only to sue for specific performance?

(3) Whether the plaintiffs are in any manner estopped from suing on the mortgage?"

(10) The pleas of the defendants were not accepted by the learned Judge of the Court below with the result that he decreed the plaintiffs' claim and passed a preliminary decree for foreclosure against them. It is against that preliminary decree that the present appeal has been filed.

(11) In connection with the plea of novation we have to consider two separate alleged agreements. The first is based on certain statements made by Vyankatrao before the Debt Conciliation Board and the Deputy Commissioner. The latter statement was made when it was proposed to transfer 'sir' lands to Kishanlal. The second agreement is dated nil (probably the 23rd February 1943) which was signed by all the parties concerned except Nathu and his mother Narbadabai. We have to see whether these agreements discharged the debt as well as the mortgage security.

(12) The manner in which the first agreement was reached is as follows: Three cases were filed before the Debt Conciliation Board. They were by Ramrao (Revenue Case No. 302/XXXII-A 1(c) of 1937-38), by Dadoo (Revenue Case No. 209/32-A-1(c) of 1937-38) and by Narbada on behalf of her son Nathu (Revenue Case No. 637/32-A-1(c) of 1937-33). Exhibit P-30 are the order sheets of Dadoo's case and these show the various stages through which the transaction passed. The application was presented on the 17th February 1938 and the creditor Vyankatrao appeared on the 20th/22nd June 1938 by his agent Parwatsingh (P. W. 4). There were other creditors also from among whom we are concerned with Kisanlal.

(13) On the above date Vyankatrao stated to the Board that he was not willing to split up the liability between the mortgagors and to hold the debtors separately liable for their debts. A difficulty then appears to have arisen inasmuch as the amount of liability exceeded the statutory limit. On the 15th October 1938 the Board pointed out that since the creditors were not willing to split up the liability among the members of the joint family the amount of debts exceeded Rs. 50,000/-. On the request of Dadoo time was granted to enable him to request the creditors to split up the debts among the various members of the family.

(14) On the 23rd March 1939, the Board noted the following:

"Parties as before. The debtor states that debt due to creditor Venkat Tukaram has been adjusted amicably by agreement to transfer part of the mortgaged property. The agent of the creditor admits this but states that the property agreed to be transferred is under attachment in execution of decrees obtained by creditors Balaji and Kisenlal and hence the agreement cannot be executed. Creditor Balaji is willing to give up his rights under the attachment. Creditor Kisenlal is not so willing. The agent of creditor Venkatrao prays for time to consult his employer to make further statement. Time allowed....."

(15) On the 4th April 1939, creditor Vyankatrao was willing to split up the liability under the mortgage in his favour provided Kishanlal gave up his rights under the attachment in execution of the decree obtained by him. Time was granted to the debtor to secure Kishanlal's consent. Meanwhile Dadoo had applied to the Deputy Commissioner for permission to sell to Kishanlal 19.57 acres of 'sir' land in Sipi-Khapa without reservation of cultivating rights. That case was Revenue Case No. 47-XI-II of 1938-39 of mouza Sipi-Khapa. In that case Vyankatrao made a statement (Ex. 1/D-3) to the following effect:

"The applicant and Tukaram are indebted to me to the extent of Rs. 39,000/-. I am willing to take 27 acres of absolute occupancy and 'malik makbuza' land plus -/4/- share of Tukaram in Sipi-Khapa in full satisfaction of the debt. The property is mortgaged to me vide mortgage-deed

dated 6-2-1929 for Rs. 12,700/-. This amount has now risen to Rs. 39,000/-."

(16) On the strength of this statement the Sub-Divisional Officer reported (Exhibit 1-D-4) on the 24th June 1939 'inter alia':

"The applicant, jointly with his brother Tukaram, is also indebted to Venkatrao Kunbi, money-lender, to the extent of Rs. 39,000/-. Venkatrao is prepared to take 27 acres of absolute occupancy and 'malik makbuza' land of the applicant, plus four annas share of Tukaram which is already mortgaged to him in full satisfaction of his debt of Rs. 39,000/-."

(17) Permission was granted to the debtor by the Deputy Commissioner, Nagpur, on the 28th June 1939 to transfer these lands (Exhibit 1-D-4). There remained nothing in the way of Dadoo and Vyankatrao now to reach some settlement. On the 26th June 1939 the Board had allowed a last chance and fixed the case on the 30th June 1939. On that date Vyankatrao made the following statement (Exhibit 1-D-2):

"The debt shown by the applicant as due to me has been adjusted by private agreement. I have nothing to realise from the applicant in the case & case No. 631 & 302/32-A-1 of 1937-38 as a result of conciliation by this Board. There remains no debt to be conciliated by this Board."

Thereafter the other debts came within the statutory limit and the Board proceeded to conciliate them and conciliated them.

(18) Nothing was done, however, by the debtors to give the proposed lands to the mortgagees. The settlement involved not only the mortgage but also the settlement of a decretal debt amounting to Rs. 3067/7/6 in Civil Suit No. 89 of 1933 of the Court of Sub-Judge, Second Class, Katol, decided on the 30th March 1933.

(19) When the debtors did not put the property in the hands of Vyankatrao, the mortgagees served a notice (Exhibit P-32) on the 26th September 1941 on the mortgagors asking them to pay the mortgage debt together with interest. To this notice all the mortgagors (except Nathu) replied on the 18th October 1941 (Exhibit P-33) in which they raised various pleas in defence and 'inter alia' stated as follows:

".. .... We owe to you an amount of the mortgage, which entitles us to go to the Debt Relief Court for getting the proper relief. If however your clients are prepared to accept from us the amount which would be due in accordance with the provisions of the above mentioned Acts by reducing the principal amount as well as by reducing the amount of interest, we are willing to give that amount to you. If you are willing to accept a share of the mortgage property worth that amount we are willing to transfer that share to you and to deliver possession thereof to you. If your clients are not agreeable to accept this offer we are prepared to go to the Debt Relief Court for obtaining relief in this case. ...."

(20) The debtors started simultaneously negotiations for the acceptance of the old terms by which lands were to be given in satisfaction of the mortgage debt and on the 23rd February 1943 the incomplete agreement (Exhibit P-38) came into existence. The mortgagees also published a public notice on the 14th June 1942 (Exhibit P-34) of their intention to sue on the mortgage.

(21) Meanwhile execution was sued out by Vyankatrao on the decree in Civil Suit no. 89 of 1933. On the 30th January 1943 Dadoo made a statement to the executing court to the following effect:

"The decretal amount as well as the mortgage debt due from the judgment-debtor Dadu has been completely satisfied on account of the adjustment arrived at in Debt Conciliation Proceedings in Case no. 209/32-A-1 of 1938-39 and Case no. 631 and 302/A-1 of 1937-38. As there remains no debt due from the judgment-debtor the execution proceedings may be struck off."

Again on the 22nd June 1943 Dadoo filed yet another statement (Exhibit P-35), in which he referred to the agreement of the 23rd February 1943 as also the agreement in the proceedings before the Debt Conciliation Board. He stated that though all the judgment-debtors had executed the sale-deed Nathu who had become major by then was refusing to sign the deed. They said that Nathu should be noticed and the Court should obtain his signature or grant time to the applicant to persuade him.

(22) When the statements of the parties were recorded by the executing Court Dadoo (judgment-debtor no. 2) stated on the 24th September 1943 (Exhibit P-25):

"D. Hr. Venkatrao holds this decree against us and we are also indebted to him on the foot of a mortgage. It was decided that we should fully pay off both debts by the transfer of land of Sonoli and Nanda and village shares of Shipi-Khapa and Golar-Khapa. Nathu judgment-debtor and his mother accepted these terms (alias Janglya). That time Nathu was a major. This agreement took place on the 21st February 1943. We purchased a stamp paper accordingly and the sale deed was scribed on the 23rd February 1943. On the 26th March 1943 myself, Ramrao and Ajabrao signed them. Judgment-Debtor Nathu was present on the 23rd February 1943 but as his mother had not come he did not sign that deed. Venkatrao Decree-Holder took away the sale deed there. Judgment-Debtor Nathu agreed on the 25th March 1943 to go to Katol with his mother on the 26th March 1943 and execute the sale deed. On the 26th March 1943 we came to Katol, but on the way Judgment-Debtor Nathu stopped at Yenwa where he went to his mother-in-law's place. We reached Katol and signed the document, but Judgment-Debtor Nathu did not come.

X X X X X

Venkatrao told the Board that according to the compromise between parties he did not wish to continue as a creditor before the Board. In the last execution application I pressed this point of compromise before the Board, but it was overruled. The terms before the Board were however not carried out. ...."

(23) As against this Nathu denied the entire story. He was examined on the same date and his deposition (Exhibit P-26) is as follows:

"I myself did not agree to execute any sale deed in favour of decree-holder in full satisfaction of the claim under the mortgage, and the decree. I did not go to Yeni. I was never present when the documents filed here were signed. No such agreement as is alleged ever took place in my presence. ...."

(24) Vyankatrao was also examined in the case and on the same date. Exhibit P-27 is his deposition as A. W. 1. He stated:

"The Judgment-Debtors compromised with me, and agreed to transfer their property in full satisfaction of my claim under a mortgage in

my favour, and this decree. Before the Board I showed my debt as that of Rs. 39,000/-, so the Judgment-Debtors agreed that I should compromise out at Board (sic) and take back my mortgage. I did accordingly. Judgment-Debtor Dadu made an agreement to transfer property to me, and then failed to carry out the terms. .... Then I started this execution and all Judgment-Debtors came to me for compromise. On the 23rd February 1943 a sale deed was executed but not signed. On the 26th March 1943 Judgment-Debtors 1-3 signed but Judgment-Debtor Nathu did not. ...."

(25) It may be pointed out that the objections of the debtors were overruled by the executing Court 'vide' order dated the 25th September 1943 (Exhibit P-24) and their appeal (Civil Appeal No. 45-B of 1943) also failed on the 29th February 1944 ('vide' order Exhibit P-28).

(26) In the mortgage suit we get some more light on this matter. In the deposition of Dadoo (1 & 2 D. W. 4) we get the following statement:

"It was settled that I should transfer 27 acres of land in mouza Sonuli and Nanda and four annas share in mouza Sipi-Khapa to the plaintiffs in full satisfaction of the mortgage in suit and of the decretal debt. Venkatrao agreed to the terms of the settlement and Venkatrao had stated before the Board that according to the private settlement, he had to receive nothing under the mortgage and the decree and withdrew himself from the proceeding before the Board. Thereafter the settlement with other creditors was reached before the Debt Conciliation Board."

As regards the refusal of Nathu to sign the agreement (Exhibit P-38) or the sale deed (Exhibit P-39) Dadoo gave the same version. He, however, added that Venkatrao had stated to the Board that "his mortgage was satisfied". The evidence of Dadoo is supported by Motideo (1 & 2 D. W. 3) and Arjunpuri (5 D. W. 2). The evidence of the last witness is too vague to be of any assistance and of Motideo is found defective because he says:

"In full satisfaction of the mortgage, Dadu Patil gave three annas share in Sipi-Khapa and two fields in mouza Sonuli to Venkatrao. The settlement had taken place in my presence. Dadu Patil executed documents in pursuance of the settlement. Venkatrao gave statement before the Board that he had to receive nothing more under the mortgage from Dadoo."

It is nobody's case that any document was executed prior to the statement before the Board.

(27) The evidence on this point by Dadoo is contradicted again by Nathu but this time he feigns lapse of memory. He said:

"Personally I do not know of any application before Debt Conciliation Board. I do not remember if my mother had taken any step in the Debt Conciliation Board.... .... I had deposed in Katol Court that the mortgage and the decree were both unsatisfied and that nothing was transferred to the decree-holder Venkatrao till then."

(28) The plaintiffs on their side proved the mortgage deed and examined Venkatrao (P. W. 3) and Parbatsingh (P. W. 4) in proof of what happened between the parties. Venkatrao stated:

"In the year 1939 at my house there was a settlement between me on one hand (sic) and Dadu, Ramrao and Narbadabai on the other. The settlement was that in full satisfication of the mortgage in suit Dadu, Ramrao and Narbadabai should transfer four annas share in mouza Sipi-khapa and 27 acres of land in mouza Nanda and Sonuli to me. There was no talk about the decree obtained by me. The debt due from Dadu and others would have exceeded Rs. 25,000/- if my debt were included. Hence Dadu and others entered into the settlement and said that I should withdraw my claim for the debt so that they might be able to enter into settlement with other creditors before the Debt Conciliation Board. Accordingly I made statement about settlement before the Board and got my claim withdrawn and the debtors were then able to enter into settlement with other creditors and in fact the claims of those creditors were settled.

x x x x

The first settlement was oral and the terms settled were final. Had a sale deed been executed according to the settlement, the mortgage debt would have been fully satisfied.

x x x x

In the proceeding for transfer of sir land (I) stated that there was the settlement in pursuance of which my claim under the mortgage was satisfied."

Parbatsingh's evidence is hardly in point.

(29) The above represents the essence of the case of the parties. The question which arises is whether there was anything settled which had the effect of releasing the security. Shri Bobde argues that as a result of the novated contract the debt was wiped out and the rights 'inter se' were governed by the new agreement and all that the plaintiffs could claim was the specific enforcement of the new agreement. He also contends that the sale-deed could have been presented for registration even though Nathu had not signed it. According to him, a mortgage is essentially a debt plus a security and the debt can be discharged by accord and satisfaction, the latter being either by payment or some promise. The contention of Shri Bobde is that there was accord between the parties when they agreed to satisfy the debt by transfer of lands and there was satisfaction inasmuch as the promise to do so was accepted. This Shri Bobde avers is fully borne out by the statements made before the Sub-Divisional Officer and the Debt Conciliation Board.

(30) Many rulings were cited by the counsel appearing in the case bearing upon the exact manner and the scope of novation. Shri Bobde also relied upon authorities in which it is stated that a debt can be extinguished by accord and satisfaction, the latter taking the shape of a bare promise. These authorities lay down well settled principles of law and more detailed reference to them is not necessary. The points contended for by Shri Bobde are stated in Halsbury's Laws of England (Hailsham Edition) as follows:

"An accord without satisfaction has no legal effect in discharging a debt. The original cause of action is not discharged so long as the satisfaction agreed upon remains executory. A tender of performance of the consideration is not sufficient. If, however, it can be shown that what the creditor accepted in satisfaction was the debtors' promise, and not the performance of that promise, the original cause of action is discharged from the time when the promise was made.

An accord is not a contract, and performance of it cannot be enforced by action against the debtor, who remains liable on the original cause of action until the satisfaction has been executed. .....

x x x x

The original cause of action is not discharged if the accord and satisfaction was effected by the fraud of the debtor, or if the satisfaction has been rendered nugatory by his act or default."

(Halsbury's Laws of England, Vol. 7, page 236). This dictum is based on the osbervation of Lord Atkinson in — 'Morris v. Baron & Co', 1918 AC 1 at p. 35 (A) and the cases cited by Shri Bobde merely reiterate the proposition.

(31) In the case of mortgages also Hulsbury says:

"The debt may be discharged by accord and satisfaction where, for example, the creditor accepts some consideration in full discharge, not being payment after the debt has become due of a smaller sum than the debt....."

(Halsbury's Laws of England, Vol. 23, page 498).

This is exemplified also by 'In re Goldburg; Ex parte Silverstone' 1912-1 K. B. 384 (B) where it was laid down that if the mortgagee accepts worthless debentures in a company for the mortgagor in substitution for his mortgage, he cannot subsequently rely on the mortgage.

(32) In — 'Krishnaswami v. Srinivasa', A. I. R. 1937 Mad 261 (C) Varadachariar and Horwill JJ. pointed out the three possible results of an agreement of this character. The learned Judges observed that in one view the new contract may itself operate as a final and absolute discharge of the debt substituting a new relationship of vendor and vendee instead of the relationship of debtor and creditor. They pointed out that thereafter the only remedy which the vendee has is a suit for the specific performance of the new contract.

(33) The learned Judges then pointed out that a second possible view is that the contract to sell some property operates only as a conditional discharge of the debt whether as a matter of law or on the basis of the presumed intention of the parties. The learned Judges observed that distinction between the two views is that on the failure of the debtor to carry out the new contract by the execution of the sale-deed, the creditor is not confined merely to the remedy of its specific performance but may sue for the debt itself and that the creditor is not bound to sue for specific performance; the debtor may, however, claim a discharge if he shows readiness and willingness to fulfil the contract.

(34) The learned Judges then state that a third possible view is that the contract to sell is an independent matter and that till the sale is completed the contract does not affect the rights of the creditor or the obligations of the debtor.

(35) It may be pointed out here that these observations were made by their Lordships in connection with section 92 of the Indian Evidence Act but these observations hold good in so far as the subject of novation is concerned. The application of these principles is exemplified in another case reported in the same volume — 'Ellappa v. Sivasubramanian', AIR 1937 Mad 293 (D). In that case there was an agreement to sell to the mortgagee a portion of the mortgaged property. Varadachariar J. held that till the title to the property intended to be sold in discharge of the mortgage debt had passed, the security was not discharged nor the mortgage extinguished.

(36) Shri Bobde claims that the present case falls within the first of the three categories pointed out in the first case from Madras cited above. Shri Mangalmurti claims that it falls within the last category. It may be pointed out that if this case does not fall within the first category then it must fall within one of the next two and it does not matter which, because the mortgage security will still be answerable for the original debt.

(37) Shri Bobde here relies upon two separate agreements. He says that even in 1939 the mortgage security was completely extinguished and he refers to the statement made by Vyankatrao before the Debt Conciliation Board in the Conciliation Case and before the Sub-Divisional Officer in the case regarding 'Sir' lands.

(38) The question which arises is whether the mortgagees had accepted the lands themselves as a payment for the mortgage debt or had merely accepted the promise to convey those lands. There is no writing from which the exact terms of the agreement can be deduced. All that we have is that Vyankatrao and his co-mortgagee withdrew themselves from the array of creditors before the Debt Conciliation Board. Mere statement before the Debt Conciliation Board that the creditor did not press his claim before the Debt Conciliation Board does not lead to the discharge of the security. There is nothing to show that the security was released from the liability to pay the debt. All that had happened was that the creditors had agreed to take satisfaction of their mortgage debt by the conveyance of certain lands to them. From the material present before us it is impossible to reach the conclusion that the mortgagees had accepted merely a promise and released the mortgage security.

(39) This conclusion is strengthened by the fact that in 1943 when Exhibit P-39 was executed there was an admission on the part of the debtors that the mortgage debt still subsisted. This is what the debtors stated:

"Hence a total amount of Rs. 15,767/7/6 on account of the said mortgage deed and execution case together is due by us to you. We admit the same."

Similar admissions are to be found elsewhere also. Dadoo, whose statement in the executing Court is quoted in paragraph 22, stated clearly that it was decided that the debtors should pay off the debt by the transfer of lands. It would therefore appear that the debt was to be wiped away not by the promise but by the transfer of the lands. The same is also the purport of the agreement (Exhibit P-38), which was to precede the execution of the sale-deed. In that too four of the mortgagors admitted the continued existence of the mortgage debt.

(40) It would thus follow that the mortgage debt was not at an end merely by reason of any agreement to transfer the lands. The extinguishment of the mortgage was to take place when the lands were actually transferred and whether we treat the agreement as an independent agreement bringing the case within the third category or as a contingent or conditional discharge, the result is the same. In — 'Har Chandi Lal v. Sheoraj Singh', AIR 1916 PC 68 (E) their Lordships of the Privy Council pointed out that if a novated agreement fails, the original mortgage is not affected. In that case there were two mortgages and it was held that on the failure of the mortgage of 1887 which was novated agreement, the creditor mortgagee of 1876 was wholly unaffected. This shows that a mortgage security which is the transfer of an interest in the land is not easily lost and can come to an end either by the payment of the mortgage debt or by such other satisfaction as the mortgagee may by a novated agreement allow to the debtor. Payment, however, whether of the debt or satisfaction in the other way is a condition precedent to the extinction of the mortgage security.

(41) Whether there has been accord and satisfaction is a question of fact (vide Chitty's Law of Contracts, page 288) and the question in the present case also is one not of law but of fact. Did the mortgagee abandon his security and release it along with the debt, taking only a promise on the part of the mortgagors to convey the lands as satisfaction? We have read the entire evidence, the relevant portions of which we have also reproduced above. We are satisfied that such was not the agreement and all that the mortgagees had agreed to do was to accept payment, if made, in the shape of transfer of the lands. This transfer never took place and even today one of the mortgagors named Nathu stoutly denies that he ever agreed to such a course. The payment in the way agreed not having been made, it is impossible to hold — and we would be reluctant to hold — that the mortgage security was set at naught and the debt or security discharged.

(42) Shri Bobde contended that the document could have been presented for registration binding at least those who had signed it. A mortgage cannot be redeemed in parts unless the mortgagee agrees, and the integrity of the mortgage in the present case was never at any time broken. The mortgage had to be redeemed as a whole or not at all. Instead of payment of the money, the mortgagees had given the option to other side to transfer lands. Till those lands were transferred, there was no redemption and, in our judgment, the case is covered by the second Madras case which we have quoted above. The mortgage security remained till either payment in redemption was made or the lands were transferred to the mortgagees.

(43) We see no force in this appeal. The appeal fails and is dismissed with costs.

B/G.M.J. Appeal dismissed.

A.I.R. 1954 NAGPUR 90 (Vol. 41, C.N. 35)

SINHA C. J. AND BHUTT J.

Gopalrao Damodarji, Food Procurement Inspector, Dist. Bhandara, Petitioner v. State Govt. of Madhya Pradesh and another, Respondents.

Misc. Petn. No. 64 of 1953, D/- 7-8-1953.

Constitution of India, Art. 311 (2) — Reasonable opportunity.

If the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a "reasonable opportunity" to show cause against the proposed action. Normally, the question of punishment is linked up with the gravity of the charge, and the penalty that is inflicted is proportionate to the guilt. Where the charge is trivial and 'prima facie' merits only a minor penalty, a civil servant may not even care to defend himself in the belief that only such punishment as would be commensurate with his guilt will be visited on him. In such a case, even if in the show cause notice a more serious punishment is indicated than what the finding of guilt warrants, he cannot be left to guessing for himself what other possible reasons have impelled the proposed action. It is not, therefore, sufficient that other considerations on which a higher punishment is proposed are present in the mind of the competent authority or are supported by the record of service of the civil servant concerned. In a case where these factors do not form part of any specific charge and do not otherwise figure in the departmental enquiry, it is necessary that they should be intimated to the civil servant in order to enable him to put up proper defence against the proposed action.

(Para 10)

Thus where the petitioner was only supplied with a report of the enquiry in which the considerations that led the Director of Food Supplies to inflict a higher punishment were never adverted to and it was even proposed that he should be reinstated and posted to the new districts of the division, but the petitioner was not afforded access to the record of his service and was not given a reasonable time to show cause against the adverse remarks contained therein.

Held, that the requirements of Art. 311(2) were not fulfilled and consequently the orders terminating his services could not be maintained. AIR 1948 PC 121, Rel. on. **(Para 12)**

S. P. Kotwal, for Petitioner; T. P. Naik, Addl. Govt. Pleader, for Respondents.

CASE REFERRED:

(A) ('48) AIR 1948 PC 121: 75 Ind App 225 **(PC) (Pr 11)**

ORDER: This is an application under Article 226 of the Constitution against the orders of the respondents terminating the petitioner's service.

(2) The petitioner is Shri G. D. Dalal who was employed as Food Procurement Inspector in the Food Department of the State Government. On the 10th March 1946 he was posted at Adyar in Bhandara District. While serving at that place he was prosecuted on a charge of receiving illegal gratification from one Chindhu Kunbi but was discharged on the 12th July 1947 on the ground that no 'prima facie' case was made out against him. Sanction for the prosecution was accorded by respondent 2 Shri P. S. Lawale who was then Deputy Commissioner, Bhandara.

(3) Further facts of the case are given in the order of respondent 2, dated the 30th June 1952, which is the subject of the present proceedings. On termination of the criminal case, the Food Officer, Bhandara, wrote to the Deputy Commissioner that it would be no use starting a departmental enquiry against the petitioner as the evidence would be the same as was tendered in the criminal case. On the 20th August 1947, however, the Deputy Commissioner wrote to the Commissioner, Chhattisgarh Division, informing him that he was holding a departmental enquiry against the petitioner to find out whether he was negligent in not prosecuting Chindhu Kunbi. In reply the Commissioner, Chhattisgarh Division, wrote to the Deputy Commissioner that an acquittal or discharge in a criminal case was not necessarily a bar to a departmental enquiry, and asked for the record of the criminal case and the district office file on the subject to find out whether there was sufficient material to hold a departmental enquiry on a charge of bribery. At the same time he directed the Deputy Commissioner to expedite the departmental enquiry that he had referred to.

(4) On enquiry by the Food Officer, Bhandara, it was found that there was no negligence on the part of the petitioner in not prosecuting

Chindhu Kunbi. The only fault that he discovered was that he had not sent his diaries during that period to his superior officers. He made a report accordingly on the 16th December 1947. The Deputy Commissioner accepted the report and recommended to the Commissioner, Chhattisgarh Division, on the 26th January 1948 that the petitioner should be reinstated in service. He also enclosed with his communication the record of the criminal case.

(5) By this time Bhandara District was transferred to Nagpur Division. In his Memorandum dated the 20th February 1948, the Commissioner, Nagpur Division, wrote to the Deputy Commissioner that the conduct of the petitioner was held not to be free from suspicion by the Magistrate as observed in paragraph 5 of his judgment and accordingly directed him to hold a departmental enquiry. The Deputy Commissioner thereon framed the following charges, viz.,

"(1) That you were negligent in not prosecuting one Chindhu of Maloda who attempted to smuggle rice without permit into Nagpur district in May 1946; and

(2) That you failed to maintain your diaries for the work done by you and to submit the same to me on due dates."

The enquiry was made by the Food Officer who submitted his report on the 31st March 1948 reiterating his former findings. The papers were then submitted to the Commissioner, Nagpur Division. In his forwarding note the Deputy Commissioner accepted the findings of the Food Officer and also referred to certain orders regarding the termination of the petitioner's service as a measure of retrenchment. The Commissioner, Nagpur Division, passed an order on the 8th September 1948 accepting the findings of the enquiring officer and awarding the following punishment:

"Suspension for the period during which Shri Dalal has already remained under suspension, i.e., from 1-4-1947 to the date of termination of his services."

The orders regarding retrenchment, it appears, were ultimately not given effect to, and are, therefore, no longer pertinent to these proceedings.

(6) The petitioner appealed to the State Government which, on the 11th October 1951, passed the following order:

"The notice dated the 24th February 1948, served by the Deputy Commissioner, Bhandara, on Shri G. D. Dalal, Food Procurement Inspector, terminating his services after one month from the date of service thereof and the order of the Commissioner, Nagpur Division, dated the 8th September 1948, in the departmental enquiry against Shri Dalal are set aside as bad in law and the case is remanded to the Director of Food Supplies, for fresh decision on merits after complying with Article 311 (2) of the Constitution."

This order was passed on the advice of the Legal Department of the State Government that the punishment not being awarded by the appointing authority was bad in law. By the time the above order was passed respondent 2 who was the Deputy Commissioner of Bhandara when the petitioner was prosecuted on the charge of bribery, had become the Director of Food Supplies and took up the enquiry. Under his directions the Deputy Director of Food Supplies sent to the petitioner a show cause notice dated the (nil) December 1951, enclosing therewith a copy of the report of the Food Officer, Bhandara, dated the 31st March 1948. The relevant part of the notice is reproduced below:

"A copy of the report of the enquiring officer in the departmental enquiry held against you in Bhandara district is enclosed. Please show cause within 15 days from the date of receipt of this notice as to why your services should not be dispensed with."

(7) In his order dated the 30th June 1952 respondent 2 accepted the finding of the enquiring officer that there was no negligence on the part of the petitioner in not prosecuting Chindhu Kunbi. He, however, found him guilty of not submitting his diaries to his officers, holding that ignorance of the rules on the subject was no excuse. In the same order he determined the question of punishment, and taking into consideration the past record of the petitioner, passed the following order:

"I feel, therefore, that though the charge of non-maintenance of diaries by itself may not justify an order of terminating his services, there is enough material as detailed above to hold that Shri Dalal is not a fit person to be retained in this department. I order, therefore, that the services of Shri Dalal should be terminated forthwith."

(8) The above order, according to the petitioner, offends against the provisions of Article 311(2) in that—

(1) the question of his guilt and that of punishment were determined by one order; and

(2) the quantum of punishment was assessed on extraneous considerations of which he was not given any notice.

As against this contention the learned Government pleader contended that Article 311 (2) creates no right in a civil servant whereby he can claim to be heard on the question of his guilt and that as regards the punishment, the competent authority is entitled to take into consideration his previous record since he has to determine the extent of the penalty with reference to a particular person and not in the abstract.

(9) It is not necessary for purposes of the instant case to determine whether under Article 311 (2) of the Constitution a civil servant is entitled to contest the finding regarding his guilt while showing cause against the punishment that is proposed. We assume that the enquiry held was proper and the finding against the petitioner regarding the non-maintenance of the diaries is well based. The question is whether despite the failure of respdt. 2 to intimate to the petitioner his past record of service, as a ground on which he proposed to assess the measure of punishment, it can be held that a "reasonable opportunity", as contemplated by Article 311 (2), of showing cause against the proposed action was given to the petitioner.

(10) It was not disputed that the competent authority is entitled to take into consideration the record of a civil servant's past service in order to determine the quantum of punishment. What, however, was contended was that if the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a "reasonable opportunity" to show cause against the proposed action. Normally

the question of punishment is linked up with the gravity of the charge, and the penalty that is inflicted is proportionate to the guilt. Where the charge is trivial and 'prima facie' merits only a minor penalty, a civil servant may not even care to defend himself in the belief that only such punishment as would be commensurate with his guilt will be visited on him. In such a case, even if in the show cause notice a more serious punishment is indicated than what the finding of guilt warrants, he cannot be left to guessing for himself what other possible reasons have impelled the proposed action. It is not, therefore, sufficient that other considerations on which a higher punishment is proposed are present in the mind of the competent authority or are supported by the record of service of the civil servant concerned. In a case where these factors did not form part of any specific charge and did not otherwise figure in the departmental enquiry, it is necessary that they should be intimated to the civil servant in order to enable him to put up proper defence against the proposed action.

(11)) In — 'High Commissioner for India v. I. M. Lall', AIR 1948 PC 121 (A) their Lordships of the Privy Council, while dealing with the interpretation of Section 240 (2) of the Government of India Act, 1935, approved of the following observations of the Honourable the Chief Justice of the Federal Court representing the majority view of the Court, viz.,

"It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, 'it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken,' and that the person concerned must then be given a reasonable time to make his representation against the proposed action and the grounds on which it is proposed to be taken."

(Underlining (here in single quotation) is ours). Article 311 (2) of the Constitution is in terms similar to Section 240 (2) of the Government of India Act, 1935, except that it includes removal also within its ambit. The above observations, therefore, apply with equal force to a case arising under the Constitution. In order, therefore, that the requirements of Article 311(2) should be deemed to be satisfied, it is not only necessary that the proposed action is intimated to the civil servant concerned but also that he should be duly informed of the grounds on which the action is proposed to be taken.

(12) Judged on this principle, it cannot be held in the instant case that the requirements of Art. 311 (2) were duly complied with. The petitioner was only supplied with a report of the enquiry in which the considerations that led respondent 2 to inflict a higher punishment were never adverted to and it was even proposed that he should be reinstated and posted to the new districts of the Chhattisgarh division. As the petitioner was not afforded access to the record of his service and was not given a reasonable time to show cause against the adverse remarks contained therein, the requirements of Article 311 (2) were not fulfilled and consequently the orders terminating his services cannot be maintained.

(13) The application is accordingly allowed and the orders of the respondents terminating the petitioner's services as a measure of punishment are quashed. The State Government shall be at liberty to take such action against the petitioner according to law as it may deem fit. In the circumstances of the case we make no order as to costs. The outstanding amount of the security shall be returned to the petitioner.

A/H.G.P. Order accordingly.

A.I.R. 1954 NAGPUR 92 (Vol. 41, C.N. 36)

CHOUDHURI J.

Fakira Krishnaji, Appellant v. Ganpat Sakharam and others, Respondents.

Second Appeal No. 1034 of 1946, D/- 11-2-1953, from appellate decree of 1st Class Addl. Dist. J., Akola, D/- 31-8-1946.

(a) Trusts Act (1882), S. 48 — Decision of majority — (Religious endowments — Joint trustees).

The majority decision, in order to be binding on the entire body of the trustees, should have been arrived at after due deliberations by all the trustees. Where it was an act of the majority alone it will not be binding on the minority. Case law discussed. (Para 13)
Anno: Trusts Act, S. 48 N. 1.

(b) Berar Land Revenue Code (1928), S. 174 (3) — Previous Consent — (Evidence Act (1872), S. 115).

Where the consent is not obtained previous to the sales, there would be no waiver of right of a person to pre-empt the sales. (Para 15)
Anno: Evidence Act, S. 115 N. 47.

(c) Religious endowments — Trustee — Wahiwatdar of temple — Suit.

The wahiwatdar of a Deosthan can maintain the suits for pre-emption on behalf of the Deosthan. AIR 1926 Nag 351; AIR 1928 Nag 217(2), Rel. on. (Para 17)

(d) Trusts Act (1882), S. 48 — Suits by one of several trustees — (Religious endowments — Trustees).

Where although the agreement not to pre-empt was the outcome of the decision of the majority of the three out of the five 'panchas', it was evidently not for the benefit of the Sansthan whose interest they were bound to protect, the pre-emption suit could be maintained by one of the 'panchas' as the suit was for the benefit of the Sansthan. The non-joinder of recalcitrant 'panchas' who figured as witnesses in the litigation against the Sansthan does not at all affect the representation of the Sansthan. Case law discussed. (Para 22)

Anno: Trusts Act, S. 48 N. 3.

G. R. Mudholkar, for Appellant; D. G. Deshpande, for Respondent No. 2.

CASES REFERRED:

(A) ('83) 6 Mad 270 (Prs 10, 12, 14)
(B) ('11) 34 Mad 406: 7 Ind Cas 422 (Prs 10, 12, 13, 19, 20)
(C) ('16) AIR 1916 Mad 692: 39 Mad 597 (Prs 10, 14)

(D) ('07) 5 Cal LJ 527 (Prs 10, 19, 21)
(E) ('26) AIR 1926 Nag 351: 94 Ind Cas 703 (Prs 11, 17)
(F) ('28) AIR 1928 Nag 217(2): 107 Ind Cas 663 (Prs 11, 17)
(G) ('45) AIR 1945 Cal 268: 39 Cal WN 37 (Prs 11, 21, 22)
(H) ('47) 51 Cal WN 383: ILR (1946) 2 Cal 447 (Prs 11, 20)

JUDGMENT: This is an appeal filed by the original plaintiff Krishnaji against the judgment and decree of the First Additional District Judge, Akola, in Civil Appeal No. 60-A of 1946 arising out of Civil Suit No. 15-A of 1946 of the Court of the Additional Civil Judge, Class II, Akola. The judgment in this appeal will dispose of Second Appeal No. 1035 of 1946 arising out of Civil Appeal No. 58-A of 1946 decided by the First Additional District Judge, Akola, arising out of Civil Suit No. 16-A of 1946 decided by the Additional Civil Judge, Class II, Akola.

(2) The appeals arise out of suits for pre-emption filed by the plaintiff Krishnaji. During the pendency of the second appeal, Krishnaji died. His son Fakira has been brought on record as the appellant.

(3) In Civil Suit No. 15-A of 1946 the plaintiff asked for pre-emption of 2 acres and 20 gunthas of land i.e. 1/5th share of the eastern portion of field S. No. 8/2 of Lavkhed, taluq Balapur, which was obtained by the defendant no. 2 Narayan from defendant no. 1 Ganpat under the sale deed dated the 29th March 1944 (Exhibit 3 D-9). In Civil Suit No. 16-A of 1946, the same plaintiff asked for pre-emption of 3/5th share in the same survey number purchased by the defendants Narayan Ganpat and Keshao Maruti under the sale deed dated the 4th April 1944 (Exhibit 3 D-8). The Maroti Sansthan (defendant no. 3) which is an occupant of Survey No. 8/1 filed Civil Suits Nos. 17-A of 1946 and 18-A of 1946 for pre-emption of the above shares. All the four suits were consolidated with the consent of the parties with Civil Suit No. 15-A of 1946.

(4) It will be clear from the above facts that the litigation is between two rival occupants of field Survey No. 8/2 of mouza Lavkhed. It is admitted that both the plaintiff and Maroti Sansthan (defendant no. 3) own separately Survey Nos. 8/3 and 8/1 of mouza Lavkhed and that the latter has a preferential right of pre-emption having a larger interest. One Sakharam owned Survey No. 8/2, area 13 acres & 12 gunthas in this village. He had five sons. Ganpat (respondent no. 1) in the present appeal is one of them. He sold his joint 1/5th share of the Survey No. 8/2 to the respondent no. 2 Narayan Ganpat by the sale deed dated 29th March 1944 (Exhibit 3 D/9) for an apparent consideration of Rs. 160/-. Sakharam's two sons Rodi and Sampat and grandson Rajaram (respondents in Second Appeal No. 1035 of 1946) sold their 3/5th joint share in field Survey No. 8/2 to Narayan Ganpat and Keshao (respondents Nos. 1 and 2 in Second Appeal No. 1035 of 1946) under sale deed dated the 4th April 1944 for an apparent consideration of Rs. 300/- (Exhibit 3 D-8).

(5) The plaintiff-appellant brought the two suits for pre-emption alleging that the majority of the 'panchas who managed the Maroti Sansthan (respondent no. 3) had agreed not to pre-empt the aforesaid sales obtained by the respondent Narayan Ganpat. The plaintiff also stated that the Maroti Sansthan could not maintain the suits for pre-emption instituted on its behalf in view of the above agreement. He, therefore, claimed for a declaration of his right to pre-empt the two sales dated the 29th March 1944 (Exhibit 3 D-9) and the 4th April 1944 (Exhibit 3 D-8). The plaintiff also stated that the prices stated therein were inflated.

(6) The respondents Narayan Ganpat as well as the Maroti Sansthan denied the alleged agreement made by the 'panchas' of the Maroti Sansthan not to pre-empt the two sales. They contended that the respondent Narayan Ganpat, who is the working Patel, is the 'de facto' wahiwatdar of the temple of the Maroti Sansthan (respondent no. 3). He, as the wahiwatdar, has a right to act for the benefit of the Sansthan and filed these pre-emption suits on behalf of that Sansthan which holds a larger share and has therefore a right to pre-empt in preference to the claim of the plaintiff who has a smaller share.

(7) The Court of the first instance held that the fair price of the land sold under sale deed dated the 29th March 1944 (Exhibit 3 D-9) was Rs. 100/-, and of the land sold under sale deed dated the 4th April 1944 (Exhibit 3 D-8) was Rs. 300/-, and that the Maroti Sansthan (respondent no. 3) was entitled to pre-empt the two sales in preference to the plaintiff-appellant. The Court of the first instance also held that the Maroti Sansthan (respondent no. 3) could claim pre-emption in preference to the plaintiff in spite of the agreement of the majority of the 'panchas' undertaking not to file a pre-emption suit. The Maroti Sansthan was, therefore, allowed to pre-empt the two sales for the prices mentioned above. The lower appellate Court confirmed the findings of the Court of the first instance and dismissed the two appeals filed by the plaintiff.

(8) In the first appeal, the following points were raised and determined:

(i) Did a majority of the Panchas of the Maroti Sansthan decide not to pre-empt the sale as alleged?

(ii) Was defendant Narayan Gapat wahiwatdar Panch of the Maroti Sansthan?

(iii) Was he or any other Panch competent to maintain the suit for pre-emption? Were they for the benefit of the Sansthan?

(iv) Had the lower Court no jurisdiction to override the decision of the majority of the Panchas?

(v) What was the market price and the fair consideration of the property in suit at the date of the sale?

(9) The lower appellate Court held that the decision of the three 'panchas' (Exhibit P-7) not to file the pre-emption suits was evidently detrimental to the interest of the deity and therefore was not effective. The lower appellate Court also held that Narayan Ganpat (respondent no. 1) was appointed a wahiwatdar or a 'de facto' manager by the five 'panchas', and as such his will ought to prevail in all matters in the management of the Sansthan overriding the majority view, and the suit for pre-emption brought on behalf of the Maroti Sansthan was competent as it was for its benefit. The market value of the two sales fixed by the trial Court was confirmed

(10) It was argued on behalf of the appellant that the majority of the 'panchas', who were in charge of the management of the Maroti Sansthan, decided by agreement dated the 10th March 1945 (Exhibit P-7) not to pre-empt the two sales obtained by Narayan Ganpat respondent no. 2, in respect of the portions of land in Survey No.

8/2, and in view of this agreement the Maroti Sansthan is not entitled to enforce its right of pre-emption under section 174(3) of the Berar Land Revenue Code as against the right of the appellant. It was further contended that even if it be presumed that Narayan Ganpat was the manager of the Maroti Sansthan, then too, he cannot override the decision of the majority as stated in the agreement (Exhibit P-7) and maintain a suit for pre-emption on behalf of the Sansthan. Reliance was placed on — 'Teramath v. Lakshmi', 6 Mad 270 (A), — 'Kunhan v. Moorthi', 34 Mad 406 (B), — 'Nethiri Menon v. Gopalan Nair', AIR 1916 Mad 692 (C), — 'Kokilasari Dasi v. Mohunt Rudranand Goswami 5 Cal L. J. 527 (D).

(11) As against this it was contended on behalf of the respondents that the manager of the properties of the deity could maintain a suit on behalf of the deity and as it is for its benefit he could override the majority decision of the 'panchas'. Reliance was placed on — 'Nandkishordas v. Kala Bai', AIR 1926 Nag 351 (E); — 'Mt. Vidiabai v. Shri Sheoji Mandir, Mohgaon', AIR 1928 Nag 217(2) (F); — 'Jyoti Prosad v. Jahor Lal', AIR 1945 Cal 268 (G); — 'Gopal Jew v. Baldeo Narain Singh', 51 Cal WN 383 (H).

(12) In — 'Teramath v. Lakshmi (A)' (cit. sup.) the majority decision of the trustees was held binding on the dissentient minority as the terms of the 'kanam' were beneficial to the Deosthan. This case was referred to in — 'Kunhan v. Moorthi (B)' (cit. sup.) in which it was held as follows:

> "The rule that in the case of charitable trusts, the act of the majority will be binding on the minority only applies when such act is done after full opportunity given for mutual discussion by all the members. When the act is done after mutual discussion when the minority had an opportunity to record their dissent it will be the act of the whole body; otherwise it will be the act of the majority alone and will not bind the minority."

(13) It would thus appear that the majority decision, in order to be binding on the entire body of the trustees, should have been arrived at after due deliberations by all the trustees. In the present case, the letter dated the 10th March 1945 (Exhibit P-7) has been executed by three out of the five trustees, namely, Maroti son of Ashru, Fakira son of Krishnaji and Sukdeo son of Chihu, in favour of Krishnaji Mahadaji that the Maroti Sansthan will not pre-empt the two sales dated the 29th March 1944 and the 4th April 1944 (Exhibit 3 D-9 and Exhibit 3 D-8) which were executed in favour of one of the 'panchas' Narayan Ganpat who has not signed the above letter. Fakira (P. W. 1) is the present appellant. He is also one of the 'panchas' of the Maroti Sansthan, and he was evidently instrumental in bringing the majority decision not to pre-empt the sales on behalf of the Sansthan. This decision was evidently beneficial to his father and against the interest of the Maroti Sansthan. He admits that the meeting of the 'panchas' was held at Namdeo Patil's house. Sukhdeo (P. W. 4) was present. The vendor Ganpat (defendant No. 1) and the other 'panch' Shioram were called, but they did not come. Shioram (3 D. W. 3) admits that he was not present at the time of the decision when the letter (Exhibit P-7) was executed. It is thus clear that it was an act of the majority alone and as such will not be binding on the minority as laid down in — 'Kunhan v. Moorthi (B)' (cit. sup.).

(14) Following 'Teramath v. Lakshmi (A)' (cit. sup.) their Lordships held in — 'Nethiri Menon v. Gopalan Nair (C)' (cit. sup.) that an act of the majority of a body of charitable trustees binds the whole body. A mortgage purporting to be on behalf of all but executed only by a majority of the trustees when the others have declined to join in its execution is binding on all the trustees. The mortgage was for the benefit of the trust. The case is not in point here as the agreement (Exhibit P-7) on the face of it was detrimental to the interest of the Maroti Sansthan.

(15) The letter (Exhibit P-7) was executed nearly a year after the two sales by the occupants of S. No. 8/2 in favour of Narayan Ganpat, respondent No. 2. Sub-section (3) of Section 174 of the Berar Land Revenue Code lays down the rule of estoppel. It is essential that the consent should be previously obtained in writing and should be of all the occupants in the survey number. In the present case, the consent not having been obtained previous to the sales, there would be no waiver of right of Maroti Sansthan, respondent No. 3, to pre-empt the sales.

(16) The next question for consideration is whether the suit brought on behalf of the Maroti Sansthan, respondent No. 3, for pre-empting these two sales is maintainable. It has been admitted by Fakira (P. W. 1) himself that Narayan Ganpat, respondent No. 2, is alone the wahiwatdar of the Sansthan. Maroti (P. W. 5) also admits that he and the plaintiff cultivated the land jointly, and it was in the interest of the Sansthan to pre-empt the land in suit. The decision, that Maroti Sansthan would not file any suit for pre-emption, was by a bare majority of one, and that too, of Fakira who was interested in the decision as it prevented the Maroti Sansthan from enforcing its preferential right as against the right of Fakira's father Krishnaji.

(17) There is evidence on record to show that Narayan Ganpat, respondent No. 2, is the wahiwatdar of the Maroti Sansthan (respondent No. 3). He could certainly maintain the suits for pre-emption on behalf of the Sansthan. In — 'Nandkishordas v. Kala Bai (E)' (cit. sup.) it has been held that—

> "The manager of the properties of the deity is in the position of the next friend of an infant plaintiff and the Court should allow him to sue as representative of the deity even if there were any flaw in his title to be the Mahant of the temple."

Similar view was expressed in — 'Mt. Vidiabai v. Shri Sheoji Mandir Mohgaon (F)' (cit. sup.).

(18) But as the interest of Narayan Ganpat was adverse to that of the Sansthan, he having taken the two sales in his own name, Sheoram, one of the 'panchas' of the Sansthan who was not a signatory to the agreement (Exhibit P-7), was rightly allowed to be substituted in place of Narayan Ganpat to continue the suit for pre-emption on behalf of the Maroti Sansthan. The question therefore is whether the suits on behalf of the Maroti Sansthan by one of the 'panchas' are maintainable without impleading the remaining 'panchas' as plaintiffs or defendants.

(19) It was held in — 'Kunhan v. Moorthi (B)' (cit. sup.) that—

> "When the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees, even where they have not perversely refused to join cannot be a ground for dismissing the suit. Although the

interest of the co-trustees is joint and indivisible, it is fully represented when they are all on the Record on one side or the other."

Similar view was taken in — 'Kokilasari Dasi v. Mohunt Rudranand Goswami (D)' (cit. sup.) which is as follows:

"Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit, and such of them as refuse to join as plaintiffs, should be made defendants. All the trustees should ordinarily be co-plaintiffs, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs, because where the administration of the trust is vested in several trustees, they all form, as it were, but one collective trustee and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately, but all must join."

(20) So also in — 'Gopal Jew v. Baldeo Narain Singh (H)' (cit. sup.) cited by the learned counsel for the respondents, it was held that—

"Apart from the right of suit in their own right of the three classes of persons, namely, shebaits, prospective shebaits and worshippers, the deity has a right of action of its own to protect its own interest.

As the deity must of necessity act through human agency, the person obviously and primarily entitled to exercise the right of the deity is the shebait or shebaits acting in a body."

In — 'Kunhan v. Moorthi (B)' (cit. sup.) the suit was for redemption of the trust property brought by one out of the seven trustees. The remaining six trustees were defendants. It was held that one trustee can sue for redemption without consulting the other trustees or making them co-plaintiffs. Such misjoinder was not fatal to the suit. The main question for consideration in the above case was whether the interest of the deity was sufficiently represented.

(21) In — 'Jyoti Prosad v. Jahor Lal (G)' (cit. sup.) the question whether all the trustees should be joined as plaintiffs in a suit brought on behalf of the temple was considered. The decision in — 'Kokilasari Dasi v. Mohunt Rudranand Goswami (D)' (cit. sup.) relied on by the appellant was referred, and the test laid down was as follows:

"Where there are more trustees than one, none of them can, save in exceptional cases, act otherwise than jointly with the others, for the authority of trustees is a joint and not a several authority. Shebaits are not trustees in the strict sense of the term as understood in English law but the same principle of unity among co-trustees has been extended to the case of co-shebaits. Where there are several shebaits, they are deemed to constitute one body, as it were, in the eye of law, and none of them can claim to represent the deity in part or to possess any specific share or interest in deity's property. Ordinarily, therefore, all the shebaits should, if possible, join in a suit on behalf of the deity, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. It cannot however be maintained as an absolute rule of law that all the co-shebaits must join in representing the deity. The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebaits, and even by a person who is not a shebait. Where a suit is a suit by the deity represented by some of its shebaits, the question whether or not the other shebaits should be joined as parties is often, in the last analysis, a mere question of procedure and expediency: the test is whether or not, having regard to all the circumstances of the case, the interest of the deity may be said to be sufficiently represented."

(22) Applying the test as laid down in — 'Jyoti Prosad v. Jahor Lal (G)' (cit. sup.) in the present case, it would appear that the agreement contained in the letter (Exhibit P-7) dated the 10th March 1945, although it was the outcome of the decision of the majority of the three out of the five 'panchas', was evidently not for the benefit of the Sansthan whose interest they were bound to protect. Under the circumstances, the pre-emption suit could be maintained by Shioram who was one of the 'panchas' as the suit was for the benefit of the Sansthan. Out of the five 'panchas', Fakira is already substituted as plaintiff in place of his deceased father who died during the pendency of the appeal. Narayan Ganpat is defendant No. 2, and Shioram is representing the Maroti Sansthan. The nonjoinder of the two remaining recalcitrant 'panchas' who have figured as witnesses in the present litigation against the Maroti Sansthan does not at all affect the representation of the Maroti Sansthan. I accordingly reject the appellant's second line of argument that there was no valid suit by the deity. In my opinion the suits for pre-emption maintained by the 'panch' Shioram would in the circumstances of the case be equally competent. Respondent No. 2 Narayan Ganpat has an interest adverse to the Sansthan and, although a wahiwatdar, was rightly precluded from continuing the suit on behalf of the Sansthan.

(23) For the reasons recorded above, this appeal as well as Second Appeal No. 1035 of 1946 fail and are dismissed with costs.

B/D.H. Appeals dismissed.

A.I.R. 1954 NAGPUR 95 (Vol. 41, C.N. 37)

HEMEON J.

Bajirao Yeshwantrao, Appellant v. The State.

Criminal Appeal No. 257 of 1952, D/- 26-2-1953, from order of Addl. Sessions J., Chhindwara, D/- 26-8-1952.

(a) **Criminal P. C. (1898), S. 195 (1) (c) — Offences under Ss. 468 and 474, Penal Code.**

Where certified copies of the sale deed and not the original were filed in the previous proceedings the absence of a complaint under S. 195 (1) (c) would not operate as bar to the trial of the accused under S. 468 of the Penal Code; and a complaint under the aforesaid clause is not necessary in respect of the offence under S. 474 of the Penal Code: but even if it could be held that the offence which is punishable under that section is one which is described in S. 463 the absence of a complaint in respect of it would not operate as a bar to the trial of the accused for the reason that the original sale deed had not

been filed in the previous proceedings. (Para 5)

Anno: Criminal P. C., S. 195 N. 15.

(b) Criminal P. C. (1898), S. 476 — "Is....of opinion that it is expedient in the interest of justice that an inquiry should be made".

Deceased's sons being minors and if at later stage accused endeavoured with the aid of the sale deed to put forward a claim to the valuable field in question they would find it difficult to establish that it was a forged document — Held it was expedient in the interests of justice that an enquiry should be made into the alleged offences under Ss. 468 and 474, Penal Code. (Para 6)

Anno: Criminal P. C., S. 476 N. 10.

A. Razak, for Appellant; W. K. Sheorey, Addl. Govt. Pleader, for the State.

CASES REFERRED:

(A) ('50) AIR 1950 PC 31: 51 Cri LJ 651 (PC) (Pr 4)
(B) ('51) AIR 1951 Mys 117: 52 Cri LJ 1506 (Pr 4)
(C) ('05) 2 Cri LJ 653: 8 Oudh Cas 313 (Pr 4)

JUDGMENT: The appellant Bajirao and his father Yeshwantrao were prosecuted under Section 302 of the Indian Penal Code for the murder of Kishan on the night of the 28th February 1951 at Linga, Chhindwara tahsil; and during the trial charges under Sections 468 and 474 'ibid' were added against the appellant. Yeshwantrao and he were both acquitted under Section 302, but the Additional Sessions Judge, Chhindwara, convicted and sentenced the appellant to undergo two terms, each of 4 years rigorous imprisonment, and to pay two fines, each of Rs. 1,000/-, under Sections 468 and 474. In appeal, I held that the addition of the charges during the trial might have been prejudicial to the appellant and quashed the convictions and sentences. The State Government, Madhya Pradesh, thereafter moved the Additional Sessions Judge, Chhindwara, to file a complaint against the appellant under sections 468 and 474 of the Indian Penal Code. The objections raised by the appellant were overruled and the Additional Sessions Judge, Chhindwara, directed a complaint to be filed against him under those sections in a competent Court. The appellant has now come up in appeal against that order.

(2) The case against him was, briefly stated, to the effect that the appellant being covetous of Kishan's valuable field, forged with the help of others a sale deed (articles K-1 to K-4), dated the 25th December 1950, purporting to have been executed by Kishan, had it registered and retained it. Kishan heard a rumour of this and made inquiries from the appellant who assured him that there was no truth in the rumour. The appellant then being apprehensive that the matter would eventually come to light killed Kishan and threw his body into a river.

(3) The appellant contended before the learned Additional Sessions Judge that (i) he had no jurisdiction to make a complaint under Sections 468 and 474 of the Indian Penal Code as the provisions of Sections 195 and 476 of the Code of Criminal Procedure did not apply to the case and (ii) he should not file the complaint as it was not expedient and desirable to prosecute the appellant. These contentions were repelled by the learned Additional Sessions Judge on the grounds that the words and figures "of any offence described in Section 463" in Section 195 (1) (c) refer to all offences committed in respect of a document produced or given in evidence in a trial and that the prosecution was expedient and desirable in the interests of the deceased Kishan's minor sons who might be put to serious loss if the appellant hereinafter used the document in question in support of his claim to the field. The learned Additional Sessions Judge also pointed out that, even if he had no jurisdiction under Section 195 of the Code of Criminal Procedure, he was entitled to file a complaint, as a criminal Court can be moved by any person except in respect of the offences referred to in Sections 198 and 199 'ibid'.

(4) In — 'Sanmukhsingh v. The King', AIR 1950 PC 31 (A), their Lordships of the Judicial Committee of the Privy Council held that Section 195 (1) (c) of the Code of Criminal Procedure refers only to a document alleged to be forged and not to a copy of it; and that where the document in respect of which a charge of forgery had been laid against the accused had not itself been produced or given in evidence in certain proceedings but on the contrary a copy of it had been produced, the absence of complaint under Section 195 (1) (c) cannot operate as a bar to the trial of the accused. In a recent case, viz., — 'Rudrappa v. Chigaterappa', AIR 1951 Mys 117 (B), this decision was quoted with approval and it was pointed out that where only a copy of the alleged forged document is produced in Court and a decree is passed by consent with the result that the Court was not in a position to give any decision thereon, a prosecution under Section 471 of the Indian Penal Code in respect of the document would not be bad for want of sanction under Section 195 (1) (c) of the Code of Criminal Procedure. A similar view was taken in — 'Emperor v. Mustafa Ali Khan', 2 Cri LJ 653 (Oudh) (C).

(5) As certified copies of the sale deed and not the original were filed in the case under Section 302 of the Indian Penal Code, the absence of a complaint under Section 195 (1) (c) of the Code of Criminal Procedure would not operate as a bar to the trial of the appellant Bajirao under Section 468 of the Indian Penal Code; and a complaint under the aforesaid clause was not necessary in respect of the alleged offence under S. 474 of the Indian Penal Code; but even if it could be held that the offence which is punishable under that section is one which is described in Section 463 'ibid', the absence of a complaint in respect of it would not operate as a bar to the trial of the appellant Bajirao for the reason given above, namely, that the original sale deed had not been filed in the murder.

(6) The learned Additional Sessions Judge in the 7th paragraph of his order has also considered the position from another angle, and I am in agreement with his views therein. It follows, therefore, that his Court was competent to file a complaint against the appellant under Sections 468 and 474 of the Indian Penal Code. The learned Additional Sessions Judge too has given cogent reasons for his opinion that it is expedient in the interests of justice that an inquiry should be made into the alleged offences under those sections. The deceased Kishan's sons are minors; and if at a later date the appellant endeavoured with the aid of the sale deed to put forward a claim to the valuable field in question, they would find it difficult to establish that it was a forged document.

(7) The application is dismissed.

B/D.H.Z. Application dismissed.

A.I.R. 1954 NAGPUR 97 (Vol. 41, C.N. 38)

R. KAUSHALENDRA RAO J.

Bakharia Dhuria, Plaintiff-Appellant v. Manak Gangaram, Defendant-Respondent.

Second Appeal No. 304 of 1946, D/- 30-3-1951, from decree of Addl. Dist. J., Chhindwara, D/- 13-11-1945.

(a) Civil P. C. (1908), S. 9 — Exclusive jurisdiction of Revenue Court — C. P. Land Revenue Act (2 of 1917), S. 203 (4).

Where a tenant purchases an abadi site without the consent of the lambardar and the lambardar brings a suit for ejectment in a Civil Court, the civil court is not competent to uphold the transfer as valid on ground that the tenant was not in possession of an adequate site sufficient for his requirements. The proper venue for deciding the dispute as to allocation of sites in a revenue court under S. 203 (4), C. P. Land Revenue Act. AIR 1940 Nag 370; AIR 1937 Nag 107, Foll.; AIR 1929 Nag 64, Not foll. (Paras 4, 5)

Anno: Civil P. C., S. 9, N. 51.

(b) Evidence Act (1872), S. 115 — Acquiescence.

Acquiescence is a matter of legal inference from the facts established in a case: 21 All 496 (PC), Ref. The mere inactivity of the person concerned for a particular number of years apart from anything else in the case does not necessarily lead to the inference of acquiescence. The question of acquiescence cannot be reduced to a rule of thumb. (Para 12)

Where a party relies upon omission or inactivity of the other as depriving the latter of his legal rights, nothing short of conduct amounting to fraud can sustain a plea of acquiescence. (1880) 15 Ch D 96, Applied. (Para 15)

Anno: Evidence Act, S. 115 N. 5.

A. V. Khare and T. B. Pendharkar, for Appellant; R. R. Dandige, for Respondent.

CASES REFERRED

(A) ('37) AIR 1937 Nag 107: ILR (1937) Nag 350 (Prs 3, 4)

(B) ('29) AIR 1929 Nag 64: 114 Ind Cas 454 (Pr 4)

(C) ('40) AIR 1940 Nag 370: ILR (1941) Nag 571 (Prs 4, 5)

(D) ('17) AIR 1917 Nag 47: 43 Ind Cas 508 (Prs 7, 8)

(E) ('15) AIR 1915 Nag 119: 11 Nag LR 126 (Prs 7, 9)

(F) ('31) AIR 1931 Nag 158: 27 Nag LR 183 (Prs 7, 10)

(G) ('37) AIR 1937 Nag 338: ILR (1938) Nag 326 (Prs 7, 11)

(H) ('99) 21 All 496: 26 Ind App 58 (PC) (Pr 12)

(I) ('39) AIR 1939 Nag 163: ILR (1941) Nag 337 (Pr 12)

(J) ('42) AIR 1942 Nag 59: ILR (1942) Nag 232 (Prs 12, 14)

(K) (1880) 15 Ch D 96: 28 WR 911 (Pr 15)

JUDGMENT: The decision in this case will govern second appeal No. 305 of 1946 also.

(2) The appellant is the plaintiff. The plaintiff is the lambardar of 'mouza' Nilkanthi kurd, tahsil Amarwara, district Chhindwara and the defendant is a tenant at the said mauza. By a registered sale deed Exhibit P-1 dated 22-4-1936 the defendant purchased the site in suit. It is part of the abadi of the village. The learned appellate Judge found that in about the year 1940 the respondent spent about Rs. 900 in building over the site. In 1943 the lambardar objected to the construction and asked him to remove the same. On his failure to do so, the suit was instituted in 1944. The learned appellate Judge found that there was acquiescence on the part of the lambardar and that the abadi site in possession of the respondent was not sufficient to meet his requirements as his family was growing. He accordingly held that the respondent could not be ejected both on the ground of acquiescence as well as on the ground that he could purchase the site as he needed a bigger site.

(3) In appeal it is contended that in view of the decision of this Court in — 'Bapu v. Ganpat', AIR 1937 Nag 107 (A) the decree of the learned appellate Judge cannot be supported in so far as it proceeded on the ground that the respondent having not been in possession of an adequate site sufficient for his requirements, the transfer was good.

(4) In — 'Bapu v. Ganpat Rao (A)' (supra), Gruer J. held that a plea that the transfer is valid on the ground that a transferee has not a site adequate for his needs is one which involves a question of allotment of sites and the proper venue for a decision on that question is a revenue Court under S. 203 (4), C. P. Land Revenue Act. The learned counsel for the respondent, however, relies upon a decision of Macnair A. J. C. in — 'Premdas v. Balkishan', AIR 1929 Nag 64 (B) in which the learned Additional Judicial Commissioner held that the Civil Court could go into the question of adequacy of sites. The decision was, however, expressly dissented from by Gruer J. The matter, however, does not rest with the decision of Gruer J. The view expressed by Gruer J. in — 'Bapu v. Ganpat (A)' (supra) has merited the approval of the Division Bench in — 'Nilkanth v. Vishwanath', AIR 1940 Nag 370 at p. 371 (C):

> "We agree with the view of Gruer J. in — 'AIR 1937 Nag 107 (A)' that if a tenant reasonably requires a bigger site he ought to get it but its location should lie in the hands of the proprietor initially and that if there is any dispute it should be decided by a revenue officer but it is not open to a tenant to purchase a particular house and then claim to retain possession on the ground that he requires a larger site than he has."

The actual decision in — 'Nilkanth v. Vishwanath (C)' (supra) however related to an 'abadi' site acquired by a co-sharer without the consent of the lambardar. The decision was that the co-sharer was liable to be ejected. In reaching that conclusion, the Division Bench derived support from the decision in — 'Bapu v. Ganpat (A)' (supra). The rule in — 'Nilkanth v. Vishwanath (C)' proceeds upon the fundamental principle that the lambardar has been given the express power of allotting 'abadi' sites and village management might become impossible if it were open to every petty co-sharer to buy a house in the village 'abadi' without the consent of the lambardar. The position of a tenant cannot be said to be better than that of a co-sharer.

(5) Having regard to the pronouncement of the Division Bench in — 'Nilkanth v. Vishwanath (C)' (supra), it is no longer open to me to follow the decision of Macnair A. J. C. The decree of the learned appellate Judge cannot be supported on the ground that the transfer was valid because the respondent was not in possession of a site sufficient for his needs.

(6) The decision of the learned appellate Judge cannot be supported on the ground of acquies-

cence either. All that is found by the learned appellate Judge is that the landlord was aware that the tenant was putting the site to use and remained quiet knowing that the tenant was expending money and constructing a building. Even on these findings I do not think it can be said that there is acquiescence on the part of the landiord.

(7) The learned counsel for the respondent relied upon — 'Mt. Deoki v. Mukunda', AIR 1917 Nag 47 (D); — 'Narain v. Behari', AIR 1915 Nag 119 (E); — 'Dhunnoo v. Sheolal', AIR 1931 Nag 158 (F) and — 'Chhaganlalsa v. Nathusingh', AIR 1937 Nag 338 (G) in support of the defence of acquiescence.

(8) The statement in — 'Mt. Deoki v. Mukunda (D)' (supra) that failure by a resident malguzar to object to the occupation of a site by a tenant for even two or three years would surely be conclusive evidence that the permission had been given cannot be regarded as anything but 'obiter' as the period of inactivity under consideration was for 12 years.

(9) 'Narain v. Behari (E)', (supra) is easily distinguishable. That was a case of a purchaser of a house on the 'abadi' later diverting it to agricultural purposes. Whatever the observations might have been, the landlord's claim for possession was decreed.

(10) In — 'Dhunnoo v. Sheolal (F)' (supra) Macnair A. J. C. held that the landlord could not eject the defendant who had constructed a building on the village 'abadi' without the consent of the former. The ground of the decision was that the inactivity of the landlord for a period of 8 or 10 years with the knowledge of the construction induced a 'bona fide' belief in the defendant that the landlord had acquiesced in the act of the defendant. The trend of the reasoning adopted by Macnair A. J. C. seems to indicate that the landlord "remained wilfully passive in order to profit by a belief which he knew to be mistaken." The case is thus distinguishable.

(11) 'Chhaganlalsa v. Nathusingh (G)' (supra) was not a case of a suit for ejectment by the landlord against a person holding an 'abadi' site or constructing over it. It was a case of claim by transferees from the landlord for possession of an 'abadi' site. The plaintiffs failed on the ground that for over 30 years the plaintiffs had not built a house on the site. Accordingly it was held that the licence to occupy the site for residential purposes must be deemed to have been revoked so as to give a right to the landlord to re-enter the land and grant it to the defendant.

(12) Acquiescence is a matter of legal inference from the facts established in a case: — 'Beni Ram v. Kundan Lal', 21 All 496 at p. 504 (PC) (H). I dissent from the proposition which is sought to be deduced from the cases cited that the inactivity of the landlord for a particular number of years apart from anything else in the case must necessarily lead to the inference of acquiescence. The question of acquiescence cannot thus be reduced to a rule of thumb. In my view, if I may state it with due respect, the true position has been stated by the Division Bench in — 'Kuwarji v. Bhurelal', AIR 1939 Nag 163 (I) and by Niyogi J. in — 'Nandkishore v. Damodar', AIR 1942 Nag 59 (J).

(13) In the first case — 'Kuwarji v. Bhurelal', (I) (supra) Stone C. J. observed at P. 165:

> "The word 'acquiescence' is used by the learned lower appellate Judge as though it were an effective defence once it was shown that the plaintiff had stood by with knowledge of his rights and without suing for a year or two—such a time as would show laches on his part or would show that he was slow to exercise his remedies. If that were sufficient to raise the defence of acquiescence we would observe that no meaning whatever could be given to the Articles, we have been examining of the Limitation Act. Under the law relating to limitation knowledge of one's right to sue does not contract, though ignorance of the facts creating the cause of action may expand, the time allowed in which to sue. The limitation periods proceed on the basis that the plaintiff could have sued before. To take an ordinary every day case, a plaintiff suing a trespasser for possession can let 11½ years go by during the whole of which period he has been aware that the defendant was a trespasser on his land and still he would be within time because the period of limitation is 12 years. The fact that he knew he was a trespasser, the fact that he did not proceed before, does not give the defence of acquiescence to the defendant."

(14) In the second case — 'Nandkishore v. Damodar', (J) (supra) a plea of acquiescence against the lambardar in a suit for possession of an 'abadi' site was negatived by Niyogi J. in the following words:

> "The plaintiff's inaction, while defendent 2 was extending the house by erecting a kotha and making other improvements, and his mere omission to assert his right and object to the acts of the defendants, would not by themselves constitute acquiescence".

(15) Where a party relies upon omission or inactivity of the other as depriving the latter of his legal rights, nothing short of conduct amounting to fraud can sustain a plea of acquiescence. In the well known case of — 'Willmott v. Barber', (1880) 15 Ch. D. 96 at pp. 105, 106 (K);, there is a lucid exposition by Fry J. of the elements necessary to establish fraud in a case of this kind·

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description?
>
> In the first place the plaintiff must have made a mistake as to his legal rights.
>
> Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.
>
> Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights.
>
> Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where

all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

(16) Coming to the facts of the instant case, the first and the fourth elements are entirely lacking. Silence is safe where there is no duty to speak and there can be no duty to speak about a matter which is equally within the knowledge of both the parties. It is not that the tenant in this case was unaware of the fact that the site which he had acquired and which he was building was part of the 'abadi'. If that be so, there could not have been any mistake about his right to build. The defendant as D. W. 1 does not say that he was either mistaken as to his rights or misled by the inactivity of the landlord. Nor is there anything to suggest that the landlord kept quiet knowing that the tenant was acting on a 'mistaken view' of his rights. It cannot therefore be held that the landlord acquiesced in the acts of the appellant.

(17) The appellant tried to derive some support from the 'wajib-ul-arz'. But it does not help him. In fact cl. 7 is clear that the house sites are not transferable save under conditions applying to the transfer of holdings i. e. with the consent of the landlord.

(18) The appeals are allowed with costs throughout. In each case the decree of the lower appellate Court is set aside and that of the trial Court is restored.

(19) The respondent is granted six months from the date of the decree of this Court for removing the structures.

B/K.S. Appeal allowed.

A. I. R. 1954 NAGPUR 99 (Vol. 41, C. N. 39)

HEMEON AG. C. J. AND BHUTT J.

Ratnakar Jha Petitioner v. Krishna Sewak Agarwal and others, Non-Applicants.

Misc. Criminal Case No. 115 of 1952, D/- 14-4-1953.

(a) Contempt of Courts Act (1952) S. 4 — Costs.

Contempt proceeding for publication of article regarding sub judice case — False declaration by one of non-applicants regarding editorship of newspaper — Though it was found that non-applicant was not liable for contempt, no order for costs was passed in his favour. (Para 9)

(b) Contempt of Courts Act (1952) S. 3 — Article in newspaper regarding imminent criminal case against petitioner.

Where the Editor, printer and publisher were fully apprised of the fact that proceedings under S. 325 Penal Code were imminent against the petitioner they would be guilty of contempt of Court, if they publish any article pertaining the case, if the article contained matter which lay within the mischief of that term. (Para 12)

(c) Contempt of Courts Act (1952) S. 3 — Article in newspaper pertaining imminent prosecution held amounted to contempt.

Prosecution of petitioner under S. 325 Penal Code imminent — Publication of article stating that petitioner committed the assault, that the petitioner had been arrested and released on bail, that his supporter had intimidated the editor and that attempts were being made to suborn prosecution witnesses and to tutor witnesses for defence — Comments of this character held were manifestly intended to interfere with administration of justice — Comment even in the absence of such intention was actionable if it had a tendency or was calculated to interfere with administration of justice — Both articles held constituted contempt — Such articles appearing when prosecution of petitioner had started, in newspaper edited and owned by alleged victim of the attack (subject-matter of prosecution of petitioner) — Contempt held substantial and not by any means pusillanimous. (Paras 13, 14)

(d) Contempt of Courts Act (1952) S. 3(2) — Interpretation.

Sub-section (2) of S. 3 excludes jurisdiction of High Court only in cases where acts alleged to constitute contempt of subordinate Court are punishable as contempt under specific provision of Penal Code — Acts constituting offence under S. 500 Penal Code — Jurisdiction of High Court to try for contempt on same acts is not excluded. Case law Ref. (Paras 16, 17)

A. Razak, for Applicant; R. K. Thakur and R. K. Verma (for No. 1), V. T. Kedar (for No. 2), and N. N. Pande (for No. 3), for Non-Applicants.

CASES REFERRED:

(A) (1903) 1903-2 KB 432: 72 L J K B 839 (Pr 10)
(B) (1927) 1927-1 KB 845: 96 L J K B 352 (Pr 11)
(C) ('39) AIR 1939 Mad 257: ILR (1939) Mad 466: 40 Cri L J 533 (FB) (Pr 12)
(D) ('33) AIR 1933 Cal 118: 60 Cal 603: 34 Cri L J 662 (Pr 12)
(E) ('38) AIR 1938 Bom 198: 40 Bom L R 73: 39 Cri L J 424 (Pr 12)
(F) ('43) AIR 1943 Lah 329: ILR (1944) Lah 111: 45 Cri L J 445 (FB) (Pr 12)
(G) ('45) AIR 1945 Lah 206: 47 Cri L J 115 (Pr 12)
(H) ('50) AIR 1950 Pepsu 9: 51 Cri L J 1219 (SB) (Pr 12)
(I) ('50) AIR 1950 E P 366 (Pr 12)
(J) ('52) AIR 1952 Nag 259: ILR (1949) Nag 640 (Pr 13)
(K) ('33) AIR 1933 Pat 142: 12 Pat 1: 34 Cri LJ 770 (Pr 16)
(L) ('33) AIR 1933 Pat 204: 12 Pat 172 (Pr 16)
(M) ('50) AIR 1950 All 556: 52 Cri LJ 1062 (FB) (Pr 17)
(N) ('52) AIR 1952 Kutch 74: 1952 Cri L J 1482 (Pr 17)
(O) ('36) AIR 1936 Lah 917: 38 Cri L J 73 (Pr 17)
(P) ('40) AIR 1940 Nag 407: 42 Cri L J 237 (Pr 17)
(Q) ('52) AIR 1952 SC 149: 1952 Cri L J 832 (SC) (Pr 17)

ORDER: This petition under the Contempt of Courts Act was originally filed by Shri Ratnakar Jha, Public Prosecutor and President of the Municipal Committee, Durg, against Shri K. S. Agarwal, owner, editor, printer and publisher of 'Zindgi', a weekly paper, and Shri K. N. Jha, printer- co-publisher, and co-editor of the same paper. Shri Dwarka Prasad, brother of Shri

K. S. Agarwal, was subsequently joined as a non-applicant as owner of the press and paper.

(2) There had been, according to the petitioner, rivalry and ill-will between Shri K. S. Agarwal and himself for some years; and Shri K. N. Jha had sided with his employer Shri K. S. Agarwal. On the 1st May 1952 the paper contained a long article against the petitioner and his family; and on the 18th August 1952, prior to municipal elections, it published a conversation between two imaginary persons which was extremely disparaging to him. On the 28th September 1952 Shri K. S. Agarwal was attacked; and on the 3rd October 1952 the police registered a case under S. 325 of the Indian Penal Code against the petitioner who was arrested on the 9th October 1952 and enlarged on bail. On the 11th October 1952, Blitz, a Bombay paper, published an article which, according to the petitioner, scandalized him at Shri K. S. Agarwal's instance; and the Nagpur Times of the 14th October contained an article concerning the alleged attack on the 28th September 1952. The Diwali number of Naya Khoon also contained an article with regard to the incident.

(3) The issue dated the 27th October 1952 of 'Zindgi' contained a letter from 'local correspondent Durg' which referred to the nefarious activities of the petitioner's son, the petitioner's attack on Shri K. S. Agarwal with a cane, threats by his supporters, tutoring of witnesses, and undue pressure on prosecution witnesses. This article contained in the middle a panel in which Shri K. S. Agarwal thanked those who had indicated their sympathy for him after the attack. On the 31st October 1952 the case against the petitioner under S. 325 of the Indian Penal Code was challaned, and on the 10th November 1952 the following matter appeared in the 'Zindgi':

'A Public Prosecutor is a Government Servant'

"To — The Editor,

'If the Government themselves start a case against Public Prosecutor, Government should remove that pleader from that post till the decision of the case because a Public Prosecutor is a Government Servant.

'The British Government had suspended the High Court Judge of Madras when a case under S. 304, Indian Penal Code was started against him. He was a European and he was challaned for the alleged offence of killing one Indian boy. When a Public Prosecutor has been challaned and he is not removed from the post of Public Prosecutor and is conducting cases against the accused persons there are many things which can arise in the mind of the Public. Our National Government and other parties who work for the good of people may solve this basic problem and take a step in the interest of justice.

Yours
One Citizen.

'Challan of the Municipal President and Public Prosecutor Ratnakar Jha presented'.

'After enquiry the Durg Police presented challan of Ratnakar Jha Public Prosecutor and Municipal President of Durg in the Court of Shri Bisen Magistrate Second Class (for offence) under S. 325, Indian Penal Code. On the Dashahre day Shri Jha attacked Shri Krishna Sewak Agarwal, Pleader, Journalist, Ex-Chairman Janpad Sabha, Bemetara with a thick cane stick and broke his skull. The case is fixed for the 22nd November 1952. Shri Agarwalji has requested the Government to appoint some special pleader for conducting this case. This will enhance the Govment's prestige because the case is an important one and the accused is President of several institutions. It is heard that Shri Jha has started a case against Shri Krishna Sewak Agarwal and Shri Kedarnath Jha Chandra under S. 500, Indian Penal Code."

(4) Shri K. S. Agarwal in his reply declared that he was not the editor, printer, publisher or owner of the 'Zindgi' or owner of the Bharat Press by which it was published. The articles of the 1st May 1952 and the 18th August 1952 in the 'Zindgi' were the subject-matter of a case under S. 500 of the Indian Penal Code in the Court of the First Class Magistrate, Durg. As he (Shri K. S. Agarwal) had been assaulted on the 28th September 1952 by the petitioner, he could not edit the paper and was, therefore, not responsible for the appearance of the article dated the 27th October 1952. He was also not responsible for the articles in Blitz, the Nagpur Times and Naya Khoon or for the article, dated the 10th November 1952, in 'Zindgi' and he claimed that the articles complained of did not constitute contempt of Court.

(5) Shri K. N. Jha asserted that he was printer, publisher and from the 28th September 1952 sole editor of 'Zindgi' in the employ of Shri Dwarka Prasad who was the proprietor of the paper and of the press. The article of the 27th October 1952 was part of the subject-matter of the case under S. 500 of the Indian Penal Code and it appeared when no proceedings were pending in Court. The article dated the 10th November 1952 did not, according to him, amount to contempt of Court.

(6) The petitioner pointed out in a written statement that Shri K. S. Agarwal in his transfer application of the 20th November 1952 admitted that he was the editor of 'Zindgi', and he cited other instances to show that he had not ceased to be connected with it. Shri Dwarka Prasad, who declared that Shri K. N. Jha was printer, publisher and from the 28th September 1952 sole editor of the 'Zindgi', admitted that he himself was the owner of the Bharat Press but asserted that he did not participate in its affairs because he was suffering from T. B. He added that the entire management and supervision were in the hands of Shri K. N. Jha, who was in his employment, that he himself was in no way responsible for the publication of the articles in question, and that they did not amount to contempt of Court. Shri K. S. Agarwal filed a copy of a declaration, dated the 10th August 1951, by him to the effect that he had ceased to be printer of the 'Zindgi'.

(7) The case under S. 500 of the Indian Penal Code to which advertence has been made was instituted against Shri K. S. Agarwal and Shri K. N. Jha on a complaint, dated the 30th October 1952, by the petitioner who based it on the articles of the 1st May 1952, 18th August 1952 and 27th October 1952 in the 'Zindgi', of which, according to him, Shri K. S. Agarwal was proprietor and editor and Shri K. N. Jha joint editor. The application now before us was filed on the 27th November 1952 and it relates essentially to the matter which appeared in the

'Zindgi' not only on the 27th October 1952 but on the 10th November 1952. There was no appreciable tardiness in filing the application and it was not liable for rejection on the ground of undue delay.

(8) Prior to its scrutiny on merits, we must decide whether or not on the available material there was substance in Shri K. S. Agarwal's plea that his connexion with the paper had terminated from the 28th September 1952 when he was incapacitated as a result of the head and other injuries allegedly caused to him by the petitioner. He had, as shown, filed a declaration, dated the 10th August 1951, under sections 4 and 5 of the Press and Registration of Books Act, 1867 to the effect that he had ceased to be the printer of the paper; and on the 7th September 1951 Shri Dwarka Prasad had executed a declaration to the effect that he had a printing press in Durg. This did not connote that Shri K. S. Agarwal had ceased to be the owner or editor of the paper after the 28th September 1952, and there was material which indicated the contrary.

There was in the first place no announcement or declaration of the cessation of interest in that publication; and in his transfer petition, dated the 20th November 1952, he had admitted that he was its editor. He had also, according to the petitioner's affidavit, shown himself as its proprietor in July 1952 in the income-tax return for 1951-52. Nor would it appear that his injuries had so incapacitated him that he was unable to perform editorial duties after the 28th September 1952. He had, in fact, on his own admission travelled to Nagpur thereafter and on the 30th September 1952 come into contact with journalists who made inquiries from him regarding the incident of the 28th September 1952.

The article of the 27th October 1952 in the 'Zindgi' also referred to the attack by the petitioner on 'Shri Krishna Sewak Agarwal, ex-president of the 'Janapad Sabha', Bemetara, 'vakil', writer, editor of the Zindgi paper'; and the Nagpur Times in its issue, dated the 14th October 1952, referred to an assault on a Durg editor on Dasehra day (28-9-1952) by a leading citizen of that town. The Naya Khoon also adverted to a cowardly attack with a 'lathi' on 'Shri Krishna Sewak Agarwal, pleader and editor of 'Zindgi'', and the article of the 11th October 1952 in Blitz related to an attack on Mr. K. S. Agarwal, a Durg journalist, by the Public Prosecutor.

(9) We have, therefore, no reason to suppose that Shri K. S. Agarwal ceased to be editor or owner of the 'Zindgi' or that Shri K. N. Jha became its sole editor from the 28th September 1952. It follows that no liability can be attached to Dwarka Prasad and that the application against him must be dismissed. We do not, however, consider that an order for costs should be passed in his favour, as he falsely declared that Shri K. N. Jha was the sole editor of the paper from the 28th September 1952. There will be no order as to costs on this part of the case.

(10) We now come to the article of the 27th October 1952. A case had been registered under section 325 of the Indian Penal Code against the petitioner on the 3rd October 1952; and on the 9th October 1952 he had been arrested and enlarged on bail, but he was not challaned until the 31st October 1952 i.e. 4 days after the appearance of the article. The question then was whether or not Shri K. S. Agarwal or Shri K. N. Jha could be adjudged liable for contempt of Court in respect of an article which appeared in the 'Zindgi' prior to the initiation of criminal proceedings in Court by the authorities.

In — 'The King v. Parke', 1903-2 KB 432 (A) it was held that the High Court had jurisdiction to attach the publisher of matter tending to interfere with the fair trial of a charge against a person who had not been committed for trial. Wills J. made the following observations at pages 437 and 438:

"Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind — that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

(11) These observations were referred to by Hewart L. C. J. in — 'Rex v. Daily Mirror', 1927-1 KB 845 (B), a case in which it was held that it was contempt of court in a newspaper to publish the photograph of a person charged with a criminal offence where it is reasonably clear that the question of his identity with the criminal has arisen or may arise or such publication is calculated to prejudice a fair trial. Hewart L. C. J., however, took care to point out that the Bench was not called upon to consider the question whether there may be contempt of court when proceedings are imminent but have not yet been launched; and he added that the question did not arise, because there was a charge and there had been an arrest. He also explained that the mischief in contempt of court consists not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person.

(12) These two cases were referred to by a Full Bench in — 'P. S. Tulajaram Rao v. Governor of Reserve Bank of India', AIR 1939 Mad 257 (C), in which it was held that to comment on proceedings which are imminent but not yet launched in Court with knowledge of the fact is as much a contempt as comment on a case actually launched. This view was followed in — 'Tusharkanti Ghosh v. Governor of Bengal', AIR 1933 Cal 118 (D); — 'Government Pleader v. Shankar Dattatraya', AIR 1938 Bom 198 (E); — 'In The Matter of "Tribune", Lahore', AIR 1943 Lah 329 (FB) (F), a Full Bench decision, — 'Emperor v. Khushal Chand', AIR 1945 Lah 206 (G) and — 'Crown v. Brish Bhan', AIR 1950 Pepsu 9 (SB) (H). Harnam Singh J. remarked in — 'Divan Chand Choudhry v. Narender', AIR 1950 EP 366 (I) that there may be contempt of Court in prejudicing mankind against persons before the cause is heard.

We are in respectful agreement with these authorities; and we hold that as Shri K. S.

Agarwal and Shri K. N. Jha were fully and intimately apprised of the fact that proceedings under section 325 were imminent against the petitioner, he was liable for contempt of court, if the articles of the 27th October 1952 contained matter which lay within the mischief of that term. So far as the article of the 10th November 1952 is concerned, it appeared after the petitioner had been challaned when the case was 'sub judice', and here too the only question for determination is whether it constituted contempt of court.

(13) We have no hesitation in deciding that the article of the 27th October 1952 contained passages which amounted to contempt of court. There is no suggestion in it that an attack had allegedly been made on Shri K. S. Agarwal, and it is, on the other hand, explicitly stated that the petitioner had assaulted him with a cane and had fractured a bone in his head. There are also references to the fact that the petitioner had been arrested and released on bail, assertions that his supporters had intimidated Shri K. S. Agarwal and allegations that attempts were being made to suborn the prosecution witnesses and to tutor witnesses for the defence. Comment of this character was manifestly intended to interfere with the administration of justice, and, as was pointed out in — 'T. B. Hawkins v. D. P. Mishra', AIR 1952 Nag 259 (J) by a Bench of which one of us was a member, comment even in the absence of such intention is actionable if it has a tendency or is calculated to interfere with the administration of justice.

(14) The article of the 10th November 1952 was not so egregious as that article, but it too constituted a contempt of court by categorically stating that the petitioner, who had been prosecuted in the Court of the 2nd Class Magistrate, Durg, under S. 325 of the Indian Penal Code, had on Dashera day attacked Shri K. S. Agarwal with a thick cane and broken his skull. Ordinarily no action for contempt of Court is taken unless the contempt is substantial, but the contempt even in this article was not by any means pusillanimous, and the article in effect contained an assertion that the petitioner was liable for the commission of an offence punishable under section 325 of the Indian Penal Code, although that was the issue for eventual determination by the Court. The article, moreover, did not appear in a paper which was edited or owned by a person who was in no way concerned with the case but in a paper which was edited and owned by the alleged victim of the attack.

(15) The contention that as the article of the 27th October 1952 was part of the subject-matter of the petitioner's complaint under section 500 of the Indian Penal Code, the High Court could not deal with it in these proceedings was based on section 2(3) of the Contempt of Courts Act (now S. 3(2) of Act 32 of 1952—Ed.) which is in these terms:

> "No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

(16) That sub-section was interpreted in two cases by the Patna Court. In — 'Kaulasha v. Emperor', AIR 1933 Pat 142 (K), a Division Bench held that when under the Indian Penal Code there is already a provision for punishing a contempt of court as a contempt of court, the Contempt of Courts Act itself shall have no application and not that the act which constituted the contempt cannot be punished under that Act because it was constituted an offence under the Indian Penal Code. In other words a single act may be both an offence under that Code and also a contempt of court and punishable in either capacity or both capacities. This view was followed in — 'Jnanendra Prasad v. Gopal Prasad', AIR 1933 Pat 204 (L), in which it was remarked that the sub-section obviously excepts those cases of contempt which are punishable by the Indian Penal Code as contempt and not if they are punishable independently of that contempt.

(17) A Division Bench* in — 'State v. Brahma Prakash', AIR 1950 All 556 (M); Vakil J. C. in — 'Ramniklal v. Pranlal', AIR 1952 Kutch 74 (N); a Division Bench in — 'Bennett Coleman & Co., Ltd. v. G. S. Monga', AIR 1936 Lah 917 (O) and Bose J. as he then was in — 'Sub Judge, First Class, Hoshangabad v. Jawahar Lal Ramchand', AIR 1940 Nag 407 (P) were of the same view. Their Lordships of the Supreme Court of India also examined the question in — 'Ramakrishna Reddy v. State of Madras', AIR 1952 SC 149 (Q) and, as their observations below indicated, shared that opinion:

> "In our opinion, the sub-section referred to above excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Indian Penal Code but not where those acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code. This would be clear from the language of the sub-section which uses the words "where such contempt is an offence" and does not say "where the act alleged to constitute such contempt is an offence". It is argued that if such was the intention of the Legislature, it could have expressly said that the High Court's jurisdiction will be ousted only when the contempt is punishable as such under the Indian Penal Code. It seems to us that the reason for not using such language in the sub-section may be that the expression "contempt of Court" has not been used as description of any offence in the Indian Penal Code, though certain acts which would be punishable as contempt of Court in England, are made offences under it."

(18) Neither Shri K. S. Agarwal nor Shri K. N. Jha suggested any apology in their written statements or in Court; and the case is clearly not one in which admonition of them would be adequate. We order Shri K. S. Agarwal to pay a fine of Rs. 250/- and Shri K. N. Jha to pay fine of Rs. 75/- under section 3 of the Contempt of Courts Act, 1926. We also direct them to pay costs; and, as already shown, the application against Shri Dwarka Prasad is dismissed but no order as to costs will be passed on that part of the case. We assess the costs payable by Shri K. S. Agarwal and Shri K. N. Jha at Rs. 200/- and Rs. 100/- respectively. This will include paper book costs.

B/R.G.D. Order accordingly.

*The Bench consisted of three Judges. Wallullah, Mootham and Wanchoo JJ.

A.I.R. 1954 NAGPUR 103 (Vol. 41, C.N. 40)

MANGALMURTI AND DEO JJ.

Mt. Manturabai and others, Defendants-Appellants v. Ithal Chiman, Plaintiff-Respondent.

Letters Patent Appeal No. 31 of 1948, D/-21-8-1953, from appellate decree of Hidayatullah J., reported in AIR 1951 Nag 447.

(a) Easements Act (1882), S. 17 (d) — Right to percolating water.

No easement right can be acquired over percolating water unless it runs in a defined stream. (Para 6)

Anno: Easements Act, S. 17 N. 1.

(b) Evidence Act (1872), S. 35 — Village records — Discrepancy.

In the case of discrepancy in the khasra entries and the 'wajib-ul-arz' the entries in the latter must prevail. (Para 7)

Anno: Evidence Act, S. 35 N. 17.

(c) Civil P. C. (1908), S. 100(1)(c) — Finding of fact of first appellate Court.

Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. 17 Ind App 122 (127) (PC), Relied. (Para 11)

Anno: Civil P. C., Ss. 100-101 N. 52.

1953 Mulla: S. 100 P. 367 N. "No.....fact" (8 Pts. extra in N. 52 to Ss. 100-101 in A.I.R. Com.—Points (l) to (u) in Mulla taken under various appropriate Notes to Ss. 100-101 in A.I.R. Com.).

(d) Easements Act (1882), S. 17 — Right to water from tank — No fixed channel — No easement. AIR 1951 Nag 447, Reversed.

The surplus water from tank X first got collected in the fields belonging to the defendant and then passed into the tank Y belonging to the plaintiff. Thus, the tank Y collected rain water and received surplus water thrown from the defendant's fields. After retaining water for such length of time as may be considered necessary by the defendant for the beneficial enjoyment of his lands, the surplus was taken out by cutting bunds. The plaintiff did not dispute the defendant's right to collect water on his fields. There was no artificial channel on the defendant's land connecting the two tanks. The lands of the defendant were on higher level than the land of the plaintiff's tank Y. The defendant had a right to discharge the surplus water from his fields into the plaintiff's tank; the right to effect a breach in the embankment anywhere else was of the defendants; the level of such breach was also to be according to his convenience, and the plaintiff never exercised any right nor had he got any right to cut the defendant's 'bandh' nor did he ever insist that the water from the defendant's field should be discharged in tank Y:

Held that plaintiff did not get a right to the surplus water discharged by the defendants for the beneficial enjoyment of his land merely because the plaintiff derived benefit from it, assuming that he had done so for over the statutory period. AIR 1951 Nag 447, Reversed. (Para 14)

Held further that it was the defendant who acquired a right to have their surplus water discharged into the tank Y. (Para 16)

Anno: Easements Act, S. 17 N. 1.

M. R. Bobde, A. S. Bobde and Y. P. Verma, for Appellants; S. N. Sil and H. N. Choudhary, for Respondent.

CASES REFERRED: Paras

(A) ('01) 14 CPLR 145 5, 16
(B) (V10) AIR 1923 Pat 65: 2 Pat 110 5, 16
(C) ('88) 11 Mad 16 6
(D) (V24) AIR 1937 Nag 310: ILR (1937) Nag 13 6
(E) (V27) AIR 1940 Nag 178: ILR (1941) Nag 299 7
(F) ('90) 17 Ind App 122: 18 Cal 23 (PC) 11
(G) (V16) AIR 1929 PC 190: 25 Nag LR 121 (PC) 11
(H) ('79) 4 Cal 633: 6 Ind App 33 (PC) 13
(I) (1853) 8 Ex 291: 155 ER 1357 13, 14
(J) (1848-49) 3 Ex 748: 18 LJ Ex 305 14
(K) (V1) AIR 1914 Mad 507: 37 Mad 304 14
(L) 44 Ohio St. 287: 7 N.E. 429 14
(M) (V9) AIR 1922 Bom 378: 46 Bom 115 15

JUDGMENT: This is defendant's appeal under Clause 10 of the Letters Patent against the judgment delivered by Hidayatullah J. in Second Appeal No. 440 of 1944, reversing the decree of the Additional District Judge and restoring that of the trial Court.

(2) The facts material for this appeal, as admitted or found, are:

Plaintiff and defendants were co-sharers in mouza Khairi at all material times. Plaintiff is the owner of tank No. 134 from which he irrigates his 'sir' fields Nos. 88-90-91 through the channel AB. This right, recorded in the 'wajib-ul-arz' of the village is not disputed by the defendants. Khasra No. 319 is the tank constructed by Government in the famine period for the benefit of the village as a whole, and is recorded 'shamlat' in the name of the proprietors of the mahal. It is not disputed that the defendants have a right of irrigation from 'mogha' (sluice) P of this tank for their fields khasra Nos. 135 and 136 which are immediately below the tank. Khasra Nos. 138, 132, Khasra No. 133, which touches the embankment of khasra No. 134, and khasra Nos. 126, 125, 124 and 123 are also irrigated from this tank.

These fields are at a lower level than khasra No. 135. If the tank khasra No. 134 is full and the cut K is kept open, the water floods back into khasra No. 135 and passes through the other khasra number of the defendants to the south of khasra No. 134. The references are to the map annexed to the decree. Khasra No. 138 is also irrigated from khasra No. 134 (Exhibit P-3). These are all 'dhan-bandis'.

(3) According to the plaint, the water of tank khasra No. 319, flowing through P goes into khasra Nos. 135 and 136 and after passing through these numbers it (i.e. water of the tank) fills the tank khasra No. 134 through the opening at K in the embankment of that tank. From khasra No. 134 plaintiff irrigates khasra Nos. 88-90-91. It is further stated:

"according to the wajib-ul-arz the plaintiff's right of irrigation has always been there from ever."

The plaint was amended by adding:

"(Original in Hindi) Plaintiff has the right to fill tank No. 134 with water collected in field No. 135 from pizra (percolation) and from 'mogha' P of 319 and has the right of irrigation of the said area of the plaintiff from 134 by

(water) passing through the nali AB. (This right is) according to wazib-ul-arz and on account of taking water for ever and on account of the plaintiff being joint owner of tank 319."

The official translation of this passage was not quite accurate. We have therefore translated it. Pizra water is the water which percolates.

(4) The plaintiff's complaint is that on or about the 21st October 1941

"the defendants closed the outlet at K in order to prevent the filling of the tank No. 134 and after digging a deep channel from T to Th along the southern embankment of the tank No. 134, conducted away the water that was pooled in No. 136 and irrigated their fields Nos. 133, 126, 135/3, 125, 124, 123, 92 and 93 and moreover sowed Lakhodi and linseed also."

It was alleged that in consequence of this wrongful act of the defendants, the plaintiff suffered loss of his paddy crop.

(5) The lower appellate Court held that the mere fact that the plaintiff was the co-owner of tank No. 319 did not give him a right to have the water from khasra No. 319 brought to his tank No. 134 through the defendant's fields Nos. 135 and 136 through the opening at K and that he had to establish that he had acquired it as an easement. The lower appellate Court held that this right was not recorded in the 'wajib-ul-arz' and that the plaintiff had failed to prove acquisition of an easement. It was further held that the defendants had acquired by prescription a right to discharge the surplus water of khasra Nos. 135 and 136 into khasra No. 134 through K, and that the fact that the water so received by the servient owner was beneficial to him did not give him a right to have it discharged into khasra No. 134. Reliance was placed on — 'Chakradhar Singh v. Tikaram Sao', 14 CPLR 145 (A), — 'Mt. Sarban v. Phudo Sahu', AIR 1923 Pat 65 (B). The appellate Court therefore dismissed this claim. Hidayatullah J. held that the plaintiff had acquired the right to receive the water of tank khasra No. 319 as prescriptive easement.

(6) Plaintiff's claim of right to water percolating from khasra No. 319 is without any substance. There is no evidence that water percolates from tank No. 319, collects in khasra Nos. 135 and 136 and reaches tank No. 134 through K. No easement right can be acquired over percolating water unless it runs in a defined stream. (Section 17 (d) of the Easements Act). In — 'Perumal v. Ramasami Chetty', 11 Mad 16 at p. 22 (C), it was stated that:

"The reason why underground water not running in a defined stream is not a subject of prescription is that there is no visible means of knowing to what extent, if any, at all, the supply to the plaintiffs' tank would be effected by water percolating in and out of defendants' land....."

These observations were quoted with approval in — 'Kalanath v. Wamanrao', AIR 1937 Nag 310 (D).

(7) It is clear that the plaintiff's alleged right to take the water of tank khasra No. 319 for khasra No. 134 or for khasra No. 88-90-91 is not recorded in the 'wajib-ul-arz' of the current settlement of 1916-17. The tank No. 134 used to irrigate Nos. 88-90-91 and this area was said to have been improved by the repairs of the tank in 1870 (Ex. P-6 of the year 1894-95). The tank No. 319 was constructed in the famine years from 1898 to 1902 by the Government for the 'nista' of the whole village. It was constructed mainly on the 'sir' fields of the predecessors-in-title of the defendants. At the settlement of 1916-17 these persons claimed the tank as their exclusive property, but that claim was negatived and the tank was recorded as 'shamlat' of all the proprietors with a note made in the remarks column that it was constructed by Government for the general use of the village.

If the plaintiff had really any claim to receive the water of tank No. 319 through the defendants' fields for tank No. 134, it would have been recorded in the 'wajib-ul-arz' Exhibit P-1. At that time the plaintiff could not have acquired a prescriptive easement. Plaintiff was not able to show us any documentary evidence in support of his claim. His learned Counsel relies on the following statement in paragraph 5 of the judgment under appeal:

"In the khasras of the village Khairi from 1916 to 1941 it is stated in the remarks column that the plaintiff is entitled to irrigate his lands from tank No. 319 'via' tank No. 134."

This statement is not borne out by the documents on record. Exhibit P-8 is the settlement khasra for 1916-17 and Exhibit P-9, Exhibit P-10 and Exhibit P-11 are the three five-year khasras for the period from 1927-28 to 1941-42. There is no khasra or other document for the intervening period. It is stated in these exhibits that khasra Nos. 88 and 91 are irrigated from tank khasra No. 134. As regards khasra No. 90 it is stated that it is irrigated from tanks Nos. 84-258-259-319-134. This is evidently a mistake. In the 'wajib-ul-arz' Exhibit P-1 it is stated that khasra No. 89 is irrigated from 258-259-319. As regards khasra No. 90 it is stated that it is irrigated from khasra No. 134. In the settlement khasra for the preceding Settlement of 1894-95 it is stated that khasra Nos. 137-138 and 200, corresponding to khasra No. 90-88 and 91 of the current Settlement were irrigated from tank No. 236 whose corresponding number in the current Settlement is 134. If khasra No. 89, which is to the North of khasra Nos. 88-90-91, was irrigated from khasra No. 134, plaintiff would have included that field also in the suit. In view of the discrepancy in the khasra entries in Exhibits P-8 to P-11 and the 'wajib-ul-arz' Exhibit P-1 regarding khasra No. 90, the entries in the latter must prevail. — 'Ramji Saheblal v. Tanyabapu', AIR 1940 Nag 178 at p.. 181 (E). The documentary evidence thus does not support the case of prescriptive easement.

(8) We are satisfied that the plaintiff has failed to prove his claim by oral evidence. As P. W. 4 he stated:

"There is no drain in defendants' field No. 135. My tank No. 134 is filled in the following manner:

Rain water is collected. The water from the defendants' 'bandhis' in field No. 135 after the 'chirata' and transplantation is collected in the tank. The defendants have got a right to throw the surplus water of the 'bandhis' of 135 into my tank No. 134. They retain as much water in the 'bandhis' as is necessary for them. I do not insist upon the defendants to get my tank filled at the cost of their crop.....The mogha P-1 is opened first for irrigation purposes. This is done by defendant Jayaram. Thereafter the mogha P-2 is opened. The drain 'YZ' is opened before these moghas. The mogha X is opened even before the above moghas. The moghas P-2 and X are on the same level. The level of the tank is generally the same throughout. The

drain XY and the mogha X, if opened at one time, will carry equal quantity of water. I cannot state how much land is irrigated by the water from the drain 'YZ'. About 8 to 10 khandis of land is irrigated by the water from the mogha X. Defendants own about 14 to 15 khandis of land near Tendu Tola. Defendants close the breach at point K according to their convenience to some extent. The water in field No. 135 does not flow to the defendants' field lying to the East of the tank 134. If the 'bandhis' in 135 is opened the water will pass to defendants' field lying to the East of the tank 134. The water from tank 319 first gets collected in field No. 135 and then passes into the tank 134. The surplus water from 135 flows into 134. In 1941 there was no sufficient rainfall. There was no rain after Pola."

The mogha X is in the Southernmost portion of the defendants' field No. 136 and apparently irrigates 138, 130 and other fields. We could not find the drain 'YZ' in any of the maps on record to make good the contract out of such interest.

(9) At this stage, it would be convenient to notice certain other inaccurate statements of facts in the judgment under appeal. It is stated (paragraph 5):

"This tank (No. 134) has no source of water and is obviously filled by surplus water from tank No. 319."

In paragraph 7 it is stated:

"The water of tank No. 319 escapes through a sluice gate at point P. Thereafter, in the absence of any cuttings in the bunds, it gets stored in the fields Nos. 135 and 136. Thereafter it passes through an artificial opening in the bund of tank No. 134, which is marked K in the plaint map."

The plaintiff has admitted that tank No. 134 collects rain water and receives surplus water of khasra No. 135 thrown by defendants. It is not disputed that the plaintiff has no right to open or close either P or K. Punnoolal (P. W. 1) has stated that if khasra No. 134 is full and the cut K is not closed, khasra No. 135 would be flooded unless the water is let out on the southern side into the defendants' other fields. The water of khasra No. 319 is brought to the land of the defendants by opening the sluice P.

The water does not overflow the bunds of the 'bandhis' of khasra No. 135. It is collected in each 'bandhi' and after retaining it for such length of time as may be considered necessary by the defendants for the beneficial enjoyment of their land, the surplus is taken out by cutting the bunds. The bunds are not cut at the same points every year or to the same depth. The water so removed is taken into other 'bandhis' and similarly used; and if any surplus remains after the requirements of the defendants are satisfied, it is led into khasra No. 134 through the cut K.

This is done not for the benefit of the plaintiff but for the beneficial enjoyment of the defendants' lands. The water of khasra No. 135 is allowed to flow into the 'bandhis' of khasra No. 136 which is to the south of khasra No. 135 (defendants' map). The plaintiff has not disputed the defendants' right to collect water in No. 136.

(10) The statement in the judgment:

"in the past the plaintiff was regularly taking water every year from field No. 135 to tank No. 134 'via' the opening at K"

is also not correct. On the other hand, the defendants were discharging the surplus water from fields Nos. 135 and 136 at their will into the tank 134 and the plaintiff had to receive it. The statement:

"though tank No. 134 was built by the defendants, it was constructed because it became a storing place for water from the bigger tank No. 319."

is obviously incorrect. The tank was not constructed by the defendants but by the plaintiff and it was constructed years before the tank khasra No. 319 was constructed. The statements:

"the presence of artificial channels connecting the two tanks with the intervening field of the plaintiff clearly shows that the right to the water of tank No. 319 was exercised by the plaintiff with the consent of the defendants. That it has been so enjoyed for nearly 50 to 60 years is apparent from the evidence in the case"

are also inaccurate. Intervening field is not of the plaintiff but of the defendants. Tank No. 319 was not in existence for more than 40 years when the evidence was recorded. The channels or ducts P and K do not connect the two tanks. There is no artificial or natural channel on the defendants' land connecting the two tanks, unless the learned Judge meant to suggest that the whole field No. 135 comprised of a large number of 'bandhis', was one channel. In the absence of a defined channel, it cannot be said that the water discharged into khasra No. 134 was passing through an artificial watercourse.

(11) The learned Judge has not demonstrated how the findings of facts of the first appellate Court offended against Section 100(1)(c), Civil Procedure Code, and were not binding on him as the second appellate Court. It would be desirable to refer here to the well known passage in the judgment of Lord Macnaghten in — 'Mt. Durga Choudhrain v. Jawahir Singh', 17 Ind App 122 at p. 127 (PC) (F), quoted with approval in — 'Ramji Patel v. Rao Kishoresingh', AIR 1929 PC 190 (G). The passage is as follows:

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

Under these circumstances the judgment under appeal is liable to be set aside.

(12) It is therefore necessary to refer to the findings of fact arrived at by the learned Additional District Judge. He held that it is the defendants who have a right to take water from khasra No. 319 through the mogha P and bring it to their fields, that the defendants have a right to retain water in fields Nos. 135 and 136 as long as they choose and as is convenient to them, that the land of the defendants of khasra Nos. 135 and 136 is on a higher level than the land of the plaintiff's tank No. 134, that the defendants have a right to discharge the surplus water from fields Nos. 135 and 136 into the plaintiff's tank No. 134, that the right to effect a breach in the embankment either at K or anywhere else is of the defendants, that the level of such breach is also to be according to their convenience, and that the plaintiff never exercised any right nor has he got any right to cut

the defendants' 'bandhi', nor did he ever before insist that the water from khasra Nos. 135 and 136 should be discharged in No. 134. On these findings the learned Judge concluded that the plaintiff had no right but only the liability to receive the surplus water from the defendants' fields into his tank No. 134 whenever the defendants required it.

(13) 'Ramessur Persad Narain Sing v. Koonj Behari', 4 Cal 633 (PC) (H), on which Hidayatullah J. relied, is distinguishable on facts. There a large 'khonwa' (overflow channel) was cut from a tank, by which and by other defined channels water from it flowed into another tank at a lower level from which water was carried by several channels to the fields of the plaintiff's mouzas for the purpose of irrigating them. The defendant placed dams in the 'khonwa' and cut a new channel from its northen part, the effect of which was to prevent water in the 'khonwa' from flowing to the lower tank and to divert it altogether from the plaintiff's mouzas. Their Lordships quoted with approval the following observations of Baron Parke in — 'Greatrex v. Hayward', (1853) 8 Ex 291 (I):

> "The right of the party to an artificial water-course, as against the party creating it, must depend upon the character of the water-course and the circumstances under which it was created."

In the instant case there is no artificial water-course unless the whole fields Nos. 135 and 136 containing numerous 'bandhis' can be regarded as an artificial water-course as seems to have been done by Hidayatullah J. If there is no artificial water-course, the plaintiff can have no right. Their Lordships laid down the following principle at page 637:

> "In the case of right to water flowing to a man's land through an artificial water-course constructed on his neighbour's land such right must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin."

No such arrangement was pleaded or proved nor was any suggested.

(14) In — 'Greatrex v. Hayward (I)', Baran Parke relied on the following statement in — 'Wood v. Waud', (1848-49) 3 Ex 748 (J):

> "The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purpose of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drain for the greater improvement of his land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of stream as a matter of right."

Plaintiff therefore does not get a right to the surplus water discharged by the defendants for the beneficial enjoyment of their land merely because the plaintiff derived benefit from it assuming that he has done so for over the statutory period.

The other decision relied on by Hidayatullah J. is — 'Villuri Adinarayana v. Polimera Ramudu', AIR 1914 Mad 507 (K) where a distinction was drawn between surface water and water flowing in an artificial water-course. It is however not an authority for the contention raised here that khasra No. 135 is an artificial water-course. The facts of the case are that the water flowed from a river through a definite channel across the lands of A up to B's lands, and after spreading itself over the field of B it flowed over the bunds of that field and joined another channel which irrigated the plaintiff's lands. A disputed but B did not dispute the plaintiff's right of irrigation. It was held that the water when it entered B's land could not be regarded as surface water but as continued in a definite water-course, and the plaintiff was entitled to the customary flow of the river water along B's lands and A and B had no right to obstruct the same.

The learned Judges quoted the following passage from Farnham's 'Law of Waters and Water-courses', Vol. III, at page 255:

> "When water appears upon the surface in a diffused state, with no permanent source of supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and it must be regarded as surface water, and dealt with as such. In — 'Crawford v. Rambo', 44 Ohio St. 287 (L), it is said that surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and then it becomes the running water of a stream, and ceases to be surface water.
>
> In each case the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs. But the mere fact that the water spreads out at some places, and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself, and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body..... But marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water."

(15) The learned Counsel for the respondent relied on — 'Baswantappa v. Bhimappa', A I R 1922 Bom 378 (M) in support of his contention that an easement right to the water falling on higher lands could be acquired by prescription by the owner of lower lands. It may be so in the particular circumstances of that case. There the water was received by means of well-defined channels from the defendants' lands.

(16) In view of the decisions in — '14 CPLR 145 (A) and — 'AIR 1923 Pat 65 (B)' it cannot be disputed that the defendants have acquired a right to have their surplus water discharged into the tank No. 134. As stated in — 'Easements and Licenses' by Joshi, 2nd Edition, at page 16—

> "As every easement right exists for the benefit of the owner of the dominant tenement alone it is inherent in the nature of the right that its exercise can be discontinued if the

user becomes onerous or ceases to be beneficial to the party entitled to enjoy it. Enjoyment of an easement right cannot therefore operate to create such a reciprocal right in favour of the servient owner as might lawfully entitle him to insist on the continuance of the easement. In other words, the existence of an easement does not carry with it a presumption of the creation of a counter easement abiding in the owner of the servient tenement against the dominant owner."

(17) For all these reasons we are satisfied that the decision under appeal is not correct. It is set aside. The decree of the lower appellate Court is restored. The respondent will bear the costs of this appeal as also of the second appeal. Counsel's fee Rs. 100/-. The costs in the trial Court and in the first appellate Court will be borne as ordered by the Additional District Judge.

(18) After the appeal was heard the learned Counsel for the plaintiff-respondent made an application (No. 1196) stating that the appeal has abated because the tanks khasra Nos. 319 & 134 have now vested in the State. The Counsel was examined on the 27th July 1953. He stated:

> "All irrigation rights have come to an end; and the plaintiff has no right of irrigation from khasra No. 134 and khasra No. 319."

If this is the correct view of the effect of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951), which was passed during the pendency of this Letters Patent appeal, the plaintiff's suit must fail in its entirety and must be dismissed with costs throughout. Even the limited decree passed in his favour by the first appellate Court must be vacated. The learned Counsel for the appellants does not pray for vacating that decree. According to him the respondent's Counsel has taken an erroneous view of the effect of the Act I of 1951. We fail to see how the defendants' appeal abates because plaintiff has lost his right decreed by the second appellate Court. The application is obviously misconceived and is dismissed with costs.

A/R.G.D. Appeal allowed.

A.I.R. 1954 NAGPUR 107 (Vol. 41, C.N. 41)

SINHA C. J. AND BHUTT J.

Surjan Singh and others, Applicants v. Fakir Singh Ishwar Singh and others, Non-Applicants.

Misc. Petn. No. 25 of 1953, D/- 26-8-1953.

(a) Houses and Rents—C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 24 — Scope of Cl. 24 — Abuse of process of law — Power of High Court to intervene — (Constitution of India, Art. 226).

The provision contained in Cl. 24 of the Rent Control Order has reference to a change in the occupation of the premises by the tenant and not to a change in the title to the property itself; that is to say, it does not concern itself with the change in the personnel of the landlords. AIR 1953 All. 441 and AIR 1953 All. 458 Rel. on. (Para 9)

Where, therefore, an application which on the face of it is for an order substituting one landlord for another and not for substituting one tenant for another is allowed by the Rent Control Officer under Cl. 24, it amounts to a flagrant abuse of the process of the law. And as the High Court exists primarily for the purpose of seeing that statutes passed by the Legislature are administered according to the letter and spirit of the law, it will intervene in such a case and quash the order made by the Rent Control Officer. (Para 10)

(b) Constitution of India, Art. 225 — Rules framed by High Court — Application under Art. 226 made beyond time — Discretion of High Court to entertain it — (High Court Rules and Orders —Nagpur High Court Rules).

Ordinarily the High Court will not entertain an application under Art. 226 after an inordinate delay, that is, beyond 45 days after the order impugned has been passed. But the High Court may condone the delay and exercise its discretion to entertain the application where it is impressed with the exceptional character of the order impugned. (Para 7)

S. P. Kotwal and M. W. Puranik, for Applicants; R. S. Dabir and V. M. Kulkarni, for Non-Applicants Nos. 1 to 5 and 7.

CASES REFERRED: Paras.

(A) (V40) AIR 1953 All. 441: 1953 All LJ 34 9
(B) (V40) AIR 1953 All 458: 1953 All LJ 151 9

ORDER: This application under Article 226 of the Constitution is directed against the order dated the 25th January 1952 passed by respondent no. 6, Additional Deputy Commissioner, Nagpur, purporting to have been made under the provisions of Clause 24 of the Rent Control Order, 1949. Petitioner no. 1 claims to be the owner of the property in question, a three-storeyed building (in one of the quarters of the City of Nagpur) popularly known as the 'Welcome Hotel'. He claims title to the property by virtue of a deed dated the 11th December 1948. It is not necessary to characterize that deed because the actual effect of that deed is a matter for determination by a Court of competent jurisdiction. The premises were in the occupation of one V. B. Deshpande, who was a tenant under respondent no. 7 admittedly the original owner of the property in question. Deshpande aforesaid appears to have vacated the premises some time in October 1950. Thereupon petitioner no. 1 obtained an order dated the 7th October 1950 from the Additional Deputy Commissioner to the effect that he had no objection to the occupation of the premises by petitioners nos. 2 and 3 as tenants of the first petitioner.

(2) The petitioners' case, further, is that the first respondent Fakir Singh was employed by the second and third petitioners as their servant to serve in the hotel which they were running on a partnership basis. This relationship between petitioners 2 and 3 and the first respondent is evidenced by a document admittedly signed by the first respondent. The document shows that he accepted employment on Rs. 100 per month to serve as a menial servant on the staff of the hotel. Things proceeded in the usual course until there came upon the scene respondents nos. 4 and 5, who claimed to have purchased the property from respondent no. 7 on the 1st October 1951. There has been a lot of correspondence between the first petitioner and respondents nos. 4 and 5 as to the terms on which respondents nos. 4 and 5 could take possession of the property as full owners. As to what is the effect of that correspondence is again a matter on which we need not pronounce.

(3) On the 25th January 1952 the learned Additional Deputy Commissioner came to make an order of allotment on an application made by the 4th and the 5th respondents to the effect that they were the owners of the property, that the three-storeyed building was in the possession

of the first respondent and of his two sons (respondents nos. 2 and 3), and that the amount of rent fixed in respect of the ground floor alone was Rs. 150 per month inclusive of taxes. This application purported to have been made under 'Section 6, Central Provinces and Berar Collection of Information and Letting of Houses Order 46'. Apparently, this application was made under a law which stood repealed at the date of the application, by the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949. It is not stated in this petition that the house was vacant or had become vacant.

The most noticeable feature of this application is the note appended at the back of the petition to the effect that the property belonged to respondent no. 7 and that respondents 4 and 5 had purchased the same by sale deed dated the 1st October 1951. It was also stated that the property had been mortgaged with possession to the first petitioner in 1948, and that the said petitioner no. 1 had let out the property to respondent no. 1 and his two sons (second and third respondents) on a rent of Rs. 150 per mensem. A very disingenuous suggestion was made in paragraph 4 to the effect that the fair rent for the ground floor of the premises would be Rs. 150 per month and that the previous order obtained by the first petitioner to the effect that the three storeys of the building had been let out at Rs. 160 per mensem was a collusive affair and that the rent thus fixed was wholly unfair. That statement was coupled with other similarly naive suggestions against the first petitioner, and ended by stating that all that had been done 'with the intention of staying in possession even after redemption of the mortgage, on the said low rent.'

(4) It would thus appear that respondents 4 and 5 suggested there that the property had been redeemed and that they were now in possession as successors in interest to the true owner of the property. In effect it was an application for substitution of respondents 4 and 5 as landlords in respect of a portion of the premises, viz the ground floor at rent of Rs. 150 per mensem. Nothing was said in this petition as regards the first and the second floors of the building, which admittedly is a three-storeyed structure. On that petition appears an endorsement by the 4th respondent to the effect that he had received an allotment order on that very day, viz the 25th January 1952. On page 32 of the paperbook appears the document which purports to contain an order which is in these words: 'Allotted to Fakirsingh & 2 sons'.

The present application in effect is directed against the validity of this order, though the petitioner moved the Additional Deputy Commissioner, not only once but twice, in order to bring it to his notice the fact that the machinery of the Rent Control Order had been sought to be abused by respondents 1 to 5 by making a collusive application without any regard for truth or for the facts of the situation as they actually were on that date. It seems to have been represented to the Additional Deputy Commissioner that respondents nos. 4 and 5 were not in fact the landlords or that respondents nos. 1 to 3 were not in fact the tenants.

(5) Having failed in their repeated attempts to get rid of the order which the petitioners characterized as wholly unjustifiable under the law this Court was moved on 5th January 1953. The office of this Court drew the attention of the Court to the fact that the application was very much delayed inasmuch as it had been filed almost a year after the order of the 25th January 1952 had been passed. This court apparently having realized the anomaly of the position as it emerged after the passing of the order impugned in this case made up its mind to condone the delay and to hear the opposite party. Notices were, therefore, directed to be issued to the non-applicants.

(6) They have appeared and the first five non-applicants and non-applicant no. 7 have filed a single return. It is a long statement making all kinds of allegations, most of them wholly irrelevant to the limited scope of the controversy before us. Those allegations have been sought to be supported by an affidavit sworn to by the 5th respondent, wife of the 4th respondent, and the verification is in these terms:

> "Verified that the allegations of fact in paras 1 to 16 above are true to my information from R. F. Rustamji and belief. ....."

This affidavit is not worth the paper on which it is written. Apparently, respondents 1 to 4, who were really in the know of facts and are expected to make their own statements as to the veracity of the assertions made in the petition, have not come forward to support their statements by their own oath. The most important statement made by the petitioners was that the first respondent was the employee of the 2nd and 3rd petitioners. There is no affidavit by the first respondent in answer to that allegation. We must, therefore, for the limited purpose of this proceeding, assume that the statement made by the petitioners that the first respondent is the employee of the second and third petitioners is correct.

(7) The return, shorn of all verbiage, pleads in the first instance that the application should be dismissed 'in limine' on the ground that it had been made very much more than 45 days after the order impugned had been passed. Ordinarily, we would not have entertained the application after such an inordinate delay; but this Court was very much impressed with the exceptional character of the order impugned in this case, and naturally, therefore, it did not think it proper to throw out the application on the ground of delay alone. This Court exercised its discretion to entertain the application even though belated, because the impression naturally formed from the facts stated in the petition is that the provisions of the Rent Control Order 1949 have been misused by the persons who made the application on the 25th January 1952 and obtained an order from the Additional Deputy Commissioner, who does not appear to have applied his mind at all either to the facts of the case or to his own powers under that Order.

(8) The second ground of attack which has been very much pressed upon us by the learned counsel for the non-applicants 1 to 5 and 7 is that the very basis for the order of allotment made in favour of the petitioners Nos. 2 and 3 was wanting in law. That order at page 22 of the paper-book is in these terms:

> "I have no objection to allow occupation of Shri Gurubachansingh and Narendrasingh refugee, H. No. 54 (10 rooms) situated at Sitabuldi near Railway belonging to Sardar Surjansingh s/o Sardar Jiwansingh Jolly Kamptee Road."

This order was passed by the Additional Deputy Commissioner on the 7th October 1950. It is contended on behalf of the non-applicants that there is no legal warrant for this order. In our opinion, there is no substance in this contention. As already indicated, the original tenant under the

original landlord, respondent No. 7, was Deshpande. Upon his vacating the premises in October 1950 the petitioners had to regularize the occupation of those premises by the second and third petitioners who were not the owners and therefore not the landlords of the premises and who had, it appears, agreed to carry on the hotel business in the old name, viz., 'Welcome Hotel'. The landlord (first petitioner) had to apprise the Deputy Commissioner of the fact that the premises had been vacated by Deshpande and that the same business of running the hotel was being carried on by the second and third petitioners on a partnership basis. This was apparently done in order to escape from the mandatory provisions of sub-clause (2) of clause 22 of the Rent Control Order. It must, therefore, be held that the order dated the 7th October 1950 had a legal basis and that the occupation of the second and third petitioners had been legalized by that order.

(9) The third ground of attack taken by the learned counsel for the non-applicants aforesaid was that non-applicants Nos. 4 and 5 came in possession of the premises by virtue of a contract between the first petitioner and them according to which he (the first petitioner) agreed to take a certain amount by way of redemption money. It is not claimed that any amount has passed between the parties; nor has it been claimed that the petitioners have vacated the first and second floors of the premises. The scope of the proceedings before us is very limited. We are called upon to pronounce only upon the validity or otherwise of the order passed on the 25th January 1952. That order purports to have been made under the provisions of Clause 24 of the Rent Control Order. On a bare reading of that clause it is manifest that the petition made on the 25th January 1952 and the order passed thereon by the Additional Deputy Commissioner were both misconceived. The house or any part of the premises had not been vacated by the tenant; nor does the application itself purport to make any statement to that effect. The note already adverted to at the end of the petition makes it clear, though it was not intended to make it clear, that there had been no change in the occupation of the premises.

What was intended to be done by that application was to replace the first petitioner as landlord by non-applicants Nos. 4 and 5. This cannot, by any stretch of language, come within the purview of the provisions of Clause 24 or any other clause of the Rent Control Order. The provision aforesaid has reference to a change in the occupation of the premises by the tenant and not to a change in the title to the property itself; that is to say, it does not concern itself with the change in the personnel of the landlords. That the provisions of Clause 24 of the Rent Control Order are not at all attracted to the situation as it actually was on the 25th January 1952 is absolutely clear and is supported by two recent decisions of the Allahabad High Court in — 'Mahabir Prasad v. Kewal Krishna', AIR 1953 All 441 (A) and — 'Lachhman Das v. Rent Control and Eviction Officer', AIR 1953 All 458 (B).

(10) In view of these facts and circumstances the question arises what should be the order to be passed by this Court. There is no doubt that respondents Nos. 4 and 5, who applied on the 25th January 1952 and obtained an order on the same date from the Additional Deputy Commissioner in terms already indicated, stole a march on the real landlord and tenants of the premises. They appear to have bolstered up the first respondent, who was really the servant of the second and third petitioners, into a tenant of the premises, and in collusion with him have obtained an order which does not come within the purview of Cl. 24 of the Order. We cannot allow such a flagrant infringement of the provisions of the Order to stand.

This Court exists primarily for the purpose of seeing that statutes passed by the Legislature are administered according to the letter and spirit of the law. In the instant case we find that the provisions of the Rent Control Order had been used for a purpose for which they were never intended and by parties who in their anxiety to take possession of the property have sought to do so through the back door. We are surprised to find that the Additional Deputy Commissioner did not proceed with the circumspection which is required of an officer who has been entrusted with the duty of administering the Rent Control Order, which is on the face of it in derogation of the pre-existing rights of landlords vis-a-vis their tenants. In the instant case the learned Additional Deputy Commissioner did not stop to consider whether on the facts alleged in the petition there was any occasion for him to intervene by making an order of allotment. The application was on the face of it for an order substituting one landlord for another and not for substituting one tenant for another. That is, to put it very mildly, a flagrant abuse of the process of the law.

We have, therefore, no hesitation in quashing that order in spite of the fact that the petitioners were very wrongly advised in seeking remedies which the law as it then stood did not afford them. As a consequential relief to our quashing the order impugned in this case the Additional Deputy Commissioner, if necessary, will proceed under Clause 28 of the Rent Control Order to rectify the contravention of the Order as a result of the illegal order passed by him. The petitioners are entitled to their costs. Hearing fee Rs. 100. The petitioners are also entitled to withdraw the outstanding amount of security deposited by them.

A/V.S.B. Order accordingly.

A.I.R. 1954 NAGPUR 109 (Vol. 41, C.N. 42)

SEN J.

Ghanaram and another, Defendants-Appellants v. Paltoo and another, Plaintiffs-Respondents.

Second Appeal No. 493 of 1945, D/- 23-8-1949.

(a) Transfer of Property Act (1882), S. 54 — Delivery of possession — Purchaser already in possession — Redelivery not necessary. 34 Cal 207, Dissented from.

Where the purchaser was already in possession as an adhiya under a lease it was not necessary that he should have first handed over possession of the property to the seller who should then have redelivered the property to the purchaser in order to constitute delivery of possession within the meaning of S. 54. It is enough if the character of the possession changes; in other words, if the seller converts, by appropriate declaration or acts, the previous possession of purchaser into plenary possession as that of the purchaser there is sufficient delivery of property. Case law discussed. (Paras 19, 23, 29)

Anno: T. P. Act, S. 54 N. 22.

1949 Mulla: S. 54 P. 301 N. "Delivery of Property" (1 Pt. extra in Mulla).

(b) Transfer of Property Act (1882), S. 54 — Tangible immovable property of a value less than one hundred rupees. AIR 1916 Bom 223, Dissented from.

A person remains an owner of the property notwithstanding that he has executed a mortgage or a lease of the property. If then he makes a transfer of his interest, he makes a transfer of the property itself and not merely of an abstract right or of certain rights out of his total bundle of rights originally owned by him. The sale of such a property (the value of which is less than one hundred rupees) may be effected by delivery of possession under S. 54. Case law discussed. (Para 30)

Anno: T. P. Act, S. 54 N. 19.

1949 Mulla: S. 54 (Topic discussed in N. 19 to S. 54 in A.I.R. Com., not separately discussed in Mulla but only touched in last para. on p. 296 to N. "Subject-matter of Sale" on P. 295).

T. P. Act, S. 54 N. 21.

1949 Mulla: S. 54 P. 299 Ns. "Mode of transfer", "No..... transfer", P. 301 N. "Unregistered Deed", P. 302 N. "Delivery.....deed" (conflict before and after 1929 Amendment of Registration Act, not fully noticed in Mulla).

(c) Transfer of Property Act (1882), S. 54 — Sale of property of less than one hundred rupees — Unregistered sale-deed and delivery of possession.

A mere existence of an unregistered instrument does not prevent the purchaser from falling back upon his title by the delivery of property. By mere delivery of property the purchaser acquires a complete title and the fact that in addition to a good title by delivery he had a bad title by an unregistered instrument should not prejudice him. Case law rel. on. (Para 31)

Anno: T. P. Act, S. 54 N. 21.

1949 Mulla: S. 54 P. 299 Ns. "Mode of transfer", "No....transfer", P. 301 N. "Unregistered Deed" P. 302 N. "Delivery.....deed" (Conflict before and after 1929 Amendment of Registration Act, not fully noticed in Mulla).

P. N. Rudra, for Appellants; D. T. Mangalmoorti, for Respondent No. 1.

CASES REFERRED: Paras

(A) ('95) 22 Cal 179 18
(B) (1900) 4 Cal WN Law Notes cxlii 19
(C) ('07) 34 Cal 207: 5 Cal LJ 390 20, 28, 29
(D) (V2) AIR 1915 Mad 573: 38 Mad 1158 20, 21, 29
(E) (V12) AIR 1925 Mad 566: 87 Ind Cas 337 20
(F) (V2) AIR 1915 Nag 114: 12 Nag LR 3 20, 22, 31
(G) (V3) AIR 1916 Nag 93: 12 Nag LR 139 20, 22, 31
(H) (V20) AIR 1933 Cal 411: 60 Cal 384 20, 23, 24, 29
(I) (V21) AIR 1934 Pat 301: 151 Ind Cas 55 23
(J) (V23) AIR 1936 Lah 756: 166 Ind Cas 751 23
(K) (V23) AIR 1936 Rang 497: 166 Ind Cas 267 23
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(N) (V1) AIR 1914 PC 67: 41 Cal 972 (PC) 26
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(P) (V3) AIR 1916 Bom 223: 40 Bom 313 30
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(S) (V9) AIR 1922 Nag 58: 18 Nag LR 8 31
(T) (V36) AIR 1949 Nag 410: ILR (1949) Nag 534 31

JUDGMENT : This is a defendants' appeal and arises out of a suit for possession. Ghanaram, respondent no. 2, was the absolute occupancy tenant of certain plots, area 1.58 acres, situate at 'mauza' Hardi. He sold these plots to Paltoo, respondent no. 1, on three different dates. On 14-12-1941 he sold plot no. 2101/2D area .55 acre for Rs. 28 under an unregistered sale deed (Exhibit P-3). Subsequently he sold plot no. 509/1, area .34 acre, for Rs. 45 under an unregistered sale deed (Exhibit P-2). Thereafter he sold plots nos. 2067/2, area .54 and no. 2106 area .15 for Rs. 32 under the unregistered sale deed (Exhibit P-1).

(2) Ghanaram subsequently sold all these plots and a house to the appellants Ghanaram and Buchalu under a registered sale deed (Exhibit D-3), dated 11-12-1942, for Rs. 600.

(3) Paltoo filed a suit on 26-10-1943 against the appellants (defendants 1 and 2), Vindheshwar Prasad (defendant no. 3), patwari of the village, and Ghanaram (defendant no. 4) to recover possession of the plots on the allegation that after he had been put in possession of the plots purchased by him from Paltoo, he was dispossessed by defendants nos. 1 to 3 in June 1943.

(4) In a joint statement, defendants nos. 1 to 3 denied the sales in favour of the plaintiff or that he had been put in possession of the plots by Ghanaram in pursuance of the sales alleged to have been made by him. They admitted that the plaintiff had been in possession of the plot no. 509/2 as an 'adhiya' up to 1942-43. The defendants stated that defendants nos. 1 and 2 were purchasers in good faith and for consideration without any notice of the title of the plaintiff. The plea was based on section 41 of the Transfer of Property Act, 1882, though it was not so specifically stated. Defendants nos. 1 and 2 stated that they had made an inquiry from Vindeshwari Prasad (defendant 3), patwari of the village, and they had been informed by him that the plots had not been sold or encumbered in any way.

(5) In a separate written statement Ghanaram admitted that he had executed the sale deeds Exhibit P-3, dated 14-12-1941 for Rs. 28, Exhibit P-2, dated 29-1-1942 for Rs. 45, and Exhibit P-1, dated 13-3-1942 for Rs. 42, but pleaded that he had borrowed the sums from Paltoo who had refused to advance the sums unless he (Ghanaram) executed the sale deeds. According to defendant no. 4, these documents were really bonds and not sale deeds. He denied that he had put the plaintiff in possession of the plots in pursuance of the sales. He, however, admitted that with the exception of plot no. 509/2, area 0.59 acre, Paltoo had been in possession of the other plots as an 'adhiya' from the year 1939-40 till the year 1942-43. Ghanaram admitted that he had sold the plots in suit to defendants nos. 1 and 2 under the registered sale deed (Exhibit D-3), dated 11-12-1942.

(6) The trial Court found that the plaintiff purchased the plots in suit from Ghanaram under three sales viz., (1) on 14-12-1941 of plot no. 2101/2D for Rs. 28; (2) on 29-1-1942 of plot no. 509/1 for Rs. 45 and (3) on 13-3-1942 of plots nos. 2067/2 and 2106 for Rs. 32; that possession of the plots had been delivered to the plaintiff in pursuance of the sales; and that consequently the plaintiff acquired a valid title to the plots in suit. The trial Court held that defendants nos. 1 and 2 had purchased the plots in suit under the registered sale deed (Exhibit D-3), dated 11-12-1942 for Rs. 600 but acquired no title as they had pur-

chased subsequently with notice of the title acquired by the plaintiff under the sales made to him. On these findings the trial Court decreed the claim of the plaintiff for possession of the plots in suit.

(7) On appeal the appellate Court upheld all the findings of the trial Court except as regards delivery of possession of plot no. 509/1. The appellate Court held that possession of plot no. 509/1 in pursuance of the sale on 29-1-1942 was not delivered to the plaintiff who consequently did not acquire any title over it. It allowed the appeal regarding plot no. 509/1 and upheld the decree of the trial Court as regards possession of other plots. It is against this decree that the present appeal has been filed by defendants nos. 1 and 2. The plaintiff did not file any appeal against the dismissal of his claim regarding plot no. 509/1.

(8) The questions for decision in this appeal are:

(1) whether possession of the plots was delivered to the plaintiff in pursuance of the oral sales made on 14-12-1941 and on 13-3-1942;

(2) whether the sales made on 14-12-1941 and on 13-3-1942 were of tangible immovable property and whether the sale in each case was required by law to be made by a registered instrument; and

(3) whether defendants nos. 1 and 2 were 'bona fide' purchasers for value without notice of the title of the plaintiff acquired by him under the sales made to him.

(9) Paragraph 3 of section 54 of the Transfer of Property Act, 1882, enacts that in the case of tangible immovable property of a value less than one hundred rupees, transfer of ownership may be made either by a registered instrument or delivery of the property. The sale deeds Exhibit P-3, dated 14-12-1941 and Exhibit P-1, dated 13-3-1942, did not convey any title to the plaintiff over the plots nos. 2101/2D, 2067/2, and 2106, because the deeds were not registered.

(10) The sales have been duly proved by the evidence of the plaintiff and of Mahatamaram (P. W. 3) and Ramdev (P. W. 4) who had respectively scribed and attested the sale deed (Exhibit P-3) dated 14-12-1941 and the sale deed (Exhibit P-1) dated 13-3-1942. It is not necessary to refer to the evidence of Ramnarayan (P. W. 2) who had scribed the sale deed (Exhibit P-2) dated 29-1-1942 as plot no. 509/1 conveyed by the deed is not the subject matter of the appeal.

(11) Ghanaram, defendant no. 4, has been rightly disbelieved by the Courts below as there is variance between his pleading and his evidence. In his written statement he admitted the execution of the sale deeds but stated that they were bonds and alleged the circumstances in which they came to be executed. In his evidence he stated that he had not taken any loans from the plaintiff and that the documents (Exhibit P-3) dated 14-12-1941 and (Exhibit P-1) dated 13-3-1942 were contracts of 'adhiya' leases which was quite contrary to the pleadings.

(12) Ghanaram, defendant no. 1, admitted that he had learnt about the sale deeds but stated that he had been informed by Mahatmaram and Ramdev that the sale deeds were bogus. These persons were examined as witnesses for the plaintiff and they did not support his statement. On the contrary they proved that the sales were genuine.

(13) The Courts below have held that Ghanaram sold plot no. 2101/2D for Rs. 28 on 14-12-1941 under the sale deed (Exhibit P-3) and plots nos. 2067/2 and 2106 for Rs. 32 on 13-3-1942. These findings were not challenged in the memorandum of appeal or before me. It must accordingly be held that oral sales had been duly proved.

(14) The next question is whether there was delivery of property in pursuance of the oral sales. Paragraph 4, section 54, Transfer of Property Act, says that delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

(15) Paltoo was already in possession of the plots purchased by him. He had been in possession as an 'adhiya' since 1939-40 and continued to be so till the date of his purchase. This was admitted by his seller Ghanaram (defendant no. 4) and by defendants nos. 1 and 2. The possession of the plaintiff is recorded in the 'panchsala khasra' (Exhibit D-1) for the years 1939-40 to 1942-43.

(16) In his evidence Paltoo, the plaintiff, stated that possession had been delivered to him at the time of the three sales and that the sales were accompanied by delivery of possession and that he has been in possession of the lands purchased by him till he was dispossessed by defendants nos. 1 to 3 in June 1943. In his cross-examination he admitted that he did not go to the lands for taking possession. He stated that his seller Ghanaram told him that he should cultivate the land from that day and should take possession. To the same effect is the evidence of Ramnarayan (P. W. 2), Mahatamaram (P. W. 3) and Ramdev (P. W. 4). Ghanaram, the seller, stated that he did not object to the possession of the plaintiff or his doing agricultural operations at any time.

(17) The declaration made by the seller converted the permissive possession of Paltoo into possession as that of a purchaser. The lower appellate Court accordingly held that the prior possession of the plaintiff was converted into possession as a vendee.

(18) In — 'Gunga Narain Gope v. Kali Churn Goala', 22 Cal 179 (A), it was held that when a vendee obtained possession on the date of sale and remains in possession thereafter, it is reasonable to presume that the possession so obtained was a lawful one and had been given by or with the assent, express or implied, of the person previously in possession, namely the vendor. The case is an authority for the proposition that it is not necessary that there should be any formal taking over of possession.

(19) In — 'Fatik Karikar v. Rajendra Nath', 4 Cal WN Law Notes cxlii (B), it was held that where the property was in the possession of a usufructuary mortgagee, the process of making over of the property by the mortgagee to the mortgagor and redelivery by the latter to the former was not necessary to bring about a sale in favour of the former under section 54 of the Transfer of Property Act, but that it would be enough if the mortgagee took the property as purchaser and the mortgagor admitted that from that moment the purchaser held the property as purchaser and not as mortgagee. The principle underlying this decision is applicable to the present case. The purchaser was already in possession as an 'adhiya' and that it was not necessary that he should have first handed over possession of the property to the seller who should then have redelivered the property to the purchaser in order to constitute delivery of possession within the meaning of section 54, Transfer of Property Act.

(20) The learned counsel for the appellant invited reference to the decision in — 'Sibendrapada Banerjee v. Secy. of State', 34 Cal 207 (C) and submitted that as Paltoo, the purchaser, was already in possession there could not be any delivery of the property to him within the meaning of section 54 of the Transfer of Property Act. The case undoubtedly supports the contention advanced by the learned counsel. The case, however, was dissented from in — 'Muthukaruppan v. Muthu Samban', AIR 1915 Mad 573 (D); — 'Dawood Saheb v. Moideen Batcha', AIR 1925 Mad 566 (E); — 'Thakurdas v. Sobhachand', AIR 1915 Nag 114 (F); — 'Dinanath v. Manbodhi', AIR 1916 Nag 93 at p. 96 (G) and — 'Kulachandra v. Jogendrachandra', AIR 1933 Cal 411 (H).

(21) In — 'AIR 1915 Mad 573 (D)', 'cit. sup., it was pointed out that there was no reason why an oral sale with a request by the vendor to the vendee to remain in possession in the capacity of vendee with absolute rights should not be sufficient to pass title without having recourse to the expedient of the vendee quitting the property one moment and entering upon it at another. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the vendee with absolute title is sufficient to satisfy the requirements of section 54 of the Transfer of Property Act.

(22) In — 'AIR 1915 Nag 114 (F)', it was held that there may be delivery of property within the meaning of section 54 of the Transfer of Property Act even if the vendee is already in possession as a lessee provided that the vendor by appropriate declaration or acts converts the possession of the vendee as tenant into one as purchaser. This case was followed with approval in — 'AIR 1916 Nag 93 at p. 96 (G).

(23) In — 'AIR 1933 Cal 411 (H)', it was held that in the case of a sale by delivery of possession, though the essence of delivery no doubt is that possession should change, it is enough if the character of the possession changes; in other words, if the vendor converts, by appropriate declaration or acts, the previous possession of the vendee into plenary possession as that of the vendee, there is sufficient delivery of property within the meaning of section 54, Transfer of Property Act, whatever is necessary and possible in the circumstances to effect a delivery of possession being done. To the same effect are the decisions in — 'Santokhi Misser v. Siro Jha', AIR 1934 Pat 301 (I); — 'Mahbub v. Kale Khan', AIR 1936 Lah 756 (J) and — 'Maung Mya Maung v. Ma Khine', AIR 1936 Rang 497 (K).

(24) In — 'Pheku Mian v. Syed Ali', AIR 1937 Pat 178 (L), the decision in — 'AIR 1933 Cal 411 (H)', was approved. In this case it was held that when the property sold is already in possession of the vendee, a renunciation by the vendor of all his rights therein and mutation of the vendee's name in the record-of-rights, made at the instance of the vendor, are sufficient compliance with the provisions of section 54 of the Transfer of Property Act. That was a case of a sale of the equity of redemption by the mortgagor to the usufructuary mortgagee. In the circumstances of the case it was held that there was delivery of property within the meaning of section 54 of the Transfer of Property Act.

(25) Reference may now be made to the case of — 'Mathura Prasad v. Chandra Narayan', AIR 1921 PC 8 (M). That was a case which related to the validity of the registration of a mortgage deed. Section 28 of the Indian Registration Act, 1877, enacted that every document which by section 17 is required to be registered shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. This provision now re-appears as section 28 in the Indian Registration Act, 1908.

(26) A similar question of registration arose in — 'Harendra Lal v. Hari Dasi Debi', AIR 1914 PC 67 (N), in which their Lordships of the Judicial Committee made the following observation:

> "Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the registration law, and no registration obtained by means thereof is valid."

(27) In — 'AIR 1921 PC 8 (M)', the question related to the registration of a mortgage. The property mortgaged was Mahomedpur Boari village, situate in the Darbhanga district; but for motives of convenience it was desired that registration should be effected in the Mozufferpur district, in which district the mortgagor had no property. It was alleged in support of the registration in that district that before the mortgage was executed Osman (the witness to the mortgage deed, who appears to have acted for all parties in carrying out the compromise) sold to the mortgagor a one-kauri share in the Kolhua property of which Osman was owner. The point for decision was whether there was a real sale of one-kauri share in Kolhua property. On the evidence it was held that there was no intention to transfer the property and that it did not form part of the mortgage security.

On these facts it was held that the mortgage was void as the registration effected in the Mozufferpur district was a fraud on the registration law. The alleged kabala had not been produced and the instrument had not been registered. There was also no delivery of possession of the one-kauri share. Neither of the conditions necessary under section 54 to make a good transfer on sale of the property of the value below Rs. 100 was fulfilled in that case. At pages 9-10 the Judicial Committee observed that the mere delivery of the instrument of sale was not sufficient compliance with the provisions of section 54 of the Transfer of Property Act which required that there must be real delivery of the property. The case, therefore, cannot be quoted as an authority for the proposition that where the purchaser is already in possession either as a mortgagee or as a lessee, there cannot be a delivery of the property within the meaning of section 54 of the Transfer of Property Act.

(28) In — 'Sohanlal v. Mohan Lal', AIR 1928 All 726 (FB) (O), the decision in — '34 Cal 207 (C)', was followed, but the decision therein was based on adverse possession.

(29) For the reasons stated in — 'AIR 1915 Mad 573 (D) and — 'AIR 1933 Cal 411 (H)', I respectfully disagree with the decision in — '34 Cal 207 (C)'. I hold that in this case the character of the possession of Paltoo changed as Ghanaram, the vendor, converted by appropriate declaration the previous permissive possession of Paltoo into plenary possession as that of a vendee, and that there was sufficient delivery of prosecution within

the meaning of section 54 of the Transfer of Property Act.

(30) The next question is as regards the registration of the sale deeds Ex. P-3, dated 14-12-1941 and Ex. P-1, dated 13-3-1942. In — 'Bhaskar Gopal v. Padma Hira', AIR 1916 Bom 223 (P), it was held that when an owner of property which is subject to a lease, sells it to his tenant, he sells reversion and the instrument of sale must be registered under section 54 of the Transfer of Property Act. A contrary view was taken by the majority of the learned Judges (Sulaiman A. C. J. dissenting) in — 'AIR 1928 All 726 (FB) (O)'. In that case Mukerji J. quoted several passages from eminent jurists like Holland, Salmond and Pollock in support of the proposition that a person remains an owner of the property notwithstanding that he might have executed a mortgage or a lease of the property.

Salmond dealing with the subject of ownership in his Jurisprudence, 10th edition, 1948 says at page 270—

> "The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he nonetheless remains the owner of the 'thing', while all the others nothing more than 'rights' over it..... He, then, is the owner of a material object, who has a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

At page 729 Mukerji J. stated that a mortgagor, in spite of executing a mortgage, whether it be a simple or usufructuary mortgage, is still the owner of the property so mortgaged; and that if then he makes a transfer of his interest, he makes a transfer of the property itself and not merely of an abstract right or of certain rights out of his total bundle of rights originally owned by him. The majority view has been followed with approval in — 'AIR 1937 Pat 178 (L)' and — 'Tukaram Ganpatrao v. Atmaram Vinayak', AIR 1939 Bom 31 (Q).

In — 'AIR 1937 Pat 178 (L)', it was held that the "equity of redemption" left in a mortgagor, after he gives his property in usufructuary mortgage, is a tangible property and the sale of such a property (the value of which is less than one hundred rupees) may be effected by delivery of possession under section 54 of the Transfer of Property Act, 1882. I respectfully agree with the decision of the majority in — 'AIR 1928 All 726 (FB) (O)' and hold that in this case the oral sales made by Ghanaram, defendant no. 4, were of tangible immovable property and that it was not necessary that they should have been by registered documents.

(31) In a series of cases in the Court of the Judicial Commissioner, it was held that a mere existence of an unregistered instrument did not prevent the vendee from falling back upon his title by the delivery of property. It was observed that by mere delivery of property the vendee acquired a complete title and there was no reason why the fact that in addition to a good title to delivery he had a bad title by an unregistered instrument should prejudice him: vide — 'Mt Rupa Telin v. Bisambar Teli', 8 C P L R 1 (R); — 'AIR 1915 Nag 114 (F)'; — 'AIR 1916 Nag 93 (G)' and — 'Harlalsa v. Bapu', AIR 1922 Nag 58 (S). This view has been adopted in this Court in — 'Bhulkoo v. Mst. Hiriyabai', AIR 1949 Nag 410 (T).

(32) I hold that the plaintiff acquired a valid title to the plots in dispute in this appeal by reason of his purchases made on 14-12-1941 and on 13-3-1942 which were accompanied by delivery of possession.

(33) The last question is whether the appellants were protected under section 41 of the Transfer of Property Act, 1882. The section has no application to the case. Ghanaram, defendant no. 4, was not in possession of the plots in dispute at the time he sold them to defendants nos. 1 and 2 under the sale deed (Exhibit D-3) dated 11-12-1942 for Rs. 600. As he was not in possession he could not be said to be an ostensible owner in possession of the property with express or implied consent of the real owner. Defendants nos. 1 and 2 have admitted that Paltoo was in possession of the plots in dispute in this appeal. If they had made inquiries from him they would have learnt that Paltoo had already purchased the plots from Ghanaram. Ghanaram, defendant no. 1, admitted that he made no inquiry from Paltoo who was then in possession. Ghanaram stated that he made an inquiry from the patwari who had informed that the plots had not been sold or encumbered in any way.

The patwari has not been examined to confirm his statement. Ghanaram further stated that he had been informed by Mahatamaram and Ramdev (P. Ws. 3 and 4) that the sales in favour of the plaintiff were bogus. These witnesses, however, do not support his statement. On the contrary they prove that the sales were genuine. Defendants nos. 1 and 2 have thus failed to prove that they were 'bona fide' purchasers for value without notice of the title of the plaintiff. Accordingly, they were not protected under section 41 of the Transfer of Property Act, 1882.

(34) The appeal fails and is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 NAGPUR 113 (Vol. 41, C.N. 43)

R. KAUSHALENDRA RAO J.

Abdul Gaffarkhan Abdul Ajijkhan, Plaintiff-Appellant v. Abdul Jikar Dada Kachhi, Defendant-Respondent.

Second Appeal No. 405 of 1948, D/- 23-10-1953, from the appellate decree of Addl. Dist. J., Buldana, D/- 7-4-1948.

Muhammadan Law — Pre-emption — Talabs — Suit for pre-emption when maintainable.

Under the Mohammedan Law the pre-emptor has to make the three 'talabs' to secure the property which he claims by right of pre-emption. The three talabs are 'talab-i-mowasibat, talab-i-ishhad' and 'talab-i-tamlik'. A suit now takes the place of the third 'talab' which originally meant the shafee (the pre-emptor) petitioning the Kazee to command the purchaser to surrender up the property to the shafee. But the suit fails if either of the first two 'talabs' was not performed prior to its institution. The essence of the first 'talab' is that the pre-emptor must assert his claim immediately on getting information of the sale. Such assertion is known as 'talab-i-mowasibat'. Mowasibat literally means jumping which connotes that the demand must be made with the utmost promptitude. (Para 3)

The second demand known as 'talab-i-ishhad' is by way of confirmation of the first demand in presence of witnesses. The pre-emptor must demand pre-emption as soon as practicable after the first demand in presence of two witnesses to attest the demand and in presence of either of the seller or of the buyer or on the property. 'Talab-i-ishhad' cannot be considered to have been properly performed unless it includes a declaration of the earlier performance of 'talab-i-mowasibat'. (Para 4)

It is no doubt permissible for a pre-emptor to combine the first two talabs in a case where the pre-emptor on hearing about the sale 'immediately' claims pre-emption invoking the witnesses in presence of the seller or the purchaser or on the premises to attest the immediate demand. In such an event the essential requirements of both the 'talabs' must be considered to have been satisfied. (Para 6)

In dealing with a claim of pre-emption under the Mohammedan Law it is incumbent on the Courts to give clear and specific findings as to whether there was due performance of each of the 'talabs'. (Para 5)

Where the pre-emptor came to know about the sale on the evening of the 15th and he did not assert his right to pre-empt until 9-30 p.m. the next day. Held that the assertion not having been made immediately on the pre-emptor coming to know of the sale the essential requirement of the first 'talab' remains unfulfilled and his suit is liable to be dismissed. (Para 6)

S. N. Kherdekar, for Appellant; A. L. Halve, for Respondent.

CASES REFERRED : Paras

(A) (V36) AIR 1949 Nag 361: ILR (1949) Nag 740 2
(B) ('89) 2 CP LR 231 2
(C) ('94) 7 CP LR 117 2
(D) (V4) AIR 1917 All 448: 39 All 133 4
(E) ('90) 17 All 543 (FB) 4
(F) ('11) 10 Ind Cas 352 (Cal) 4
(G) (V10) AIR 1923 All 251: 45 All 290 4
(H) ('68) 10 WR 119 (Cal) 5a
(I) ('70) 4 Beng LR AC 216: 13 WR 259 5a
(J) (V33) AIR 1946 Cal 135: ILR (1946) 1 Cal 169 5a
(K) ('75-77) 1 All 283 5a, 6
(L) (V2) AIR 1915 All 294: 37 All 522 6

JUDGMENT : This appeal is by the plaintiff in a suit for pre-emption. The pre-emption was claimed in respect of a half share in a house in Mehkar in Buldana district in Berar. The vendor, the vendee and the pre-emptor are all Mohammedans. The claim for pre-emption was based upon the Mohammedan Law of Pre-emption. The claim was decreed in the first Court but was dismissed by the first appellate Court holding that the Mohammedan Law of Pre-emption should not be applied to the case on principles of justice, equity and good conscience.

(2) In second appeal it is contended for the appellant that where the parties are all Mohammedans, it is not inequitable to apply the Mohammedan Law of Pre-emption. There is support for this contention in the decision reported in — 'Abdul Aziz v. Khairunnisa Begum', AIR 1949 Nag 361 (A) which relied on earlier cases of the Court of the Judicial Commissioner in — 'Mst. Sahibbee v. Bannoo Mian', 2 CP LR 231 (B) and — 'Abdul Razak v. Jagoba', 7 CP LR 117 (C). Those cases, the respondent points out, related to the Central Provinces. But Berar is much more familiar with the right of pre-emption than the Central Provinces. It is however unnecessary to pronounce on this contention or the further contention that the right of pre-emption can no longer be recognised because it is in contravention of the fundamental right guaranteed by Article 19(f) of the Constitution. In my view the appeal must fail because of the pre-emptor's failure to comply with the rules of the Mohammedan Law concerning the right of pre-emption.

(3) The first appellate Court held that the "demand made by the pre-emptor fully complied with the provisions of section 186 of Mulla's Mohammedan Law (1944 Edn.)". To refer to the provisions of section 186 of Mulla's Mohammedan Law, as though the section is part of a statute to be enforced or complied with, is not proper and is apt to be misleading. What the Court had to find was whether the preliminary 'demands' which were a condition precedent to the enforcement of the right of pre-emption under the Mohammedan Law were made in accordance with the rules of that law.

Under the Mohammedan Law the pre-emptor has to make the three 'talabs' to secure the property which he claims by right of pre-emption. The three talabs are 'talab-i-mowasibat', 'talab-i-ishhad' and 'talab-i-tamlik.' The suit now takes the place of the third 'talab' which originally meant the shafee (the pre-emptor) petitioning the Kazee to command the purchaser to surrender up the property to the Shafee. But the suit fails if either of the first two 'talabs' was not performed prior to its institution. The essence of the first 'talab' is that the pre-emptor must assert his claim immediately on getting information of the sale. Such assertion is known as 'talab-i-mowasibat'. 'Mowasibat' literally means jumping which connotes that the demand must be made with the utmost promptitude. The following passage from the 'Hidaya' illustrates how strict is the Mohammedan Law about the necessity for promptness on the part of the pre-emptor in making the first 'talab' :

> "If the Shafee receive a letter which, either in the beginning or the middle, apprises him of the circumstance of his Shaffa, and he read it on to the end, his right of Shaffa is thereby invalidated. Many of our modern doctors accord in this opinion; and it is in one place recorded as the doctrine of Mohammed. In another place, however, it is reported from him, that if the man claim his Shaffa in the presence of the company amongst whom he may be sitting when he receives the intelligence he is the Shaffee, his right not being invalidated unless he delay asserting it till after the company have broke up. Both these opinions are mentioned in the Nawadir; and Koorokhee passed decrees agreeably to the last quoted report; ....." (page 550).

(4) The second demand known as 'talab-i-ishhad' is by way of confirmation of the first demand in presence of witnesses. The pre-emptor must demand pre-emption as soon as practicable after the first demand in presence of two witnesses to attest the demand and in presence of either of the seller or of the buyer or on the property. See — 'Muhammad Ahmad Said Khan v. Madho Prasad', AIR 1917 All 448 (D). 'Talab-i-ishhad' cannot be considered to have been properly performed unless it includes a declaration of the earlier performance of 'talab-i-mowasibat'. See — 'Rujjub Ali v. Chundi Churn', 17 Cal 543 at p.

547 (FB) (E); — 'Ratan Mandal v. Azim Mandal', 10 Ind Cas 352 (Cal) (F) and — 'Sadiq Ali v. Abdul Baqi Khan', AIR 1923 All 251 (G).

(5) It was, therefore, incumbent on the Courts below in dealing with a claim of pre-emption under the Mohammedan Law to give clear and specific findings as to whether there was due performance of each of the 'talabs'. Such findings were not given. The facts found by the learned appeal judge only indicate that the pre-emptor made but one demand for pre-emption on the 16th of July in presence of two witnesses Sk. Nazuk and Gulam Dastgir. The pre-emptor visited the house in suit and in presence of the vendor and the vendee declared his intention to pre-empt the property. That there was no performance of the first 'talab' i.e., 'talab-i-mowasibat' is put beyond doubt by what the pre-emptor P. W. 1 deposed :

"On 15th I came about the sale ..... On the 16th, I went on the premises in suit. I expressed my intention on the spot in suit in the presence of the parties to the sale transaction and before two witnesses. I declared my intention to assert my right 'then'. This was the 'only' time I asserted my right of suing."

(5a) On the pre-emptor's own showing it is clear that the suit was liable to be dismissed for his failure to perform 'talab-i-mowasibat'. See — 'Jhootee Singh v. Komul Roy', 10 WR 119 (H); — 'Ram Charan v. Narbir Mahton', 4 Beng LR AC 216 (I); — 'Abdur Rasheed v. Md. Idris', AIR 1946 Cal 135 at p. 138 (J) and — 'Ali Muhammad v. Taj Muhammad', 1 All 283 (K).

(6) The learned counsel for the appellant, however, contends that 'talab-i-ishhad' may be combined with 'talab-i-mowasibat' and it is not necessary that the two 'talabs' should have performed separately. That is permissible in a case where the pre-emptor on hearing about the sale 'immediately' claims pre-emption invoking the witnesses in presence of the seller or the purchaser or on the premises to attest the immediate demand. In such an event the essential requirements of both the 'talabs' must be considered to have been satisfied. See — 'Mt. Nathu v. Shadi', AIR 1915 All 294 (L). But in the present case though the pre-emptor came to know about the sale on the evening of the 15th he did not assert his right to pre-empt until 9-30 p.m. the next day. The assertion not having been made immediately on the pre-emptor coming to know of the sale the essential requirement of the first 'talab' remains unfulfilled. In — 'Ali Muhammad v. Taj Muhammad (K)', (supra) the pre-emptor came to know about the sale at 7-30 a.m. and did not mention about pre-emption till 7-30 in the evening. The Court held that there was no performance of 'talab-i-mowasibat' and the suit was dismissed.

(7) In the result the decision of the Court below is upheld for reasons different from those given by the learned appeal judge. The appeal is dismissed with costs.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 115 (Vol. 41, C.N. 44)

SEN AND DEO JJ.

Dominion of India, Defendant-Appellant v. S. G. Ahmad, Plaintiff-Respondent.

Letters Patent Appeal No. 7 of 1949, D/- 9-2-53, from judgment of Hidayatullah J., reported in AIR 1952 Nag 77.

(a) Limitation Act (1908), Art. 31 — Starting point of Limitation — Railways Act (1890), S. 72.

If the railway authorities by their letters assure the plaintiff that an enquiry was being made regarding the non-delivery of the goods and subsequently say that the efforts have proved abortive, time for cause of action must be computed from the date of the communication of the refusal or declaration of inability to deliver the goods. Case Law reviewed. (Para 10)

Anno: Limitation Act, Art. 31 N. 10; Railways Act, S. 72 N. 35.

S. T. Bhave, for Appellant.

CASES REFERRED : Paras

(A) ('47) Civil Revn. No. 131 of 1947, D/- 27-6-1947 (Nag) 5

(B) (V35) AIR 1943 Nag 17: ILR (1947) Nag 369 5, 12

(C) (V10) AIR 1923 All 22 (2): 45 All 43 7, 12

(D) (V39) AIR 1952 All 897: 1952 All LJ 451 (FB) 8

(E) ('12) 23 Mad LJ 511: 17 Ind Cas 419 8

(F) (V11) AIR 1924 Mad 567: 77 Ind Cas 511 8

(G) (V33) AIR 1946 Mad 133: 224 Ind Cas 436 8, 11

(H) (V37) AIR 1950 Mad 438: 1950-1 Mad LJ 210 8

(I) (V12) AIR 1925 Lah 478: 6 Lah 301 8, 11

(J) (V34) AIR 1947 Cal 98 9, 12

(K) (V38) AIR 1951 Cal 462 9

(L) (V20) AIR 1933 Pat 45: 12 Pat 67 9

(M) (V36) AIR 1949 Pat 268: 29 Pat LT 477 9

(N) (V38) AIR 1951 Punj 254 9

(O) (V40) AIR 1953 Mys 16: ILR (1953) Mys 128 9

(P) ('47) Civil Revn. No. 131 of 1947, D/- 27-6-1947 (Nag) 10, 11

(Q) (V30) AIR 1943 Nag 117: ILR (1943) Nag 176 (FB) 11

JUDGMENT: This is a Letters Patent Appeal by the defendant Dominion of India representing the G. I. P. Railway Administration against the decision of Hidayatullah, J. upholding the claim of the plaintiff Captain S. G. Ahmed.

(2) The plaintiff purchased a ticket on the 5th June 1942 for his journey by train from Fort Sandeman to Jabalpur. He booked his luggage which consisted of 5 packages to be carried in the luggage van of the train. He paid the necessary freight and obtained a railway receipt No. 456224. He arrived at Jabalpur on the 11th June 1942 and asked for delivery of the luggage, but was informed that the packages had not arrived till then. On the 13th June 1942, only 4 packages were delivered to him. The fifth package, which was a black trunk, was not delivered. He was informed by the Railway Authorities that probably the package in question had been miscarried and would be delivered in due course. Thereafter, the plaintiff made repeated enquiries and wrote several letters to the Railway authorities. Ultimately, he was informed on the 16th March 1943 that the package viz., the black trunk, was lost. The list of articles contained in that trunk is given in annexure A of the plaint. The plaintiff valued the contents and the trunk at Rs. 1,149/4/-. Prior to the institution of the suit he had given the necessary notices Exhibit P. 16 under section 77 of the Indian Railways Act and section 80 of the Code of Civil Procedure. The plaintiff filed the suit on the 10th December 1943 and valued his claim at Rs. 1,149/4/-. According to the plaint, the cause of action is said to have arisen on the 15th March 1943 at Jabalpur.

(3) The claim was resisted on various grounds. The ground that needs consideration is about limitation as the question of limitation alone has been

pressed before us. The objection regarding limitation is contained in paragraph 7 of the written statement which is as follows:

"It is denied that the cause of action arose on the 15th March 1943. Four packages were made over to the defendant Railway at Delhi by the N. W. Railway, the contracting railway, and met onward despatch to Jabalpur. They arrived at Jabalpur by 555 Up Train on the 11th June 1942 when they were available for delivery, but delivery was effected by the plaintiff only on the 14th June 1942. The cause of action therefore arose on the 11th June 1942 when the packages ought to have been delivered."

(4) The trial Court overruled the plea of limitation and decreed the claim of the plaintiff in full with costs. Its decision was upheld by the first appellate Court and by the learned Single Judge who held that

"time would run not from the 13th June 1942, but from the 16th March 1943 when the fact that the railway was unable to deliver the trunk was communicated to the plaintiff".

(5) Shri S. T. Bhave, learned counsel for the Railway Administration, contends that the suit is barred by time under Article 31 of the Limitation Act. He says that limitation should have been computed from the 13th June 1942 and not from the 16th March 1943. He strongly relies on the decision of Pollock, C. J. (as he then was) in — 'Gopaldas Mohota and Co. v. Governor-General in Council', Civil Revn. No. 131 of 1947, D/- 27-6-1947 (Nag) (A). He argues that the learned Single Judge did not follow the decision of Pollock, C. J. as he was of opinion that he was bound by the opinion of — 'Niyogi, J. in — 'Govindlal v. Governor-General in Council', AIR 1948 Nag 17 (B). He points out that case does not deal with the question of limitation.

(6) We are of opinion that the suit is not barred by time. Article 31 of the Limitation Act is as follows:

Description of Suit.	Period of Limitation.	Time from which period begins to run.
Against a carrier for compensation for non-delivery of, or delay in delivering goods.	One year.	When the goods ought to be delivered.

The words in the third column viz., 'when the goods ought to be delivered' have been the subject of numerous decisions.

(7) A majority of decisions interpreting the words 'when the goods ought to be delivered' have taken the view that where no time for delivery is fixed, time will begin to run from the date of communication of a definite refusal or declaration of inability by the Railway Administration to deliver the goods. In — 'Jugal Kishore v. G. I. P. Rly. Co.', AIR 1923 All 22 (2) (C), the facts were that the plaintiff made over certain bales of cloth on the 28th August 1918 to the G. I. P. Railway Company at Bombay for transmission to Chunar. As the goods did not arrive at Chunar, the plaintiff began to make inquiries about them both from the G. I. P. Railway Company and from the East Indian Railway Company, to whose line the goods would in the ordinary course of business have been transferred at Manikpur junction. For considerably over a year the plaintiff was put off by the Railway Companies to the effect that the matter was being inquired into; but ultimately he instituted a suit for damages on the 31st March 1920. The suit was held to be within limitation and the objection of the defendant was overruled by Stuart and Sulaiman JJ. They said:

"The treatment accorded to the plaintiff is unfortunately not the first which a consignee has had to suffer. When there was a delay in the arrival of the goods, the plaintiff started writing to both the companies, who delayed action by the plaintiff by informing him that the matter was under inquiry. A perusal of the lengthy correspondence that ensued shows that the plaintiff was all along made to believe that inquiry was being made."

The learned Judges further observed:

"Article 31 fixes one year from the date when the goods ought to have been delivered and applies to suits to recover compensation for non-delivery. It is to be noted that in the present case no time was fixed for the delivery of goods, and the correspondence between the parties shows that the matter was being inquired into and that there was no refusal to deliver, up to well within a year of the suit. In the circumstances of the case we are unable to hold that the suit was instituted more than a year from the expiry of a reasonable time within which the goods should have been delivered."

The learned Single Judge has followed this decision. In the instant case also, no date was fixed for delivery.

(8) The same view was taken by a Full Bench of the Allahabad High Court in — 'Mutsaddi Lal v. Governor-General in Council', AIR 1952 All 897 (FB) (D). The learned Judges held:

"If the goods do not reach the destination on the date when in the normal course of affairs they are expected to reach there and the railway administration on being approached for delivery holds out hope to the plaintiff that the goods would be delivered and that the matter was being inquired into, then the starting point of limitation under Article 31 cannot be said to be the date on which the goods should have reached the destination in the normal course. The pharse 'when the goods ought to be delivered' means the point of time at which the carrier undertakes to deliver the goods or the date when the carrier informs the consignee that it would be delivered or when the carrier communicates to the consignee its inability to deliver the goods or a reasonable date that may be fixed on a consideration of events subsequent to the handing over of the consignment to the carrier for carriage."

In — 'Madras and Southern Mahratta Rly. Co., Ltd. v. Bhimappa', 23 Mad LJ 511 (E), Sir Ralph Benson, O. C. J. and Sankaran Nair, J. observed:

"No time has been fixed for the delivery of the goods and the correspondence between the parties shows that the matter was being enquired into and the suit was brought within one year from the date of refusal to deliver. We are unable to say that the plaintiffs delayed more than one year from the expiry of a reasonable time within which in the circumstances of the case the goods should have been delivered."

In — 'South Indian Rly. Co. v. Narayana Iyer', AIR 1924 Mad 567 (F), Waller, J. ruled:

"Article 31 applies to a suit by a consignee for damages for the loss of goods in transit, the starting point being the date when the Railway Company finally says that the goods cannot be delivered."

In — 'M. A. P. Palanichami Nadar v. Governor-General of India in Council', AIR 1946 Mad 133 (G) and also in — 'Governor-General in Council v. Messrs Khadi Mandali', AIR 1950 Mad 438 (H), similar view was taken. The learned Judges expressed their disagreement with the decision in — 'Secretary of State v. Dunlop Rubber Co., Ltd., Delhi', AIR 1925 Lah 478 (I), which has been cited by Shri Bhave in support of his argument.

(9) In — 'Raigarh Jute Mills Ltd. v. Commr. for the Port of Calcutta', AIR 1947 Cal 98 (J), Gentle, J. held:

> "Where, therefore, the plaintiff brings a suit for damages for non-delivery of a part of the consignment, the time under Article 31 begins to run from after a definite refusal or declaration of inability to deliver and the cause of action arises when the owner of the goods is made aware that there will be no further delivery of the undelivered part of the consignment."

In — 'Jainarain v. The Governor-General of India', AIR 1951 Cal 462 (K), Chakrabartti, J. (now C. J.) observed:

> "Where no time is fixed for delivery and where after the discovery of non-delivery, correspondence ensues between the consignor and the Railway authorities in the course of which the Railway goes on promising enquiries and never denying any liability, limitation does not begin to run till the correspondence ends either fruitlessly or with a final statement by the Railway of its inability to deliver or a final repudiation of the consignor's claim. The time 'when the goods ought to be delivered' within the meaning of Article 31 is not the time when they should have been delivered in the normal course, at least in a case where there is no time fixed for delivery, but the time when they ought to be delivered according to the subsequent promises by the Railway which informs the parties that it is carrying on enquiries."

In — 'B. & N. W. Rly. Co., Ltd. v. Kameshwar Singh', AIR 1933 Pat 45 (L), Sir Courtney-Terrell, C. J. who delivered the leading judgment and overruled the objection of limitation, observed:

> "He (reference is to the plaintiff) was justified in waiting to bring his suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late. In my opinion the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit. I would, therefore, dismiss the appeal."

In — 'The Governor-General in Council v. Kashiram Marwari', AIR 1949 Pat 268 (M), the facts were that no date was specified for delivery of goods consigned by the railway and the correspondence between the parties showed that the consignor had received a reply from the railway authorities that the matter was being investigated and it was patent that the plaintiff had filed the suit for damages for non-delivery within one year from the railway's refusal to deliver the consignment. The Division Bench held that

> "it could not be held that the plaintiff had brought the suit more than a year from the expiry of the reasonable time within which the goods should have been delivered".

A similar view was also held in — 'Dominion of India v. Messrs. Khurana Bros.', AIR 1951 Punj 254 (N) and — 'Government of Mysore v. Kapurchand', AIR 1953 Mys 16 (O).

(10) The words 'when the goods ought to be delivered' were interpreted strictly in — 'AIR 1925 Lah 478 (I), which was followed by Pollock, C. J. (as he then was) in — 'Gopaldas Mohota and Co., Ltd. v. Governor-General in Council', Civil Revn. No. 131 of 1947, D/- 27-6-1947 (Nag) (P). The report is not full and it does not appear that the railway authorities held out any definite assurance that the matter was under enquiry. It is not known on what material the District Judge came to the conclusion that time would run from the 13th June 1921 when the plaintiff ceased to have any reasonable hope of obtaining satisfaction from the Railway. No reference is made to any correspondence with the railway authorities. The learned Judges observed:

> "Under Article 31 time runs from the date on which the goods ought to be delivered, and the question considered by the learned District Judge as to when the recovery of the plaintiffs' goods became hopeless appears to us immaterial."

In our opinion, if the railway authorities by their letters assure the plaintiff that an enquiry was being made regarding the non-delivery of the goods and subsequently say that the efforts have proved abortive, time must be computed from the date of the communication of the refusal or declaration of inability to deliver the goods. We respectfully agree with the reasonings adopted in the decisions to which reference has been made in paragraphs 7, 8 and 9.

(11) It appears that the learned Single Judge, who decided the Civil Revn. No. 131 of 1947 (Nag) (P) did not intend to lay down the law as will appear from the following passage:

> "It was decided in — 'Rajeshwar v. Dasrath', AIR 1943 Nag 117 (Q), that there should be no interference in revision with the judgment of the Small Cause Court on a question of fact or law unless the conclusion is one which no judge acting judicially could reasonably reach. The decision in this case is supported by the decision of the Lahore High Court."

The decision under revision was of a small cause nature. The only cases considered by the learned Judge were — 'AIR 1946 Mad 133 (G)' and — 'AIR 1925 Lah 478 (I)'.

(12) In the case before us, the cause of action arose on the date the plaintiff received the letter Exhibit P. 12, dated the 12th April 1943 from the Superintendent of Claims which was in the following terms:

> "The trunk is still untraceable. The loss of the same is very much regretted. But unfortunately the provisions of section 75 of the Indian Railways Act being mandatory in this case, it is not possible to award any compensation for the loss."

The plaintiff and the Courts below have stated that the cause of action arose on the 16th March 1943. It appears from Exhibit P. 12 that it was a reply to the plaintiff's letter, dated the 15th March 1943. It was through error that the 16th March 1943 was taken as the date of communication of the reply of the Railway Administration. This has not, however, vitiated the finding

in any way. We agree that the decision of Niyogi, J. in — 'AIR 1948 Nag 17 (B)', does not deal with Article 31 and the learned Single Judge was in error in thinking that he was bound by that decision. The learned Judge has, however, followed the view in — 'Jugal Kishore v. G. I. P. Rly. Co.', (C) (cit. sup.) and — 'Raigarh Jute Mills Ltd. v. Commr. for the Port of Calcutta', (J) (cit. sup.).

(13) The suit was rightly decreed. The appeal fails and is dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 NAGPUR 118 (Vol. 41, C.N. 45)

DEO J.

on difference of opinion between

MANGALMURTI AND MUDHOLKAR JJ.

Badribishal Bhagulal Gupta, Applicant v. Mishrilal Karnidan Oswal and another, Non-Applicants.

Civil Revn. Appln. No. 413 of 1950, D/- 23-1-1953, from order of Civil Judge, 2nd Class, Rajnandgaon, D/- 24-4-1950.

Civil P. C. (1908), O. 38, Rr. 1 and 2 and S. 151 — Warrant under O. 38, R. 1 — Power of Court under S. 151 to enlarge scope of warrant by adding that defendant be not arrested on his depositing money or furnishing security for the amount — Surety bond for amount — Surety bond held to be under R. 1 and not for personal appearance — Surety held liable — Decree held could be executed against him — (Civil P. C. (1908), S. 145).

On an application by the plaintiff under O. 38, R. 1 the Court directed issue of a warrant of arrest for producing the defendant before the Court to show cause why he should not furnish security for his appearance. To this warrant a note was added that if the defendant deposited Rs. 160/- or gave security for Rs. 160/- he should not be arrested. The warrant was executed and upon one B's executing a surety bond in favour of the Court, for the amount, the defendant was released. The report of the process server was, "As the defendant has furnished security for appearance on the date of hearing, he is released on taking that bond." On receipt of the report the Court recorded: "Warrant received back duly executed. Defendant furnished a surety. Defendant is absent. Case be taken on fixed date." Eventually the suit was decreed. The decree-holder then took out an execution against the surety for the amount due under the decree. The surety objected on the grounds that he had stood security for the appearance only and that if his bond undertakes liability to satisfy the decree, it was outside the scope of O. 38, Rr. 1 and 2 and could not be made a basis of his liability. In the bond the surety had undertaken to be liable for the claim that might be decreed against the defendant:

Held, Per Deo J. (agreeing with Mangalmurti J.) that in exercise of the inherent power under S. 151, the Judge could enlarge the proviso to Rule 1 for the ends of justice in favour of the defendant. A Court did not act without jurisdiction in giving an option to the defendant which was obviously to his advantage. It was open to him to accept it or to deposit Rs. 160/- or to get arrested and sent to the jail. He had chosen the option most advantageous to him. It was therefore fruitless to contend that the surety contemplated in the warrant was only for personal appearance whenever called upon to do so and was not for payment of Rs. 160/-. (Para 24)

Held further even if the action of the Court was considered an irregularity the surety could not treat the bond executed by him as a nullity, particularly when on the faith of the bond the defendant was not brought under arrest before the Court and the order under R. 2 was not passed. AIR 1936 Cal 143, Relied on. (Para 25)

Anno: Civil P. C., S. 151, N. 4; O. 38, R. 1 N. 1; S. 145 N. 3.

T. M. Chande, for Applicant; K. S. Misra, for Non-Applicant No. 1.

CASES REFERRED: Paras

(A) ('29) 115 Ind Cas 241(1) (Mad.) 4

(B) (V23) AIR 1936 Cal 143: 162 Ind Cas 619 4, 5, 11, 25

(C) ('08) 35 Cal 61: 6 Cal LJ 320 (FB) 11, 12

(D) (1841) 9 Dowl 487 12

(E) (1831) 1 Dowl 28 12

(F) (V30) AIR 1943 Nag 335: ILR (1944) Nag 370 25

(G) (V31) AIR 1944 Nag 59: ILR (1944) Nag 451 25

(H) (1943) 1943-1 All ER 108 25

MUDHOLKAR J.:

This is an application for revision of an order passed in execution of a decree of a Court of Small Causes against the applicant as surety of the judgment-debtor Ramlal who is non-applicant No. 2 to this application.

(2) The non-applicant No. 1 sued the non-applicant No. 2 for recovery of a sum of Rs. 160/-. The non-applicant No. 1 filed an application on the 31st August 1946 under Order XXXVIII, rule 1 of the Code of Civil Procedure alleging that the non-applicant No. 2 was disposing of his property and was about to leave the local limits of the jurisdiction of the Court with intent to obstruct realisation of the claim of the non-applicant No. 1, if decreed, and prayed for the issue of a warrant of arrest of the non-applicant No. 2. The Court granted the application and directed the issue of a warrant of arrest for the production of the non-applicant No. 2 in Court to show cause why he should not furnish security for appearance. The Order also provided that if the non-applicant N. 2 deposited the amount he may not be arrested. In the warrant a note appears to have been added providing an option to the non-applicant No. 2 either to deposit Rs. 160/- in cash or to give security for the amount.

The warrant was executed against the non-applicant No. 2 and he was arrested but upon his executing a bond in favour of the Court undertaking to pay the decretal amount, the process-server who had arrested him released him. The process-server made a report to the Court whereupon on the 5th September 1946 the Court recorded the following in its order sheet:

> "Plaintiff by Mr. Latif. Warrant received back duly executed. Defendant furnished a surety. Defendant is absent. Case be taken on fixed date."

Eventually, the suit was decreed. The non-applicant No. 1 realised Rs. 25/- from the non-applicant No. 2. Then he took out execution against the applicant for the balance and the costs of the suit. The applicant objected to the execution of the decree against him on the ground that the

bond executed by him fell outside the scope of Order XXXVIII, rules 1 and 2 and that therefore he could not be made liable for the decretal amount.

(3) It is common ground that the applicant did not commit a default in the production of the non-applicant No. 2 before the Court during the hearing of the suit. It is however clear that the applicant has in an unmistakable manner undertaken the liability for the decretal amount. Where a person executes a surety bond under Order XXXVIII, rule 2, the primary liability he undertakes is the production of the defendant in Court on every date of the hearing of the suit and during execution proceedings. If he makes a default in this matter then only he becomes liable to pay the decretal amount. The order passed in this case was clearly for the purpose of ensuring the presence in Court of the non-applicant No. 2. It does not call upon the non-applicant No. 2 to furnish security for the satisfaction of such decree as may be passed. In other words, the court did not require the surety to undertake an unconditional liability to pay the decretal amount. The bond executed by the applicant is quite clearly outside the scope of Order XXXVIII, rule 2 of the Code and of a different nature from what the Court ordered.

(4) According to the learned counsel for the non-applicant No. 1, the fact that the terms of the bond go beyond the purview of rule 2 of Order XXXVIII does not stand in the way of the enforcement of the bond. In support of his contention he has referred to two decisions : — 'Muthuraju Sreenivasa Rao v. Mahammad Ghonse Sahib', 115 Ind Cas 244 (1) (Mad.) (A) and — 'Amulya Ratan v. Prosad Chandra Kar', AIR 1936 Cal 143 (B). No doubt the head note in 115 Ind Cas 244 (1) (Mad) (A) supports him but it is clear from the judgment that though it was contended on behalf of the surety that a bond which goes beyond the scope of Order XXXVIII, rule 2, cannot be executed, the learned Judge, who decided the case did not think it necessary to decide the point because in the case before him the terms of the bond had been fixed by consent of the parties.

In the present case it does not appear that the terms of the bond were settled between the parties and no argument was advanced before us to the effect that they were so settled. Then there is the further fact that the bond here is in favour of the Court and not in favour of the non-applicant No. 1. This circumstance would justify an inference that the terms of the bond were not settled between the parties but that the applicant voluntarily executed the bond in order to ensure the release of the non-applicant No. 2.

(5) The other case relied on by the learned counsel for the non-applicant No. 1 is AIR 1936 Cal 143 (B). It deals with a bond taken under Order XXXVIII, rule 5, Civil Procedure Code. There Mitter J. observed as follows :

> "Having regard to the object of the provisions for attachment before judgment, which I have indicated above, I hold that the Court in making a demand for an intaking security for the prospective decretal amount may have acted at most in an irregular manner in the exercise of its jurisdiction."

With great respect I am unable to subscribe to the view that ordering something to be done even though it is clearly beyond the provisions of law, is merely an irregularity. In my view where, as here, the Court gives a direction permitting security for the decree to be taken it clearly extends the provisions of the proviso to Order XXXVIII, rule 1 and thus transgresses the jurisdiction conferred upon it. The direction is therefore a nullity and cannot sustain the bond taken in pursuance of it.

(6) The question then is whether quite apart from Order XXXVIII, rule 2, the applicant should be deemed to be bound by the engagement entered into by him. In my opinion that cannot be done. There is in fact no agreement between the applicant on the one hand and the Court on the other. That is because there was no 'consensus ad idem' between the Court and the applicant. What the Court called upon the non-applicant No. 2 to do was to furnish security for his appearance in Court. What the latter did was to furnish security of the applicant for the performance of such decree as may be passed. So, if the order of the Court is regarded as an offer and furnishing of the bond as an acceptance then each having entertained a different idea as to the nature of the engagement no contract can be said to have resulted.

(7) It is however argued that though there was divergence between the 'offer' and the 'acceptance' the acceptance was acquiesced in by the Court and that this brought a contract into existence. The bond itself represents 'acceptance' but as I have already pointed out the bond does not appear to have been accepted by the Court and indeed I am doubtful whether the Court even examined it.

(8) For these reasons I hold that the bond cannot be executed against the applicant. Accordingly, I would allow the application and set aside the order of the Court below and would make no direction regarding costs.

MANGALMURTI J. :

(9) The facts of the case are stated by my learned brother Mudholkar J. in the first two paragraphs of his opinion and I need not repeat them. As stated by him in the last sentence of paragraph 2 the objection raised by the applicant is that the bond executed by him falls outside the scope of Order XXXVIII, rules 1 and 2 of the Code of Civil Procedure and that therefore he cannot be made liable for the decretal amount. In my opinion the argument has no force.

(10) The proviso to rule 1 of Order XXXVIII of the Civil Procedure Code is to the following effect :

> "Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court."

Thus the defendant could avoid his arrest by paying the sum mentioned in the warrant. In this case the warrant which bears the signature of the Judge contains the following note :

> "If Ramlal pays Rs. 160/- or gives security for the sum of Rs. 160/- he may not be arrested."

The proviso to rule 1 of Order XXXVIII does not provide for the taking of the security but only payment of the sum specified in the warrant as sufficient to satisfy the plaintiff's claim. The note does not say that the security should be one for appearance. On the other hand it was to be taken in place of the sum specified in the warrant as sufficient to satisfy the plaintiff's claim. The bond was thus treated by the Court as equiva-

lent of the sum mentioned in the proviso to rule 1 of Order XXXVIII and not as a security bond mentioned in rule 2 'ibid' for defendant's appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit.

The stage for ordering the defendant to furnish the security contemplated by rule 2 of Order XXXVIII had not been reached, the equivalent of the money mentioned in the proviso to rule 1 'ibid' having been received. If the amount mentioned in the warrant had been paid it would have been utilized towards the satisfaction of the decree when passed. The applicant's bond which is equivalent of the sum mentioned in the proviso can, in my opinion, be so utilized specially as the applicant has in unmistakable terms undertaken the liability for the decretal amount.

(11) It is, however, said that the Court acted in excess of the provisions of the proviso to rule 1 of Order XXXVIII as the proviso does not contemplate taking of the security but only contemplates payment of money; but as observed by Mitter J. in AIR 1936 Cal 143 at p. 145 (B)

> " ..... but the object of the legislature for providing for attachment before judgment (in the present case arrest before judgment) is to secure the prospective decree-holder in matter of realisation of the money that may be eventually found by the Court to be due to him. Every act done by a Court in contravention of the provisions of a statute is not necessarily beyond jurisdiction or a nullity.
>
> It may be an irregularity. In cases of contravention of statutory provisions, no hard and fast line can be laid down for demarcating between acts which are nullities and acts which are irregularities but this much can be said, as was laid down by Mookerji, J., in delivering his judgment in — 'Ashutosh Sikdar v. Behary Lal Kirtania', 35 Cal 61 (C), that the question must be determined keeping in view the nature, scope and object of the provisions of the statute contravened. Having regard to the object of the provisions for attachment before judgment, which I have indicated above, I hold that the Court in making a demand for an intaking security for the prospective decretal amount may have acted at most in an irregular manner in the exercise of its jurisdiction.

In that view of the matter the remedy of the defendants was to point out to the Court the irregularity in the notice, issued on the 13th November 1929, which by its terms demands security from them of the decretal amount, when they appeared to show cause in pursuance of the same, and if the Court still insisted on the said security, to proceed to a higher tribunal, and the respondent having executed the surety bond in the form he has done cannot in my judgment raise the objection which he has raised in this case in the course of execution proceedings started against him under the provisions of section 145 of the Code".

These observations apply with equal force to the present case which is a case of arrest before judgment, the object of which is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him. (Mulla's Civil Procedure Code 11th Edition 1941 page 1117 under the heading "Scope of the Order").

(12) Mookerjee J. has discussed the question of nullities and irregularities at great length in — '35 Cal 61 at p. 72 (FB) (C)', and the discussion contains the following very useful observations:

> "As pointed out in Macnamara on Nullities and Irregularities, no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.
>
> It may be conceded, that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test, however, is well-established, and is often useful; as was observed by Mr. Justice Coleridge in — 'Holmes v. Russell', (1841) 9 Dowl. 487 (D) it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. To the same effect are the observations of Mr. Justice Taunton in — 'Carrett v. Hooper', (1831) 1 Dowl. 28 (E)."

Applying this test to the present case we find that the applicant could certainly waive the objection, and so taking of the security bond for the payment of the decretal amount in place of cash under the proviso to rule 1 of Order XXXVIII amounts to an irregularity and not illegality.

(13) I do not find that each party in this case entertained a different idea as to the nature of the enlargement. The Court by its note on the warrant very clearly wanted security for the amount of Rs. 160/- which was the sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and accordingly the applicant gave the security bond for the performance of such decree as may be passed. The applicant thus gave the type of security wanted by the Court and in my opinion there was 'consensus ad idem' between the Court and the applicant.

(14) The order of the lower Court is, therefore, upheld and the application for revision is hereby dismissed. Costs will be borne as incurred. Counsel's fee Rs. 15/- if certified.

(On the difference of opinion the case was placed before a third Judge under Cl. 26 of the Letters Patent (Nag) and Rule 11 of Chap. 1 of Part 1 of the High Court (Nag) Rules)

DEO J.:

(15) This is an application made by the surety of the non-applicant No. 1 Ramlal for revision of the order of the executing Court directing attachment and sale of his property. It was heard by a Division Bench of Mangalmurti and Mudholkar JJ. but as they differed on the question of the validity of the security bond dated the 3rd September 1946, the case is put up before me for disposal in view of Chapter 1, rule 11 of the Rules of this Court.

(16) On the 31st August 1946 the non-applicant No. 2 Misrilal who had sued the non-applicant No. 1 for recovery of a sum of Rs. 160/- in the Small Cause Court at Rajnandgaon, made an application for his arrest before judgment alleging that the defendant was disposing of his property and was about to leave the limits of the State with the intention of defeating his claim. This application was granted 'ex parte', treating it as one

under Order XXXVIII, rule 1, Civil Procedure Code. The Court directed issue of a warrant of arrest for producing Ramlal before the Court to show cause why he should not furnish security for his appearance. A warrant was prepared on the same day. It is on a printed form in Hindi which purports to be in accordance with section 478 of the Civil Procedure Code of 1877 (Act XXX of 1877). The material portion of this warrant is as under

"This is therefore to command you to arrest the aforesaid Ramlal Bania and produce him before this Court to show cause why he should not furnish security for Rs. 200/- for his personal appearance before the Court until such time as the said suit shall be fully and finally disposed of, and until execution of the decree that may be passed against him in this suit is in force and is not paid off".

A note is added to this warrant that

"If Ramlal deposits Rs. 160/- or gives security for Rs. 160/- he shall not be arrested."

(17) The warrant was executed by the arrest of Ramlal; but upon Badribishal executing the surety bond in dispute he was released. The report of the process-server is :

"As the defendant has furnished security for appearance on the date of hearing, he is released on taking that bond."

On receipt of this report, the Court made the following record in the order sheet dated the 5th September 1946 :

"Plaintiff by Mr. Latif. Warrant received back duly executed. Defendant furnished a surety. Defendant is absent. Case be taken on fixed date."

(18) Eventually the suit was decreed. The decree-holder then took out an execution against the surety for the amount due under the decree. The surety objected on the grounds that he had stood security for the appearance only and that if his bond undertakes liability to satisfy the decree, it is outside the scope of Order XXXVIII, rules 1 and 2 and cannot be made a basis of his liability.

(19) It is not disputed that the defendant appeared at all hearings of the suit and thereafter whenever he was called upon to do so. There is thus no default if the applicant had stood surety for the appearance of the defendant in Court.

(20) The material portion of the surety bond is—

"Whereas the plaintiff has got the defendant Ramlal son of Balgovind Bania arrested in his suit, I Badribishal, son of Bhagulal, resident of Rajnandgaon, today stand surety for him that if the defendant will not pay the plaintiff's claim, I shall be liable for that claim including costs. I have therefore executed this surety bond so that it may be valid and useful when necessary."

(21) There is no presumption that the Civil Procedure Code of 1908 was in force in the Rajnandgaon State at the material time. Though given time, the counsel on either side were not able to place before the Court the Code in force in that State or any Order or notification of the Ruler which made the Code in question applicable to that State. The case has been dealt with so far on the assumption that it is to be decided with reference to this Code.

There is good ground for this assumption. Though the warrant is on a form prescribed by the Code of 1877, the order of arrest purports to be under Order XXXVIII, rule 1. That can safely be taken to be the rule of the Code of 1908. The summonses to the defendant and witnesses issued in this case were under the Code of 1908. The application for execution is under Order XXI, rule 11 of this Code. It therefore appears that though majority of the forms in frequent use were according to the new Code, some forms according to the old Code continued to be used. I therefore proceed to decide the case on the footing that the Civil Procedure Code in force in British India was in force in the State and that the Code of 1908 is applicable to this case.

(22) Having regard to the proviso to Rule 1 of Order XXXVIII, which was added in 1908, a defendant can prevent his arrest by paying in the amount specified in the warrant. The Court is to hold the amount in deposit until the suit is disposed of or until its further orders. If the decree is passed against the defendant, the amount is available for satisfaction of the decree. If the suit is dismissed or decreed for a smaller sum, the defendant is entitled to refund of the whole or balance. Under the old Code he could not do so as of right. He had to be arrested and brought before the Court before any payment or security was taken from him. The intention of making this provision is to secure the amount of the decree if the defendant wishes to avoid his arrest or to secure his personal appearance by his arrest and detention till he has shown cause why he should not be arrested. The warrant of arrest prescribed by the new Code (form No. 1, Appendix F) requires the bailiff to first demand the amount specified in the warrant and if it is not paid to forthwith arrest the defendant to show cause etc.

There is no provision to demand at that stage security for appearance. If the defendant is arrested and brought before the Court and is not able to show cause why he should not be arrested, the Court shall order him either to deposit in Court money or property sufficient to answer the claim against him or to furnish security for his appearance until satisfaction of the decree, if any, passed against him. This is rule 2.

(23) The first question for consideration is what is the nature of the order of the Court as evidenced by the warrant. If the note at the foot of the printed matter is excluded from consideration there is no doubt that the defendant could not furnish any security for appearance till he was brought before the Court under arrest and could not have paid the amount to the bailiff to prevent his arrest because the bailiff was not authorised to receive it. This warrant could have been brought in conformity with proviso to Rule 1 by adding the note :

"If Ramlal deposits Rs. 160/- he shall not be arrested."

The foot note gives the defendant a further option. It enables him to give a security for Rs. 160/- in lieu of cash payment to prevent his arrest. The note does not merely substitute Rs. 160/- for Rs. 200/- in the body of the warrant as submitted by the learned counsel for the surety. That would not have prevented his arrest and would not have authorized the bailiff to accept a security bond even for appearance. As already stated the only way to prevent arrest under the proviso to rule 1 is to pay to the bailiff any sum specified in the warrant as sufficient to satisfy the plaintiff's claim.

(24) As the defendant had not shown any cause, the Court was entitled to make an order

in terms of rule 2. Since the defendant had already furnished security as required by the Court, the Court could not ask him to deposit in Court any money or property nor could it ask him to furnish security for appearance in Court. The trial Court evidently thought that this might work hardship on the defendant and reduced the amount to Rs. 160/- and gave him the two alternatives.

In exercise of the inherent power under section 151, Civil Procedure Code, the learned Judge could evidently enlarge the proviso to Rule 1 for the ends of justice in favour of the defendant. A Court does not act without jurisdiction in giving an option to the defendant which is obviously to his advantage. It was open to him to accept it or to deposit Rs. 160/- or to get arrested and sent to the jail. He has chosen the option most advantageous to him. The case might have been otherwise if a term not warranted by the Code was sought to be imposed on the defendant. In that case the defendant might have been able to resist the term as a nullity. It is therefore fruitless to contend that the surety contemplated in the warrant was only for personal appearance whenever called upon to do so and was not for payment of Rs. 160/-.

(25) It is settled law that the discretion permitted by section 151 of the Code can be used to enlarge the provision of procedural law under any other section or order of the Code. — 'Manorath v. Atmaram', AIR 1943 Nag 335 (F) and — 'Mt. Semabi v. Ganpatrao', AIR 1944 Nag 59 (G). The Court therefore was not acting in excess of its powers under Order XXXVIII, rule 1, in making the order it did. Since the warrant expressly makes an offer that a security for payment of Rs. 160/- would be accepted in lieu of payment of Rs. 160/- in cash, to prevent an arrest, and since the surety sought the release of Ramlal by offering security for Rs. 160/-, he cannot escape liability for that amount. This cannot be illegal.

Even if it is considered an irregularity as was held in AIR 1936 Cal 143 (B), the surety cannot treat the bond executed by him as a nullity, particularly when on the faith of the bond the defendant was not brought under arrest before the Court and the order under rule 2 was not passed. An attempt to define the distinction between an order which is a nullity and which is an irregularity was recently made by Lord Greene M. R. in — 'Craig v. Kanseen', 1943-1 All ER 108 (H). On a survey of the several decisions noticed in the case it will be clear that the distinction is difficult to define.

(26) Under the circumstances, I am of the view that the surety bond dated the 3rd September 1946 is valid as held by Mangalmurti J. I respectfully dissent from the view taken by Mudholkar J.

(27) The application for revision therefore fails and is dismissed with costs. Counsel's fee Rs. 50/-.

B/R.G.D. Revision dismissed.

A.I.R. 1954 NAGPUR 122 (Vol. 41, C.N. 46)

DEO J.

Ramdayal Mansukhlal Agarwal, Appellant v. Prayagdas Anandi and others, Respondents.

Second Appeal No. 192 of 1952. D/- 28-10-1952, from judgment and decree of 2nd Addl. Dist. J., Raipur, D/- 17-10-1951.

(a) Contract Act (1872), S. 11 — Minor — Decree on contract entered into by guardian.

No decree can be passed against a minor or his estate on a contract entered into on his behalf by a guardian under which no charge is created on the estate except in such cases where the minor's estate would be liable for the obligation incurred by the guardian under the personal law to which he is subject. 2 Nag L. R. 25, AIR 1927 Nag 296 and AIR 1916 Nag 11 Rel. on. (Para 5)

Anno: Cont. Act S. 11 N. 4, 11.

(b) Civil P. C. (1908), O. 41 R. 33 — Exercise of power in favour of respondent or parties who have not filed appeal or cross objection.

The words of O. 41 R. 33 are very wide — They must be applied with discretion — No hard and fast rule can be laid down, but ordinarily, the power contained in the rule should be limited to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the right of the parties in accordance with justice, equity and good conscience — Suit for refund of price paid for 'Dhan' on the failure of A, B and C to supply the same — C who entered into contract with plaintiff as power-of-attorney holder from guardian of A and B who were minors and who received the money found not to have paid it to the minors — Suit decreed by trial Court against A and B but dismissed against C — Appeal by former impleading C and plaintiff as respondents — No appeal by plaintiff against dismissal of suit against C — Held appellate Court had jurisdiction under this rule to pass decree against C though the plaintiff had not appealed against dismissal of the suit against C: AIR 1926 PC 34; AIR 1916 PC 148 and AIR 1933 Nag 186, distinguished. (Para 10)

Anno: C. P. C., O. 41 R. 33 N. 6.

A. P. Sen, for Appellant; M. L. Shrivastava (for No. 1); and V. K. Sanghi (for Nos. 2 and 3), for Respondents.

CASES REFERRED: Paras

(A) ('06) 2 Nag LR 25 5
(B) (V3) AIR 1916 Nag 11: 13 Nag LR 109 5
(C) (V14) AIR 1927 Nag 296: 23 Nag LR 94 5
(D) (V13) AIR 1926 PC 34: 49 Mad 435 (PC) 7
(E) (V30) AIR 1943 All 342: ILR (1943) All 830 7, 9
(F) (V3) AIR 1916 PC 148: 44 Cal 1 (PC) 8
(G) (V20) AIR 1933 Nag 186: 29 Nag LR 173 8
(H) ('46) F. A. No. 18 of 1939, D/- 17- 9- 1946 (Nag) 8
(I) (V25) AIR 1938 Pat 275: 17 Pat 338 9
(J) (V1) AIR 1914 Cal 722: 24 Ind Cas 208 10

JUDGMENT: The admitted or proved facts of this case are:

In December 1947 plaintiff agreed to purchase from "Dau Anurudhdayal Brahmanandlal" represented by the manager Ramdayal (appellant) 'dhan' worth Rs. 1000/- and paid to Ramdayal on two occasions a total sum of Rs. 922/7/- and gave him 71 empty gunny bags for filling the 'dhan'. The defendants failed to supply the 'dhan' and failed to return the bags. The plaintiff is thus entitled to get a refund of Rs. 922/7/- which he paid to Ramdayal.

(2) The defence of Ramdayal that plaintiff paid Rs. 922/7/- towards the price of 71 bags out

of which 55 were removed by him and 16 remained in the house of defendants 1 and 2 was not accepted.

(3) Dau Anurudhdayal and Brahmanandlal were minors at the date of this transaction. Their mother was their guardian and the defendant was their agent, evidently appointed by the guardian. Ramdayal held a registered power of attorney as deposed to by Anurudhdayal. The dealings of the defendant were evidently carried on in the name "Dau Anurudhdayal Brahmanand Talukdar Chikhliwale" as appears in the receipt Exhibit P-1.

(4) The trial Court decreed the suit against the defendants 1 and 2 and dismissed it against defendant No. 3. On an appeal by the defendants 1 and 2 to which both the plaintiff and defendant No. 3 were respondents, the lower appellate Court allowed the appeal, dismissed the suit against defendants 1 and 2 and decreed it against defendant No. 3. He now appeals impleading the other parties as respondents.

(5) The lower appellate Court did not accept the evidence of Ramdayal that he paid the amount to the guardian of defendants 1 and 2 or deposited it in their books of account. In view of this finding, which was not seriously challenged, the defendant No. 3 cannot escape his liability to the plaintiff. As stated in — 'Tukaram v. Ramchandra', 2 Nag LR 25 (A); — 'Jhitibai v. Tejmal', AIR 1916 Nag 11 (B) and — 'Ramchandra v. Rupchand', AIR 1927 Nag 296 (C), no decree can be passed against a minor or his estate on a contract entered into on his behalf by a guardian under which no charge is created on the estate except in such cases where the minor's estate would be liable for the obligation incurred by the guardian under the personal law to which he is subject. Since the minors have not received the amount of Rs. 922-7-0, they cannot be held liable to the plaintiff and the defendant No. 3 who has not paid that amount to them is bound to refund it to the plaintiff. In this view the decree of the lower appellate Court is correct.

(6) The learned Counsel for the appellant, however, contends that the lower appellate Court had no jurisdiction to pass a decree against defendant No. 3 in the absence of an appeal against him by the plaintiff. His contention is that Order XLI, Rule 33, Civil Procedure Code, which appears to have been invoked by the lower appellate Court, does not permit the course followed by it. Under that rule the appellate Court has power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may exercise in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

(7) The learned counsel relies on — 'Muhammad Khaleef v. Les Tanneries', AIR 1926 PC 34 (D), where a suit was filed against A and B as agent of A. The suit against A was decreed and was dismissed against B, but B was directed to pay the plaintiff's costs. The plaintiff did not appeal against the decree dismissing the suit against B. In a joint appeal by A and B the suit was dismissed with costs against both A and B. In a further appeal to the Privy Council by the plaintiff, their Lordships held that so far as B was concerned, the appeal was, in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which was not allowable under the Code of Civil Procedure or under the Letters Patent. Their Lordships further held that Order XLI, Rule 33 is not intended to apply to such an appeal and consequently the appeal so far as B was concerned must be dismissed. It appears that this was a case of joint and several liability of A and B and the decision must be considered applicable to those facts: — 'Dalchand v. Surajmal', AIR 1943 All 342 (E).

(8) The other two cases relied on by the learned counsel are inapplicable to the facts in this case. In — 'Nobin Chandra v. Chandra Madhab', AIR 1916 PC 148 (F), the plaintiff got a decree for rendition of accounts but for a shorter period than claimed. The suit was dismissed by the appellate Court. On appeal to the Privy Council the plaintiff claimed a decree for the entire period. Their Lordships held that in the absence of an appeal or cross-objections in the lower appellate Court the plaintiff could not get any further relief than the restoration of the decree of the trial Court. In — 'Mt. Vithi v. Paiku', AIR 1933 Nag 186 (G), it was held that the plaintiff-respondent could not file cross-objections against a defendant who was not a party to the appeal. In — 'Mst. Beni Begam v. Nathmal', F. A. No. 18 of 1939, D/- 17-9-1946 (Nag) (H), a Division Bench of this Court considered the scope of Order XLI, Rule 33 and observed:

> "The rule can only come into operation where it would otherwise be impossible to give a party who has appealed the relief to which he is entitled and which he has claimed. Cases sometimes arise where adequate and proper relief cannot be given to a party who has appealed unless the decree of the lower Court against some other party who has not appealed is suitably modified."

(9) In — 'Keshwar Sao v. Guni Singh', AIR 1938 Pat 275 (I), the plaintiff claimed a relief against the first defendant and in the alternative against the second defendant. The first Court passed a decree against the first defendant and dismissed the suit against the second. In an appeal by the first defendant the appellate Court was entitled under Order XLI, Rule 33, to pass a decree against the second defendant even though there was no appeal by the plaintiff. To the same effect is the decision in — 'Dalchand v. Surajmal (E) (supra)'.

(10) The lower appellate Court had jurisdiction under Order XLI, Rule 33, to pass a decree against defendant No. 3 though the plaintiff had not appealed against the decree dismissing his suit against him. The words of Order XLI, R. 33 are very wide. They must be applied with discretion. No hard and fast rule can be laid down, but ordinarily, the power contained in the rule should be limited to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the right of the parties in accordance with justice, equity and good conscience: — 'Ganga Dhar v. Banabashi', AIR 1914 Cal 722 (J).

(11) As the lower appellate Court has found, the defendant No. 3 admittedly received Rs. 922-7-0 from the plaintiff for payment to defendants 1 and 2, did not make that payment and retained it. It is not in accordance with justice, equity and good conscience to allow him to retain the benefit of his fraud and deprive the plaintiff of that amount. According to the contract made

by defendant No. 3, plaintiff was entitled to the decree against defendants 1 and 2 for refund of that amount, if the defendant No. 3 had really paid it to them or duly spent it on their account. Otherwise, he must restore the amount to which he is not admittedly entitled.

(12) I therefore hold that the lower appellate Court rightly passed a decree against defendant No. 3. The appeal fails and is dismissed with costs. Counsel's fee Rs. 70/-. The two respondents will be entitled to separate costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 NAGPUR 124 (Vol. 41, C.N. 47)

SEN J.

Pralhad Narayan, Plaintiff-Applicant v. Smt. Mankuarbai w/o Shrikrishna Das and another, Defendants-Non-Applicants.

Civil Revn. No. 364 of 1951, D/- 29-8-1952, from order of Addl. 1st Civil J., 2nd Class, Jabalpur, D/- 17-2-1951.

(a) Court-fees Act (1870), Ss. 7 (xi) (e) and 7 (v) — Applicability.

In a suit for possession by a tenant against his landlord a tenant cannot be compelled to pay court-fee on the market value of the property merely because another person has been brought on the premises. The real possession in such a case is of the landlord and not of the third party and the suit falls under S. 7 (xi) (e).

Thus where A, a tenant, sues B, his landlord, for possession alleging that B is in illegal occupation of the premises leased to him and joins C as additional defendant who is said to be in occupation by virtue of certain agreement with B, the character of the suit is not changed. It is still a suit against the landlord which is governed by S. 7 (xi) (e) and not one under S. 7 (v). Civil Revn. No. 444 of 1949, D/- 24-3-1950 (Nag), Foll.; AIR 1948 Mad 409, Ref.; AIR 1933 Nag 312 and 32 Cal 268, Distinguished. (Para 8)

Anno: Court-fees Act, S. 7 (xi) (e) N. 4; S. 7 (v) N. 3.

(b) Civil P. C. (1908), S. 115 — Order as to Court-fees — Revision.

Suit by tenant for possession against landlord — Court-fee paid under S. 7 (xi) (e), Court-fees Act — Order by lower Court demanding ad valorem Court-fees under S. 7 (v) (e) — Held Order could only be rectified in revision. AIR 1926 Nag 290; AIR 1933 Nag 221(1) and AIR 1918 Nag 51(1), Distinguished. (Para 6)

Anno: Civil P. C., S. 115 N. 27b.

R. J. Pawar with D. G. Deshpande, for Applicant; N. P. Dwivedi, for Non-Applicants; T. P. Naik, Govt. Pleader, for the State.

CASES REFERRED: Paras

(A) (V13) AIR 1926 Nag 290: 22 Nag LR 30 6
(B) (V20) AIR 1933 Nag 221(1): 30 Nag LR 133 6
(C) (V5) AIR 1918 Nag 51(1): 49 Ind Cas 382 6
(D) ('50) Civil Revn. No. 444 of 1949, D/- 24-3-1950 (Nag) 7
(E) (V35) AIR 1948 Cal 200: ILR (1948) 2 Cal 386 7
(F) (V35) AIR 1948 Mad 409: 1948-1 Mad LJ 338 7
(G) (V20) AIR 1933 Nag 312: 29 Nag LR 367 8
(H) ('05) 32 Cal 268 8

ORDER: The plaintiff questions the order returning the plaint for presentation to the proper Court in this revision. The lower Court held that it had no jurisdiction to try the suit as the market value of the property in suit was more than Rs. 5,000/- and that the plaintiff was liable to pay 'ad valorem' court-fee.

(2) The plaintiff claims to be a tenant of the premises in suit. He seeks possession and injunction. He valued the relief for possession at Rs. 1,200/- being one year's rent, the rent being Rs. 100/- per mensem.

(3) The suit was originally filed against the landlady Shrimati Mankuar Bai (now defendant no. 1) alone. Later he joined Seth Ram Gopal Maheshwari (defendant no. 2) on the following allegation:

"The plaintiff apprehends that with a view to defeat his claim in suit the defendant no. 1 is trying to transfer the possession of the demised 'Kothi' to the defendant no. 2, Ram Gopal Maheshwari. Any such contemplated transfer is not binding on the plaintiff but with a view to obtain a full and final adjudication of the disputed claim involved in the suit the defendant no. 2 has been impleaded."

(4) The case of the defendant no. 1 is that the premises were not let out to Seth Ram Gopal Maheshwari. In para 2 of the written statement of the latter, it is stated:

"The answering defendant entered into partnership with the defendant no. 1 to run a Press and to publish a daily newspaper called "Nava Bharat" and to start that work in the premises in suit. An agreement of partnership was executed by both the parties to the effect containing all the terms of the partnership agreed upon between them on the 1st December 1949 which was registered on the 20th January 1950. In pursuance of this agreement both the defendants started their work in the premises in suit except the 7 rooms and the 1 verandah in which the Government is having its godown for stocking foodgrains from the 1st December 1949 and are carrying on their work since then."

To the same effect is the statement of the landlady.

(5) A suit by a tenant to recover the occupancy of immovable property from which he has been illegally ejected by the landlord is governed by section 7, para (xi), clause (e). Court-fee is to be computed on the amount of the rent of the immovable property payable for the year next before the date of presenting the plaint. In any other case for possession, court-fee is payable according to section 7, para (v) of the Court-fees Act. As the property in suit is a house, the question is whether court-fee is payable under section 7, para (v), clause (e) or section 7, para (xi), clause (e) of the Act.

(6) A preliminary objection was taken regarding the maintainability of the revision. Reference was made to — 'Samsherkhan v. Abdul Sattarkhan', AIR 1926 Nag 290 (A); — 'Rajjupuri v. Dewa', AIR 1933 Nag 221(1) (B) and — 'Kisan Gopal Tejmal v. Baliram', AIR 1918 Nag 51(1) (C). In the present case the question of court-

fee was also involved. The order in respect of the court-fees could only be rectified in revision. In all the three cases quoted above, the question of court-fees was not involved. I overrule the objection.

(7) I have examined the pleadings and I am of opinion that the suit falls within para (xi)(e) of section 7 of the Act. Defendant no. 2 is said to be in occupation of the premises by virtue of a certain agreement of partnership with defendant no. 1. The character of the suit is not changed by the joinder of defendant no. 2. The case of the plaintiff is that the defendant landlady is in illegal occupation and he is entitled to its possession. There is no conflict of interests between defendant no. 1 and defendant no. 2. A tenant cannot be compelled to pay court-fee on the market value of the property merely because another person has been brought on the premises. The real possession in such a case is of the landlord and not of the third party. In — 'Atmaram v. Sitaram', Civil Revn No. 444 of 1949, D/- 24-3-1950 (Nag) (D), a similar question was raised. The suit was by a tenant against the landlord and another person for possession of a certain holding from which he had been wrongfully evicted. The claim was valued under section 7, para (xi)(e). The valuation was contested by the landlord and it was contended that the relief fell under para (v) of section 7. The lower Court upheld the objection. Mudholkar, J. held that the claim had been properly valued. He observed:

> "Here the basic allegations are that the applicant became a tenant of the field and that he was illegally evicted therefrom by the landlord. Upon these allegations the applicant is clearly entitled to value the relief for possession under section 7(xi)(e) of the Court-fees Act. The decision in — 'Arjun Singh v. Phani Bhusan', AIR 1948 Cal 200 (E), supports this view. No doubt the tenant created by the landlord is also joined as a party to the suit, but then he stands in the shoes of the landlord and the suit must, even as regards him, be deemed to be one between landlord and tenant. The reasoning underlying the decision in — 'Ghulam Dastagir Saheb v. Marudai Pillai', AIR 1948 Mad 409 (F), supports this view."

In — 'Ghulam Dastagir Saheb v. Murudai Pillai (F)' (cit. supra) it was held that a suit for ejectment by a subsequent lessee against a prior lessee in possession after the expiry of the lease is governed by clause (xi)(cc) and not clause (v) of section 7 of the Act.

(8) The lower Court relied on the decision in — 'Mst. Bhagobai v. Shiamlal Dwarka Prasad', AIR 1933 Nag 312 (G), in which it was held:

> "A suit by a tenant dispossessed by his landlord against the landlord and a third person who is in possession of the property, even if it be in collusion with the landlord, is not only a suit for recovery of possession from the landlord but for dispossessing the third person and is not, as such, a suit between landlord and tenant under section 7(xi)(e) of the Court-fees Act. The court-fee payable is according to section 7(v) of the Act."

This view was based on the decision in — 'Furzand Ali v. Mohanth Lal Puri', 32 Cal 268 (H). The judgment in the Calcutta case is very short. There is no discussion of the question and no reasons have been given for the view. Both these cases are, however, distinguishable. It appears that the landlord was not in actual possession of the property in suit. The persons inducted by the landlord were in possession. Here the actual possession is of the landlady. I hold that the claim was correctly valued. The decision of the trial Court on the point is erroneous.

(9) I set aside the order returning the plaint for presentation to the proper Court.

(10) The revision is allowed with costs.

B/D.R.R. Revision allowed.

A.I.R. 1954 NAGPUR 125 (Vol. 41, C.N. 48)

MUDHOLKAR J.

Bhimrao Tanbaji, Applicant v. Girdharilal Ramrakh and another, Non-Applicants.

Civil Revn. No. 294 of 1953, D/- 20-3-1953, from order of 1st Addl. Dist. J., Nagpur, D/- 12-4-1951.

(a) **Civil P. C. (1908), S. 104 (2) and O. 43, R. 1 — Appellate order setting aside ex parte decree — No appeal lies.**

Appeal under O. 43, R. 1 — Ex parte decree obtained by respondent 2 against respondent No. 1 set aside — No second appeal lies — The fact that in setting aside ex parte decree, the appellate Court also set aside dismissal of suit against the appellant, does not entitle appellant to prefer appeal, where the lower appellate Court did not follow up its decision by drawing a decree. (Para 3)

Anno: Civil P. C., S. 104 N. 4, 21.

(b) **Civil P. C. (1908), S. 115 — Appeal treated as revision even though filed beyond limitation since the nature of the decision was to leave doubt as to which remedy was open to the aggrieved party.** (Para 4)

Anno: Civil P. C., S. 115 N. 19, 17.

(c) **Civil P. C. (1908), O. 9, R. 13, Proviso — "Decree" in proviso.**

'Obiter': The expression "the decree" in the proviso to O. 9, R. 13 according to the rules of construction, ought to be confined to an ex parte decree to which alone the substantive provision expressly relates. It means only an 'ex parte' decree in so far as defendants other than the one applying to have it set aside are concerned, and it does not include in so far as such defendants are concerned, even a decree passed on contest. (Para 5)

Anno: Civil P. C., O. 9, R. 13 N. 23.

(d) **Civil P. C. (1908), O. 9, R. 13, proviso — Suit dismissed against one of defendants — Dismissal cannot be set aside.**

What the substantive provision as well as the proviso contemplate is the setting aside of a decree "against" a defendant, not one in favour of a defendant. Where the suit has been dismissed against one of the defendants, the proviso does not empower the Court to set aside the dismissal. To hold otherwise would be doing violence to the language of the proviso. (Para 5)

Anno: Civil P. C., O. 9, R. 13 N. 2, 23.

G. J. Ghate and S. W. Deshpande, for Applicant; W. G. Deo, for Non-Applicant No. 2.

ORDER: This purports to be an appeal from an appellate order setting aside an 'ex parte' decree obtained by the respondent No. 2 against the respondent No. 1.

(2) A preliminary objection is taken on behalf of the respondent No. 2 that no appeal lies as the appeal before the lower appellate Court was one under Order XLIII, rule 1 of the Code of Civil Procedure. On behalf of the appellant it is said that as the suit had been dismissed against him by the trial Court and its dismissal has been set aside by the lower appellate Court, though in an appeal under Order XLIII, rule 1 of the Code, the decision of the lower appellate Court in so far as he is concerned amounts to a decree and is, as such, appealable. In the alternative it is contended that the proceeding should be treated as one in revision if it is held that no appeal lies against the decision of the lower appellate Court.

(3) I think that the preliminary objection must be upheld as the appeal before the lower appellate Court was one under Order XLIII, rule 1 of the Code and no second appeal is provided for against the decision of such an appeal. No doubt, the lower appellate Court has, while setting aside the 'ex parte' decree against the respondent No. 1, also set aside the dismissal of the suit against the appellant. That fact, however, does not entitle the appellant to prefer an appeal because the lower appellate Court did not follow up its decision by drawing a decree.

(4) Even though no appeal lies, the proceeding can be treated as an application for revision. No doubt the application was made more than 45 days after the decision of the lower appellate Court, but as the nature of the decision was such as to leave a doubt regarding the remedy open to the aggrieved party, I condone the delay.

(5) The question then is whether the lower appellate Court had jurisdiction to set aside the decree of dismissal of the suit against the appellant. Order IX, rule 13, reads thus:

"In any case in which a decree is passed 'ex parte' against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

Under the proviso "the decree" can be set aside in certain circumstances "as against" all or any of the defendants. Whether "the decree" referred to in the proviso means only an 'ex parte' decree in so far as defendants other than the one applying to have it set aside are concerned, or whether it includes, in so far as such defendants are concerned, even a decree passed on contest is a matter which has not been expressly considered in any of the cases to be found in the commentaries of Mulla and Sarkar.

Were it necessary to pronounce on the matter, I would have been inclined to hold that the expression "the decree" in the proviso, according to the rules of construction, ought to be confined to an 'ex parte' decree to which alone the substantive provision expressly relates.

However, I find it possible to decide this case on another ground. What the substantive provision as well as the proviso contemplate is the setting aside of a decree "against" a defendant, not one in favour of a defendant. Where, as here, the suit has been dismissed against one of the defendants, the proviso does not empower the Court to set aside the dismissal. To hold otherwise would, in my judgment, be doing violence to the language of the proviso. I therefore hold that the lower appellate Court had no jurisdiction to set aside the decree in so far as the appellant is concerned.

(6) In this view, I allow the application for revision and direct the trial Court to try the suit in so far as the respondent No. 1 is concerned. I may, however, mention that the respondent No. 2 had preferred an appeal before the lower appellate Court challenging the dismissal of the suit against the appellant. This appeal was dismissed by the lower appellate Court on two grounds: that the decree appealed from had ceased to subsist as the lower appellate Court has set it aside and also that the appellant was absent on the date of hearing. It would, in the light of my decision, be open to the respondent No. 2 to move the lower appellate Court to restore and hear his appeal on merits. The learned counsel for the appellant undertakes not to oppose such a request.

(7) Costs incurred by the appellant here and in the lower appellate Court shall be borne by the respondent No. 2. Counsel's fee Rs. 30/-.

B/R.G.D. Revision allowed.

A.I.R. 1954 NAGPUR 126 (Vol. 41, C.N. 49)

CHOUDHURI J.

Ramchandra Chamru, Appellant v. State of Madhya Pradesh, Respondent.

Criminal Appeal No. 323 of 1952, D/- 5-6-1953, from order of 1st Addl. Sessions J., Nagpur, D/- 31-10-1952.

(a) Penal Code (1860), S. 96 — Accused denying attack cannot claim right of private defence.

In order to establish an exercise of the right of private defence, it is absolutely necessary to detail the exact circumstances which led the accused to strike the blow in question with his weapon and obviously such a defence can seldom be successfully made out when the accused's case is that he did not strike the blow at all. AIR 1952 Cal 621, Relied on. (Para 9)

Anno: Penal Code, S. 96 N. 3.

(b) Penal Code (1860), Ss. 96 and 99 — Right of private defence — Extent of.

The right of private defence under S. 96 is qualified by S. 99, which lays down that a right of private defence in no case extends to the inflicting of more harm than it is necessary for the purpose of defence. If merely during the course of a hand-to-hand scuffle with an unarmed person (between the accused and the deceased) the accused pulled out his 'gupti' and stabbed the deceased it is very difficult to accept that he did so in the exercise of his right of private defence. (Para 10)

Anno: Penal Code, S. 96 N. 1; S. 99 N. 6.

(c) Penal Code (1860), S. 304, Part 1 — Sentence.

Accused having illicit intimacy with sister of deceased visiting her on her invitation — Deceased arriving there by chance — Scuffle between accused and deceased — Accused stabbing deceased — Accused convicted under S. 304, Part 1 as he exceeded right of private defence — Sentence of 10 years reduced to 5 years under peculiar circumstances of the case. (Para 11)

Anno: Penal Code, S. 304 N. 9.

G. P. Khanorkar, for Appellant; W. B. Pendharkar, Govt. Pleader, for the State.

CASES REFERRED: Paras
(A) (V12) AIR 1925 Nag 260: 26 Cri LJ 587 5
(B) (V39) AIR 1952 Cal 621: 1952 Cri LJ 1427 9

JUDGMENT: The appellant Ramchandra son of Chamru was prosecuted under Section 302 of the Indian Penal Code for the murder of one Laxman son of Tima of Umrer. He was convicted under Section 304, Part I, of the Indian Penal Code, and sentenced to rigorous imprisonment for a period of ten years by the First Additional Sessions Judge, Nagpur.

(2) Ramchandra used to visit the house of Mst. Yashodi (P. W. 1) frequently as he had illicit connection with her. On the night of the 31st July 1952 he went to her house as usual. Laxman, who was the brother of Mst. Yashodi, happened to go there and finding Ramchandra sitting with his sister beat him with a lathi. Ramchandra left the house of Mst. Yashodi. Laxman followed him. There was a scuffle between them when they grappled with each other. During this scuffle Ramchandra stabbed him with a 'gupti' and escaped. Laxman was removed to the house of his sister Mst. Yashodi where he succumbed to the injury inflicted by Ramchandra. The above facts are not now disputed.

(3) The defence of the appellant Ramchandra was that he was beaten with a stick by Laxman inside Mst. Yashodi's house. He managed to release himself from his clutches with great difficulty and as he was running towards his house he was chased by Laxman who gave him some more blows with his stick and then grappled with him and wanted to throttle him. He struggled to free himself and though he cried for help he received none. During this struggle he pulled out a stick which he had picked up from the house of Mst. Yashodi and which Laxman had kept pressed by his foot during the scuffle. As he pulled out this stick Laxman lost his balance and fell forcibly on it receiving the injury. He stated that he did not know that this stick was a weapon and pleaded that he never intended to kill Laxman. He stated that he used the stick thinking it to be stick in order to save himself but unfortunately it hit the deceased.

(4) The learned Additional Sessions Judge held that the accused exceeded the right of private defence in causing the death of Laxman and convicted him under Section 304, Part I, of the Indian Penal Code as stated above. The appeal is directed against this finding of the trial Court. The only ground raised is that the case fell within the purview of Section 100 of the Indian Penal Code and the appellant ought to have been acquitted.

(5) The learned counsel for the appellant referred to paragraphs Nos. 24, 25, 28 and 30 of the judgment of the Additional Sessions Judge, and argued that the circumstances under which the appellant had inflicted the injury to Laxman justified the plea of self-defence. It was contended on behalf of the appellant that when he was assaulted by Laxman he was not bound to modulate his attack and with the instinct of self-preservation upon him he pursued his defence a little further. He was justified in doing so and he cannot be said to have exceeded his right of private defence. The learned counsel for the appellant relied on the decision in — 'Sitaram v. Emperor', AIR 1925 Nag 260 (A) in support of his contention.

(6) The learned Additional Sessions Judge has come to the conclusion that the appellant had received six stick blows from deceased Laxman before there was grappling between them near Kacharu's house. It is also clear from the evidence of Bhullu (P. W. 4) that during the scuffle which ensued after the appellant was beaten several persons who had assembled near the house of Mst. Yashodi had approved of Laxman's action, so that the appellant may be prevented from visiting Mst. Yashodi's house. There is also satisfactory evidence to show that the stick (Article D) which was used by Laxman in beating the appellant was a fairly heavy stick which according to Dr. Phadke could cause a fatal blow.

(7) The learned Additional Sessions Judge has also after weighing the oral evidence on record come to the conclusion that the deceased was in an advantageous position even during the grappling and therefore the appellant was entitled to defend his body against the attack by the deceased. The appellant's right of private defence commenced at the stage when he received stick blows from the deceased during the assault which took place near Kachru's house. It has been established that immediately after Laxman gave two stick blows to the appellant, Laxman's stick fell down during the scuffle between him and the appellant. It is thus clear that when the deceased was stabbed by the appellant during the scuffle he had no lathi in his hands There could therefore be no reasonable apprehension in the mind of the appellant that Laxman would cause grievous hurt or death.

(8) The appellant in his defence stated that when Laxman grappled with him he wanted to kill him by throttling. Goma (D. W. 1) has deposed that Laxman was pressing the neck of the appellant Ramchandra with both of his hands. His evidence was not believed by the learned Additional Sessions Judge in view of the fact that he is closely related to Mst. Yashodi (P. W. 1) who has been trying to shield the appellant. Dr. Phadke who examined the appellant soon after the occurrence did not find any marks of violence on his neck. Kachru (P. W. 2), Bhullu (P. W. 4) and Yashoda (P. W. 12) do not support the version given by the appellant. Ramdayal (P. W. 11) was evidently influenced. He was disbelieved when in his cross-examination he stated that the appellant's throat was being pressed by Laxman immediately before he was struck.

(9) In order to establish an exercise of the right of private defence, it is absolutely necessary to detail the exact circumstances which led the accused to strike the blow in question with his 'gupti', and obviously such a defence can seldom be successfully made out when the accused's case is that he did not strike the blow at all. In his replies to questions Nos. 17 to 20, he has persistently maintained that he did not stab Laxman during the scuffle. He stated that he lost his balance and Laxman fell on his chest and cried out "Oh father, I am dead". Immediately after, he ran away.

In — 'Dhirendra Nath v. State', AIR 1952 Cal 621 (B) it has been held as follows:

"A plea of the right of private defence can be taken by a person who admits the act charged against him, but pleads an excuse. If a person, however, states that he had not done the act at all, it is difficult to see how at the same time the question of a right of private defence would arise. Whether or not an accused person, taking a plea of the right of private defence, is to prove it in the same manner as the prosecution is required to prove its case or whether a lower standard of proof would suffice, the accused must, at least, make a case out of which a plea of the right of private defence might arise.

It is true that an accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. But the question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden."

(10) The right of private defence under S. 96 of the Indian Penal Code is qualified by Sec. 99 'ibid' which lays down that a right of private defence in no case extends to the inflicting of more harm than it is necessary for the purpose of defence. If merely during the course of a hand-to-hand scuffle with an unarmed person, as the facts indicate here, the appellant pulled out his 'gupti' and stabbed the deceased it is very difficult to accept that he did so in the exercise of his right of private defence. I see no reason to disagree with the finding of the learned Additional Sessions Judge that the appellant in stabbing the deceased had exceeded his right of private defence.

(11) The next question for consideration is the sentence of ten years rigorous imprisonment which has been awarded by the trial Court. The trial Court came to the conclusion that the appellant was entitled to defend his body against the attack by the deceased Laxman. There has been criminal intimacy between the appellant and Mst. Yashodi (P. W. 1), and the appellant had gone to her on invitation. It was by chance that the deceased happened to arrive there and took objection to the visit of the appellant. It is in the evidence of Mst. Yashodi that she had remonstrated to her brother for beating the appellant as she herself had called him. Taking into consideration the entire circumstances, the sentence of ten years rigorous imprisonment, in my opinion, would be too severe a punishment in the present case. I therefore reduce the sentence to five years rigorous imprisonment.

(12) With the above modification in the sentence, the appeal fails and is dismissed.

B/R.G.D. Conviction maintained and sentence reduced.

A.I.R. 1954 NAGPUR 128 (Vol. 41, C.N. 50)

MUDHOLKAR J.

Barba Kopaji, Defendant-Applicant v. Rajeshwar Rangnath, Plaintiff-Non-Applicant.

Civil Revn. No. 349 of 1952, D/- 7-4-1953, against decree of Civil 2nd Class J., Darwha, D/- 30-4-1952.

Provincial Small Cause Courts Act (1887), Ss. 15 and 25 — Suit for fruit of trees or damages — Question of title incidental.

Where the plaintiff has a 'prima facie' right of recovering the value of half the fruit of trees, a suit for half the fruit or for damages in lieu thereof, is not a suit which is barred from the cognizance of a Small Cause Court, even though the defendant raises the question of title by denying the plaintiff's title. In such a case the question of title is only incidental and when such is the case it is in the discretion of the Court of Small Causes whether to try the suit itself or to return the plaint for presentation to the proper Court. It cannot be said that in exercising its discretion to try the suit itself, the Court commits any error. (Paras 3, 4)

Anno: Prov. Small Cause Courts Act, S. 15 N. 3, S. 25 N. 1.

P. R. Padhye, for Applicant; R. J. Bhave, for Non-Applicant.

CASE REFERRED:
(A) ('81) 3 All 168 (Pr 3)

ORDER: This is a defendant's application for revision of a decree passed by a Court in its small causes jurisdiction. The claim as laid by the plaintiff was for the recovery of the price of half the produce of mango crop from a tree belonging to him, for the years 1949,1950 and 1951.

(2) It is common ground that the tree is situate in the field belonging to the defendant. According to the plaintiff he has a half share in the mango crop of the tree because he is the owner of that tree. The suit was defended on various grounds but the only point which is material here is whether the suit was cognizable by a Court of Small Causes because it was for the recovery of profits from immovable property and also because it raised a question of title to the immovable property.

(3) The suit is clearly not beyond the cognizance of the Court of Small Causes on the first ground because it has been held in — 'In the matter of the Petition of Nasir Khan v. Karamat Khan', 3 All. 168 (A) that a suit for the fruit upon trees, or for damages in lieu thereof, is not a suit which is barred from the cognizance of a Small Cause Court.

(4) As regards the second ground it is sufficient to point out that there is an entry in the record of rights to the effect that the plaintiff has a half share in the produce of the tree. It would follow, therefore, that the plaintiff has at least a 'prima facie' right of recovering the value of half the crop. No doubt, the defendant has raised the question of title by denying the plaintiff's title to the tree. That question, however, is only incidental and when such is the case it is in the discretion of the Court of Small Causes whether to try the suit itself or to return the plaint for presentation to the proper Court. It cannot be said that in exercising its discretion to try the suit itself, the Court committed any error.

(5) In this view I uphold the decree of the Court below and dismiss the application for revision with costs. Counsel's fee Rs. 15/-.

B/R.G.D. Application dismissed.

A.I.R. 1954 NAGPUR 129 (Vol. 41, C.N. 51)

V. R. SEN AND DEO JJ.

Rambilas Sitaram, Defendant No. 6, Appellant v. Ganpatrao Pandharinath and others, Plaintiff and Defendants 1 to 5, Respondents.

First Appeals Nos. 99 & 110 of 1945, D/-13-3-1953, from decree of Sub-J., 1st Class, Wardha, D/-29-9-1945.

(a) Transfer of Property Act (1882), S. 53 — Intention to defeat or defraud creditor — Burden of proof — (Evidence Act (1872), S. 102).

The burden of proof in a suit under S. 53, T. P. Act that the alienation was made with a view to defeat or delay the creditors is on the plaintiff. Plaintiff must plead and prove circumstances to discharge this onus. If he makes out a 'prima facie' case of fraudulent intention, the burden shifts on to the transferee to prove his good faith AIR 1941 Mad 690; AIR 1943 All 2 and AIR 1947 Cal 154, Ref. (Para 13)

It is not enough to bring out circumstances which create suspicion. The decision must rest upon legal grounds established by legal testimony and not on suspicion.

Mutation of names by itself is not sufficient to discharge the onus that lies on the transferee. AIR 1943 All 2, Ref. (Para 27)

Held that the two facts established, viz., that the sale took place during the pendency of the suit and that no appreciable attachable property was left, were not sufficient to discharge the initial onus, particularly in view of the sale price being only about 4 per cent. of the vendor's indebtedness to the creditor. (Para 13)

Anno: T. P. Act, S. 53 N. 6, 34; Evidence Act, Ss. 101 to 103 N. 33.

(b) Transfer of Property Act (1882), S. 53 — Avoidance of transfer in part.

Even if a transfer is partly for consideration, it can be set aside as a whole if it is collusive and fraudulent. (Para 27)

Anno: T. P. Act, S. 53 N. 15.

(c) Transfer of Property Act (1882), S. 53 — Intention to defeat or defraud creditor — Proof of.

Transfer by sale in favour of father-in-law — Property worth much more than price stated — Consideration being payment of mortgage debt which had not become due — No legal necessity for alienation — Subsequent payments towards mortgage made by transferors who continued in possession — Story of lease not believed — Held that prima facie case of intention to defeat and defraud creditors was made out. Transfer held not in good faith or for consideration. (Paras 24, 26)

Anno: T. P. Act, S. 53 N. 6, 16.

(d) Transfer of Property Act (1882), S. 53 — Effect of declaration under.

The effect of the declaration under S. 53, T. P. Act, is that the transaction does not affect the creditors' right to recover their claims from the property transferred. The declaration still leaves the deed operative between the parties thereto and does not amount to cancelling or setting aside the deed because the creditors have no title or interest in the property to set aside the deed as between the parties thereto. 10 Mad 213 and AIR 1948 Bom 265, Rel. on. (Para 30)

Anno: T. P. Act, S. 53 N. 8.

(e) Transfer of Property Act (1882), S. 53 — Suit for avoiding transfer — Limitation — Starting point — (Limitation Act (1908), Art. 120).

A suit for declaration under S. 53, T. P. Act is governed by Art. 120, Limitation Act and the starting point of limitation under Art. 120, Limitation Act is the date on which circumstances entitling the plaintiff to have his interest guarded first comes to his knowledge, as the right to sue then accrues to him. AIR 1930 PC 270; AIR 1931 Lah 70 (2); AIR 1931 Oudh 333 and AIR 1941 PC 1, Rel. on. (Para 31)

Anno: T. P. Act, S. 53 N. 35; Lim. Act, Art. 120 N. 23.

M. Adhikari, for Appellant; D. T. Mangalmurti, (for No. 1), M. R. Bobde and G. J. Ghate, (for Nos. 2 and 3), for Respondents.

CASES REFERRED: Paras

(A) (V28) AIR 1941 Mad 690: 200 Ind Cas 577 13
(B) (V30) AIR 1943 All 2: 205 Ind Cas 30 13, 27
(C) (V34) AIR 1947 Cal 154: 225 Ind Cas 367 13
(D) (V24) AIR 1937 Nag 372: ILR (1938) Nag 206 (FB) 28
(E) ('08) 35 Cal 551: 35 Ind App 98 (PC) 29
(F) (V3) AIR 1916 PC 238: 44 Cal 662 (PC) 29
(G) (V27) AIR 1940 All 407: ILR (1940) All 542 29
(H) (V26) AIR 1939 Pat 5: 180 Ind Cas 615 29
(I) ('87) 10 Mad 213 30
(J) (V35) AIR 1948 Bom 265: ILR (1947) Bom 807 30
(K) (V17) AIR 1930 PC 270: 11 Lah 657 (PC) 31
(L) (V18) AIR 1931 Lah 70 (2): 12 Lah 262 31
(M) (V18) AIR 1931 Oudh 333: 7 Luck 131 31
(N) (V28) AIR 1941 PC 1: ILR (1941) Kar PC 1 31

JUDGMENT: This judgment will dispose of both the First Appeal No. 99 of 1945 and First Appeal No. 110 of 1945, arising out of the decree in Civil Suit No. 30-A of 1944, decided on the 29th September 1945, declaring that the property in suit is liable to attachment and sale in execution of the decree (Ex. P-6) in Civil Suit No. 1-B of 1938, decided on the 11th September 1939, and that the sale deeds, Exhibit P-1 dated the 18th June 1934 in favour of defendant 1 and Exhibit P-2 dated the 27th March 1939 in favour of defendant 2 are bogus transactions. First Appeal No. 110 of 1945 is by defendants 1 and 2 and First Appeal No. 99 of 1945 is by defendant No. 6 who had purchased a house from defendant No. 2 under the sale deed (Exhibit 6 D-7) dated the 16th October 1943.

(2) Under a partition decree based on a compromise passed on the 18th February 1933 the defendants 3 to 5, Champat, Ramdas and Bahenabai, obtained immovable properties as per plaint schedule A and were made liable for the family debts due to Pandharinath, father of plaintiff Ganpatrao, the Co-operative Society, Karanji, and two other creditors. At that time defendants 3 and 4 were minors and their mother, defendant No. 5, was their guardian.

(3) A daughter of defendant No. 1 Sitaram was married to defendant No. 3 in 1930, i.e., about three years before the partition in 1933. On the 13th December 1933 defendant No. 5 for herself and as guardian of her two minor sons executed the mortgage (Exhibit 1 D-9) in favour of the Co-operative Society, Karanji, for Rs. 1,693/4/- to satisfy a debt due by Wamanrao, the father of defendants 3 and 4, and which the executants had undertaken to pay under the partition. The mortgage deed provided for interest at Re. 1/- per

cent. per month and made the debt repayable by four annual instalments from the 1st April 1935 to the 1st April 1938. The annual instalment including interest was for about Rs. 600/-. The property hypothecated was one-fifth share in Karanji with all rights excluding the cultivating rights in sir lands but including the two Khudkasht Fields Nos. 10 and 46. Wamanrao and Martandrao, father and brother of defendants 3 and 4, were sureties. Defendant No. 1 was an attesting witness.

(4) On the 18th June 1934 the defendant No. 5 acting for herself and her minor sons executed the sale deed (Exhibit P-1) in favour of defendant No. 1 of the mortgaged property excluding Khasra No. 46 but including a kotha in that village. According to the sale deed, the defendant No. 1 took 'havala' of the mortgage debt of Rs. 1,800/- and the balance of Rs. 700/- was required for cultivation operations, improvements and household expenses and was to be paid before the Sub-Registrar. The endorsement of the Sub-Registrar shows that the payment was made in his presence.

(5) Pandharinath applied for adjudication of defendants 3 and 4 as insolvents, basing his cause of action on the transfer Exhibit P-1, dated the 18th June 1934. The application was dismissed on the ground that the minors were not debtors within the meaning of the Insolvency Act. This insolvency case No. 66 of 1934 was decided on the 30th July 1937. During the pendency of this case Pandharinath died and the plaintiff and his brother continued the proceedings. After the dismissal of this application, they instituted a suit for the recovery of their debt and obtained the money decree (Ex. P-6) for about Rs. 12,000/-. In execution of that decree the plaintiff, who is the sole surviving decree-holder, applied for attachment of certain property but it was refused, it is alleged, on the 25th October 1941 on the ground that it stood recorded in the revenue records in the name of defendant No. 1. This is the cause of action for the suit instituted by the plaintiff on the 5th March 1944 for himself and on behalf of the creditors of defendants 3 to 5, for a declaration; and he obtained the decree under appeal.

(6) The second sale deed (Exhibit P-2) in favour of defendant No. 2 was executed by defendant No. 3 as major and by defendant No. 5 for herself and as guardian for defendant No. 4. The property sold is the -/2/- share of mouza Morangna with all rights, but excluding cultivating rights in Sir, and a tiled house at Wardha. The consideration for the sale, Rs. 5,00/-, was to be paid before the Sub-Registrar and, as the endorsement shows, it was so paid.

(7) The immovable property obtained by defendants 3 and 5 at the partition was :

(a) one-fifth share in mouza Karanji together with two Khasra numbers of Sir land and two Khasra numbers of Khudkasht land and a kotha. This kotha is not shown in the plaint schedule.

(b) -/2/- share of mouza Morangna with sir and occupancy lands,

(c) grazing land at Morangna,

(d) one occupancy field at Kharangna,

(e) a share in mango groves in several villages, and

(f) a house site with plinth at Wardha.

(8) As regards the first sale deed, the lower Court found that

(a) the defendant No. 1 was aware of the indebtedness of the defendants 3 to 5 to the plaintiff's father;

(b) there was no necessity for paying off the mortgage in favour of the Society as even the first instalment had not become due;

(c) the defendant No. 1 did not ascertain what arrangements the defendants 3 to 5 were making to pay off the plaintiff's father;

(d) not only this, according to the recitals in the sale deed, he paid Rs. 700/- in cash to the executants before the Sub-Registrar instead of taking a 'havala' to pay a creditor;

(e) the defendants 3 to 5 continued in occupation of the kotha and after they constructed a new kotha, this kotha was kept locked;

(f) they continued in possession of Knasra No. 10 and on the date of the suit defendant No. 3 was recorded an occupancy tenant. The story of defendant No. 1 that it was leased out to defendant No. 3 was not believed;

(g) the defendant No. 1 did not pay the rent of this field to the lambardar, which was paid by defendant No. 3;

(h) defendant No. 3 recovered rents from the tenants but the receipts for rents were signed and issued by defendant No. 1;

(i) defendant No. 1 did not file any receipts to show that he received profits from the lambardar. The only receipt, Exhibit D-11, for such profits is for the year 1944;

(j) the mortgagee was not paid off immediately after the sale deed, except Rs. 800/- on the 3rd October 1934. The Society had to obtain an award on the 25th August 1937 and start execution proceedings against the mortgagors and the defendant No. 1 who had taken the 'havala'. The subsequent payments to the bank on behalf of the mortgagee are as under :

Rs. 200/-	on the 9th February 1938 through defendant No. 1 by the hand of defendant 2.	Exhibit 1 D-4.
Rs. 325/-	on the 9th April 1938 through defendant No. 1 by the hand of defendant 2.	Exhibit 1 D-5.
Rs. 300/-	on the 3rd January 1940 through defendant No. 1 by by the hand of Deepchand (D. W. 1).	Exhibit 1 D-6.
Rs. 200/-	on the 6th February 1940 through defendant No. 1 by the hand of Deepchand.	Exhibit 1 D-7.
Rs. 290/-	on the 2nd August 1940 through defendant No 1 by the hand of Deepchand.	Exhibit 1 D-8.

The lower Court held that all these payments were made by defendants 3 to 5.

(k) the defendant No. 1 was not in a financial position to purchase this property as he was drawing Rs. 43/- per month as a school teacher and as there were no documents to prove that he had then money-lending of Rs. 6,000/-;

(l) the defendant No. 1 had no cultivation at Karanji;

(m) he did not care to enquire of the market value of the property before making the purchase; and

(n) that at the date of the agreement of sale he did not pay earnest money though a written agreement was taken.

On these facts found, the lower Court observed:

"I fail to understand as to how defendant No. 1 had any money to pay for the sale deed and as to why he should make his investment at 6/- per cent per annum and as to why he should purchase property at Karanji Kazi. .....It

appears that Bahenabai, her brother and defendant No. 1 anyhow managed to effect the transaction of sale.....

Looking to the close relationship between the vendors and the vendee the evidence about possession of the property, the awkward (?) evidence about the sales and the payments to the Bank not by the vendee but by the vendors and to some extent inadequacy of the price of the property alleged to be purchased by the defendant No. 1 (P. W. 5, Balaji), I hold that the sale deed dated the 18th June 1934 is a bogus transaction. The payment of Rs. 700/- before the Sub-Registrar was merely a show."

(9) As regards the second sale deed, the learned Judge stated :

(a) that the defendant No. 3 sold this property to his own broker without making an inquiry of the price;
(b) that the need for purchase of bullocks, stated in the sale deed, was not proved;
(c) that there was high demand for sites at Wardha;
(d) that the village share was worth at least Rs. 2,000/- (P. W. 5, Balaji was relied on);
(e) that the sale was executed when the plaintiff's suit was pending;
(f) that there is no evidence that defendant No. 2 received profits of Kharangna from the lambardar;
(g) that the sale of house at Wardha to defendant No. 6 was brought about by defendant No. 3 who purchased the stamps for and attested the sale deed and the correction deed;
(h) that there is no explanation why defendant No. 3 took such keen interest in these transactions; it must be because the sale in favour of defendant No. 2 was bogus;
(i) that defendant No. 2 has not entered the witness-box.

The learned Judge therefore observed :

"It appears clearly that to defeat the plaintiff, defendants 3 to 5 executed this sale deed and the payment of Rs. 500/- was merely a show. I therefore find that the sale deed dated the 27th March 1939 is a bogus transaction."

(10) As regards the sale by defendant No. 2 to defendant No. 6, the learned Judge held that the latter was not a 'bona fide' purchaser for value as defendants 2 and 3 were close acquaintances and defendant No. 3 brought about this transaction. Therefore defendant No. 6 must have known how defendant No. 2 acquired this property.

(11) Defendants 1, 2 and 6 attack all adverse findings. It will be convenient to examine first the facts of the second sale deed. The finding of the lower Court that the value of the village share was at least Rs. 2,000/- is not only not based on any evidence but is contrary to the evidence on record. The evidence of the patwari Balaji (P. W. 5) is unreliable. It is a sheer guess work. He had not looked into the village papers before giving evidence. He said that the net annual profits of the whole mahal was Rs. 100-150 and 'siwai amdani' was Rs. 10 to 12/-. He therefore asserted that the village was worth Rs. 8,000/-. According to the evidence of this witness, the return on this investment was only 1¼ per cent to 2 per cent, which is absurd. The price is highly exaggerated by him but even on his evidence the price would be Rs. 1,000/- and not Rs. 2,000/-. There is reliable evidence of income in the Settlement Khewat (Exhibit P-8) according to which the village profits are Rs. 119/4/-. There is no 'siwai' income. This works out profits of Rs. 15/- per year on the -/2/- share. Champat has deposed that it was Rs. 13/- per year. The minimum yield of Rs. 5/- per cent on investment on immovable properties is normally expected. The year 1939 was a year of acute depression. The price of the village share cannot therefore be more than Rs. 300/-. There is no finding of the price of the house in the year 1939. Plaintiff examined the attesting witness but he did not ask him about the value of the house. At the partition admittedly the vacant site with plinth was obtained by defendants 3 to 5. A structure was put up by defendant 3 of tiles and 'sind' walls. The evidence of P. W. 3 and P. W. 4 is unreliable. The former was indebted to the plaintiff for several years and had no occasion to ascertain the price of plots and houses at Wardha. He is not able to say even the year in which he saw this property. According to the other witness, its value when he gave evidence was about Rs. 1,700/- to Rs. 1,800/-. He admitted that the defendant No. 6 must have spent about Rs. 1,700/- to Rs. 1,800/- to improve the house and that the price had gone up by 4-5 times than the prices in 1939. Thus the price of the plot and the structure thereon when defendant No. 2 purchased it must have been almost negligible. This is also evident from a comparison of Ex. P-9 dated the 11th January 1929, a sale deed in favour of the witness, and Exhibit P-2 in dispute. It is common knowledge that the depression which started from about the year 1930 was at its lowest in 1939. The two storeyed house of the witness on a plot of 1800 square feet with a very little open land was purchased by him for Rs. 1,200/-, while the area of the plot in question is only 512 square feet. The plinth area was also less, but the precise area cannot be ascertained from the evidence. The walls were of 'sind'. Defendant No. 3 Champat has stated that he built the structure of bamboo walls with mud plaster at a cost of about Rs. 100/- only. P. W. 4 has also stated that the structure of the house in 1939 might be worth about Rs. 100/- to Rs. 200/-. Thus the house property was worth about Rs. 200/- at the time of the sale. That being so, the defendant 2 purchased the property for adequate consideration. He had paid it before the Sub-Registrar as is clear from the endorsement and the evidence of the attesting witness Pandba (P. W. 2) and defendant No. 3. There is no evidence to the contrary. We therefore hold that defendant No. 2 purchased the property for adequate consideration and that the sale is not a sham transaction.

(12) Defendant No. 3 has stated that defendant No. 2 was his occasional broker and that he sold the property for purchase of bullocks. Defendant No. 5 has deposed that two pairs of bullocks were purchased out of this consideration. There is no evidence to the contrary.

(13) The lower Court has started on the presumption that the burden of proof lay on the transferee to prove that he had not taken the transfer with a view to defeat or delay the creditors. This is obviously erroneous. The plaintiff has brought this suit undoubtedly under section 53 of the Transfer of Property Act. This is clear not only from the title of the suit and the allegations in the plaint but also from the application under Order I, rule 8, Civil Procedure Code, for leave to institute the suit for himself and on behalf of all creditors of defendants 3 to 5. In paragraph 16 the lower Court has expressly held that the suit was under section 53 of the Transfer of Property Act and was therefore governed by Article 120 of the Limitation Act. The burden

of proof in a suit under this section that the alienation was made with a view to defeat or delay the creditors is on the plaintiff. Plaintiff must plead and prove circumstances to discharge this onus. If he makes out a 'prima facie' case of fraudulent intention, the burden shifts on to the transferee to prove his good faith. — 'Narasimhamurti v. Maharajah of Pittapur', AIR 1941 Mad 690 (A); — 'Har Prasad v. Mohammad Usman', AIR 1943 All 2 (B); — 'Rajbari Bank v. Harshamukhi Singha', AIR 1947 Cal 154 (C). It is not enough to bring out circumstances which create suspicion. The decision must rest upon legal grounds established by legal testimony and not on suspicion. The plaintiff had pleaded that the transfer was made during the pendency of his suit, that the transferee was a relation, friend and a 'dalal' of the transferors, that the property was worth at least Rs. 2,000/-, that the consideration stated in the deed was not paid, that the defendants 3 to 5 continued in possession of the property till the date of the plaint and that the mutation of name was a link in the fraud. We have already found that the sale was for an adequate consideration which was utilized for purchase of bullocks and that the defendant No. 2 was only an occasional broker. There is no evidence that the defendants 3 to 5 continued in possession of the property. On the contrary, plaintiff's witnesses have admitted that defendant No. 6 had reconstructed the house at a great cost and was in possession. No doubt, the defendant No. 2 has not entered the witness-box to swear that he received his share of the profits from the lambardar. No inference adverse to him can be drawn on this ground unless the onus has shifted on to him. All that the plaintiff has proved is that the sale took place during the pendency of the plaintiff's suit, that no appreciable attachable property was left after this sale, that Champat did not make enquiries about the value of the adjoining plots, and that defendant No. 5 was not aware of the agreement to sell. There is no evidence that the adjoining plots had changed hands at about that time or that the value of the plot in question was inadequate as compared with the prices of those plots. After attaining majority, defendant No. 3 was residing at Wardha and doing some kind of business. Naturally defendant No. 5 relied on her adult son to enter into the transaction of the sale of the property. From her evidence it is clear that she knew of the sale and that the sale proceeds were utilized for purchase of bullocks. The two facts established, viz., that the sale took place during the pendency of the suit and that no appreciable attachable property was left are not sufficient, in our view, to discharge the initial onus, particularly in view of the sale price being only about 4 per cent of the vendors' indebtedness to the plaintiff.

(14) The learned counsel for the plaintiff strongly relies on the circumstance that four years later defendant No. 3 took a somewhat active part in bringing about the transaction of the sale of the house at Wardha between defendant No. 2 and defendant No. 6. The explanation offered by defendant No. 3 that he was casually present is not acceptable. Even so, it would not be legal to infer that the consideration paid on behalf of the defendant No. 6 who was then a minor was received by defendant No. 3. The plaintiff has not cared to examine either the writer or the attesting witnesses or the identifying witnesses to prove that the consideration was received by defendant No. 3. Nor would it be legal to hold that the earlier sale was a sham transaction. Disagreeing with the lower Court, we therefore hold that the sale dated the 27th March 1939 in favour of defendant No. 2 is not a sham transaction or was it brought about with a view to defeat or delay the plaintiff's claim. The plaintiff's suit against defendants 2 and 6 must therefore fail.

(15) As regards the sale in favour of defendant No. 1, the finding that defendant No. 1 had no money to pay for the sale is not based on any legal evidence. The plaintiff had not pleaded that defendant No. 1 was not in a position to pay the consideration. Consequently the latter did not produce any documentary evidence to prove the extent of his property and money-lending business and his ability to pay the consideration. When it was suggested in the cross-examination of Champat that the defendant No. 1 was not in a position to advance the consideration, the defendant asserted in his evidence that he had properties. He stated that he had 17 acres at Nandra, 25 acres at Mandgaon and 45 acres at Sakurli joint with his uncle. The land at Nandra was cultivated at home and the others were given on lease. There was no cross-examination on this point. He also asserted that he was carrying on money-lending business and that in the year 1934 it was to the extent of Rs. 6000/-. The evidence regarding money-lending was dismissed by the lower Court on the ground that defendant No. 1 had not produced those documents. He has therefore made an application here for admission of the several documents regarding his money-lending. In the first place, this fact should not have been considered against defendant No. 1 in the absence of a specific plea. There was no evidence on the side of the plaintiff to prove that defendant No. 1 was not a man of means. There was therefore no occasion for defendant No. 1 to produce those documents in the lower Court. Under these circumstances, we admit these documents in appeal. The defendant No. 1 has given evidence of his agricultural property and purchase of houses at Hinganghat. All this was not possible from his meagre earnings as a school teacher. Disagreeing therefore with the lower Court, we hold that the defendant No. 1 was carrying on money-lending business and had other property from which he could raise the consideration to be paid for the sale in question.

(16) As regards the consideration, the amount of Rs. 700/- was paid before the Sub-Registrar. There is no evidence that the money was returned to the vendors. As regards the mortgage debt payable to the Society, the plaintiff has alleged that "defendants 3 and 4 had themselves paid 'some' of the instalments payable to the Society". It is, however, not stated which of the six payments were made by them. It is not the plaintiff's case that the debt remained to be satisfied on the date of the suit. The first payment of Rs. 800/- was made on the 3rd October 1934. That payment appears from the receipt to have been made by defendant No. 1. The other payments are also shown to have been made by defendant No. 1 through defendant No. 2 and Deepchand. Deepchand swears that he made those payments on behalf of defendant No. 1 and handed over the receipts to him. He repelled the suggestion that Champat had any cloth shop adjoining his shop at Wardha and he was interested in him. There is no evidence that there was such a shop. There is no reason therefore to disbelieve the evidence of Deepchand, who appears to be a disinterested witness. The plaintiff has not examined the bank clerk who received these payments

or the Secretary who signed these receipts to prove that it was the defendant No. 3 who in fact made these payments. There is no evidence to show that defendant No. 3 paid these amounts to Deepchand and defendant No. 2 to make payments in the name of defendant No. 1. As appears from the copies on record, the receipts were signed by defendant 2 or Deepchand as persons actually making the payments and receiving receipts therefor. There is therefore no evidence that these payments were made by defendant No. 3. The finding of the lower Court that all these payments were made by defendants 3 to 5 is obviously contrary to the plaintiff's pleading and is not supported by the evidence on record.

(17) The other circumstances are, however, telling. It appears that in the partition the defendants 3 and 5 were allotted considerable unattachable property. Pandharinath could have enforced his pre-partition debt against all the members of the family. He, however, chose to divide the liabilities and took mortgages from Wamanrao and Martandrao. Apparently, the minors refused to execute the mortgage and were not willing to satisfy the debt. It is not unlikely that they were acting on the advice of defendant No. 1 who was deeply interested in his son-in-law. The only valuable attachable property was the one-fifth share of mouza Karanji and the two Khudkasht fields appurtenant thereto. According to the plaintiff as P. W. 1, the value of property covered by Exhibit P-1 was about Rs. 6,000/- and according to P. W. 3 it was worth Rs. 5,000/- to Rs. 6,000/-. The defendant No. 1 has not adduced any evidence to the contrary. The net village profits on the one-fifth share amounted to Rs. 104/- (Exhibit P-7). Its price in 1934 must have been about Rs. 2,000/-. The defendant No. 1 says that he calculated a return of 6 per cent. Even so, the price of this share comes to about Rs. 1,700/-. The kotha was worth Rs. 100/- (D. W. 1 Bala). It is absurd that the price of 19.20 acres with a rent of Rs. 29/- was only Rs. 700/- which is the defendants' calculation. The evidence of Bala is unacceptable. We prefer the evidence of P. W. 3 which is supported by P. W. 5 and we hold that the field was then worth Rs. 2,500/- to Rs. 3,000/-. In the witness-box Champat was not willing to finally accept the offer to sell his one-third share for Rs. 7,000/-. No doubt, prices were very high in 1945; but it is absurd to contend that a field worth Rs. 700/- was fetching Rs. 21,000/-. Under these circumstances, we have no hesitation in holding that the property covered by the sale deed (Exhibit P-1) was worth much more than the price stated therein.

(18) As observed by the lower Court, there was no occasion for this sale. Even the first instalment of the mortgage debt had not become due. If really the intention was to pay off the mortgage immediately, the defendant No. 1 would have made payment forthwith and would not have allowed the award to be passed. The payments that were in fact made could easily have been made from the income of the property. Any 'bona fide' alienee would not take a sale-deed of minor's property unless there was legal necessity for the alienation and the consideration was adequate.

(19) Immediately after this sale-deed, Pandharinath applied for the adjudication of defendants 3 and 5 as insolvents. The sale-deed in favour of defendant No. 1 was alleged to be an act of insolvency, being a transfer of property by the debtors with intent to defeat or delay their creditors. During the pendency of those proceedings, Pandharinath died and the plaintiff and his brother were brought on record. They continued the proceedings. The application was dismissed on the 30th October 1937 on the ground that defendants 3 and 5 were not debtors within the meaning of the Insolvency Act. The question whether the impugned transfer was an act of insolvency or not was not decided. That remedy was apparently misconceived. If the defendants 3 and 5 could be adjudged insolvents, there is no doubt that the transfer could have been set aside under section 53 of the Provincial Insolvency Act.

(20) It is not now disputed that the defendants 3 to 5 continued in possession of the kotha and the Khudkasht field. As regards the village share there is evidence that defendant No. 3 collected rents from the tenants and that the receipts were later on passed by defendant No. 1 (D. W. 1 Bala). This evidence does not appear to be reliable because the 'patti' was not separated and defendant No. 1 was not the lambardar. Wamanrao continued to be the lambardar and must have been recovering rents from the tenants. The receipt from the lambardar (Exhibit D-11) relating to the profits for the year 1944 proves that the defendant No. 1 was not the lambardar. Defendant No. 3 who was in possession of the Khudkasht field was paying rent to the lambardar. If these payments were made in the name of defendant No. 1, there would have been receipts to that effect. His evidence that he paid the rent for 1934-35 to Wamanrao and that the latter declined to pass a receipt & promised to make an entry in the rent receipt book cannot be true. Rent receipt books are not issued to co-sharers but to tenants. A co-sharer does not ordinarily pay rental assessment but gets it adjusted towards his share of village profits. His statement that he received his share of profits from Wamanrao and passed receipts in his favour cannot be believed in the absence of the documents and the evidence of Wamanrao. We are therefore satisfied that the property continued to remain in the possession of defendants 3 to 5.

(21) The learned counsel for the defendant No. 1 has argued that mutation having been made in accordance with the sale-deed, it should be held that it was not executed with the intention of defeating the claim of the plaintiff. We cannot accept this contention. Even if the sale-deed is fraudulent as alleged by the plaintiff, the parties to it will take steps to make it appear genuine. The mutation of names cannot, in the circumstances of the case, be a factor against the plaintiff.

(22) The defendant No. 1 had no cultivation at mouza Karanji, nor did he propose to have any cultivation after the purchase of this property. As an educated person he must have known that he would not be able to retain the Khudkasht field unless he allowed it to remain fallow or cultivated it at home. As a business transaction he would not therefore purchase the property unless he had the intention to start cultivation at mouza Karanji. Defendant No. 1 has not even pleaded circumstances why he purchased this property though he had no intention to cultivate the field. We do not accept his testimony that he did not know of the relevant law till the field was recorded as occupancy holding of defendant No. 3 in 1935. Even then he did not take a surrender from defendant No. 3 and/or make arrangement for its cultivation in later years. The kotha included in the sale-deed also continued in possession of defendants 3 to 5. No person would buy a kotha in a village unless he can use it.

(23) The story of defendant No. 1 that he gave leases to defendant No. 3, that the latter promised to reconvey the field, and that he received lease money every year was rightly disbelieved by the lower Court. The facts that the field was not surrendered even after ten years and that the alleged lease money was not enhanced, though the prices and income had considerably increased during the war, are very significant. Such an agreement is not enforceable at law and is of no effect.

(24) All these circumstances are sufficient not only to discharge the initial onus that lay on the plaintiff but to make out a case, if unrebutted, that the transaction was made with a view to defeat or delay the claim of the plaintiff and other creditors of defendants 3 to 5. The defendant No. 3 swear that he paid off the other two creditors but he has not given the dates of payment. Since he took over management on attaining majority in 1935, these payments were not evidently made before the date of the sale in question.

(25) The next question for consideration is whether the defendant No. 1 is a transferee in good faith and for consideration. The burden lies on him to prove this case. Rs. 700/- were paid before the Sub-Registrar. Rs. 800/- were paid by defendant No. 1 to the Bank and Rs. 790/- were paid by him through Deepchand. This included Rs. 315/- paid as interest from the date of sale and must be excluded from the 'havala' amount. The remaining two payments of Rs. 525/- appear to have been made by defendant No. 2. Defendant No. 2 is not examined and defendant No. 1 does not say that he paid the amount to defendant No. 2 to make these payments. The defendant No. 2 was a broker of defendant No. 3; and these payments might have been made by him at the instance of defendant No. 3 as suggested by the plaintiff. The reason for not making payment of the 'havala' given by defendant No. 1, that he totally forgot about the dates of payment, shows that he had no intention to pay the 'havala' in a lump sum and that he did not bother about the payments evidently because the defendant No. 3 would make them. In the absence of corroborative evidence, we are not prepared to hold that the defendant No. 1 made these payments through defendant No. 2. Thus the defendant has proved the payment of consideration to the extent of Rs. 1,975/- only.

(26) The defendant No. 1 had taken part in bringing about the partition by compromise. He therefore knew that the attachable property was insufficient to satisfy the plaintiff's debt and that the plaintiff would be almost defeated if the impugned transfer in his favour prevailed. We cannot accept his statement from the witness-box that the liability of debts taken over by defendants 3 to 5 was only Rs. 3,000/- to Rs. 4,000/-. He was being consulted by defendant No. 5 in the management of the property. He must have also known that defendants 3 to 5 were not willing to secure the plaintiff's debt. He had taken the sale-deed for a grossly inadequate consideration. His intention apparently was to allow the transferors to remain in possession of the property. It was therefore clear to him that the object of the sale deed was to defeat or delay the plaintiff and other creditors. Under these circumstances, it is not unreasonable to hold that he shared that intention. Otherwise, he would not have agreed to take the transfer. We therefore hold that the transferee has not acted in good faith.

(27) Even if a transfer is partly for consideration, it can be set aside as a whole if it is collusive and fraudulent as here. We have no doubt that the object of this sale-deed was to keep the attachable property beyond the reach of creditors of defendants 3 to 5. Beyond the fact that there was mutation of names, there is no evidence that the transaction was acted upon. Mutation of names by itself is not sufficient to discharge the onus that lay on defendant No. 1. 'AIR 1943 All 2 (B)'.

(28) Shri Bobde next submitted that the sale has not in any way materially affected the plaintiff because the attachable property obtained at the partition was grossly inadequate for his claim and a substantial portion was already mortgaged to the Society. As the mortgage was not challenged by the plaintiff, his decree was bound to remain unsatisfied, whether there was sale or no sale. This contention overlooks the fact that the property, even subject to the mortgage, was valuable though insufficient to satisfy the whole claim. To that extent the plaintiff is defeated if the sale holds good. We cannot also accept this contention that defendant No. 1 steps into the shoes of the mortgagee society by paying it off. In the first place, defendant No. 1 has not paid off the Society fully. Consequently, there could be no subrogation. Whatever payments he has made were made not to protect his interest under the sale but on behalf of defendants 3 to 5 as their agent as part of the consideration. He is therefore not entitled to subrogation. 'Taibai v. Wasudeorao', AIR 1937 Nag 372 (FB) (D).

(29) As we have reached the finding that the transfer (Exhibit P-1) was partly for consideration and binding between the parties, as it was not set aside by the defendants 3 and 4 under the Hindu Law, it is not necessary to examine the contention of Shri Bobde that section 53 of the Transfer of Property Act has no application when the transaction is collusive and colourable or to examine the following decisions relied on by him: — 'Petherpermal Chetty v. Muniandy Servai', 35 Cal 551 (PC) (E); — 'Mina Kumari Bibi v. Bijoy Singh', AIR 1916 PC 238 (F); — 'Parbhu Nath Prasad v. Sarju Prasad', AIR 1940 All 407 (G); — 'Sheo Gobind v. Ram Asray', AIR 1939 Pat 5 (H). As a matter of fact, the last case is against the contention of the learned counsel. There it was held that there is no rule of law that a plaintiff who has been sought to be defeated by a fraudulent and colourable transfer which is a sham transaction, is limited to the remedy of section 53 of the Transfer of Property Act.

(30) Now remains the question of limitation. The effect of the declaration under section 53, Transfer of Property Act, is that the transaction does not affect the creditors' right to recover their claims from the property transferred. The declaration would still leave the deed operative between the parties thereto and would not amount to cancelling or setting aside the deed because the creditors have no title or interest in the property to set aside the deed as between the parties thereto. 'Pachamuthu v. Chinnappan', 10 Mad 213 (I) and — 'Abdullakhan v. Purshottam', AIR 1948 Bom 265 (J). It is not disputed that Article 120 of the Limitation Act is applicable to a suit for a declaration under this section. Under that Article, limitation begins when "the right to sue accrues". The suit is within time if, as alleged in the plaint, the right to sue accrued on the 25th October 1941 when the executing Court is alleged to have refused to attach the property covered by Exhibit P-1. Relying on the order of the exe-

cuting Court (Exhibit P-5). dated the 25th October 1941, the lower Court accepted this contention. That order runs thus:

"'25th October 1941': Decree-holder by agent Narayan. Judgment-debtor No. 1 in person; corrected copy of Jamabandi not filed. Dismissed as wholly infructuous. Costs on judgment-debtor."

The judgment-debtor referred to is defendant No. 3 Champat. The application for execution is not on record to ascertain the immovable property whose attachment was sought. Attachment of the kotha could not have been allowed as it was not liable to attachment and sale, irrespective of the sale-deed in dispute, because it was a house of an agriculturist used for agricultural purposes. The Khudkasht field could not be attached apart from the village share. Before ordering attachment of village share, the Court may, under Order 21, rule 14, Civil Procedure Code, require the decree-holder to produce a certified extract of the latest mutation register maintained in the Collector's office which shows the names of registered proprietors and their respective shares. A jamabandi is not such a document. The defendant No. 3 had stated that he had purchased one field from his father. There was grazing land at mouza Morangna and there were mango groves. The right in which all the lands were held is not known. The case was dismissed on the 25th October 1941 for default in producing a corrected copy of jamabandi. There is no order rejecting any application for attachment of the property in question. Under these circumstances, Exhibit P-5 is not sufficient to hold that the executing Court refused on the 25th October 1941 to order attachment of the property covered by Exhibit P-1 or any part of it. We therefore hold that the right to sue did not accrue to the plaintiff on the 25th October 1941.

(31) As stated by their Lordships of the Privy Council in — 'Mt. Bolo v. Mt. Koklan', AIR 1930 PC 270 (K), a right to sue, within the meaning of Article 120 of the Limitation Act, does not accrue

"until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

In — 'Lal Singh v. Jai Chand', AIR 1931 Lah 70 (2) (L), it was held that the starting point of limitation is the date on which circumstances entitling the plaintiff to have his interest guarded first comes to his knowledge as the right to sue then accrues to him. In — 'Parkash Narain v. Birendra Bikram Singh', AIR 1931 Oudh 333 (M), it was held that the right to sue accrues when the creditor has clear and definite knowledge of the facts which constitute fraud and of its effect upon his interest. In — 'O. Rm. O. M. Sp. Firm v. Nagappa', AIR 1941 PC 1 at p. 6 (N), their Lordships made these observations:

"But the decisions in India have established a rule of limitation under Article 120 by which the plaintiff in the cases to which the rule applied cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay."

The decision in — 'Lal Singh v. Jai Chand (L)' (cit. sup.) was cited with approval as laying down this principle. The mutation of names was made a few months after the transfer. Pandharinath knew of this sale and its possible effect on his rights as a creditor. He had promptly moved the Insolvency Court for relief. The plaintiff has not explained why he delayed institution of the suit even after the insolvency case was decided in 1937. He is therefore guilty of delay in bringing this suit. The right to sue accrued to him sometime in 1934 or at any rate when the insolvency case was decided in 1937. In either case, this suit is barred by time.

(32) As already stated, First Appeal No. 99 of 1945 by defendant No. 6 is allowed with costs and the plaintiff's suit is dismissed with costs throughout against defendants 2 and 6. Plaintiff has also failed against defendant No. 1 on the question of limitation. First Appeal No. 110 of 1945 is therefore allowed with costs. The decree of the lower Court is set aside and the suit is dismissed with costs. The defendants 3 to 5 will not get their costs from the plaintiff. Counsel's fee Rs. 200/- in First Appeal 110 of 1945 and Rs. 150/- in First Appeal No. 99 of 1945. The defendant No. 2 will bear his costs of First Appeal No. 110 of 1945 as incurred because he has not incurred any separate costs. A decree be drawn up accordingly.

B/D.R.R. Appeals allowed.

A.I.R. 1954 NAGPUR 125 (Vol. 41, C.N. 52)

V. R. SEN AND DEO JJ.

Tikaram Namaji, Plaintiff-Appellant v. Tarachand Gujoba and others, Defendants-Respondents.

First Appeal No. 42 of 1946, D/- 17-4-1953, from the order of Addl. Dist. J., Bhandara, D/- 20-2-1946.

(a) Civil P. C. (1908), O. 32, R. 4(4) — Officer of Court as guardian ad litem.

The omission to issue notices to certain persons who are alleged to be fit and willing to act as guardian 'ad litem' for the minor or failure to record the statement of one of them whether he was or was not willing to act as guardian 'ad litem' does not vitiate the appointment of Court reader as guardian or render the decree null and void. These would be irregularities which do not affect the decree unless the minor's interests are prejudiced. The minor will not be entitled to get the decree set aside unless prejudice on account of gross negligence of guardian is proved. AIR 1916 All 353, Rel. on. (Paras 9, 10)

Anno: C. P. C., O. 32, R. 4 N. 9 Pt. 4.

(b) Civil P. C. (1908), O. 32, Rr. 4(4) and 11 — Officer of Court as guardian 'ad litem'.

Appointment of a guardian ad litem for a minor defendant is not a matter of mere form. The rules of Order 32 have to be strictly followed. The Court has to be satisfied that the person proposed as guardian ad litem is a fit and proper person to represent the interest of the minor. Even in the appointment of an officer of Court as guardian the Court must satisfy itself that the officer is a fit and willing person to protect the interest of the minor and has no interest which is in any way adverse to that of the minor. Rule 11 of Order 32 is applicable to such guardian. He can retire and the Court can remove him. (Para 12)

Where the Court appoints the Court-reader by his name as guardian ad litem it means that the appointment is in his individual capacity and not as a Court-reader. (Para 12)

Anno: C. P. C., O. 32, R. 4 N. 9.

(c) Civil P. C. (1908), O. 34, Rr. 3, 5 — Notice of application for final decree.

Though there is no express provision in the Code for issue of notice to the defendant mortgagor of an application for making a preliminary decree final it is necessary that such a notice must be issued to him as the mortgagor is entitled to make payment into court at any time before a final decree is passed, and is also entitled to extension of time on good cause being shown. Moreover, the well known maxim 'audi alteram partem' which is a fundamental rule of judicial procedure governs such cases. Case law Ref.
(Para 26)

Anno: C. P. C., O. 34, R. 3 N. 7; R. 5 N. 11.

(d) Civil P. C. (1908), O. 32, R. 3 — Non-representation.

A minor can impeach a decree on the ground of fraud, collusion, or gross negligence of his next friend or guardian; and where the decree is to be set aside on the ground of gross negligence, an application for review is the proper remedy but if it is to be set aside on the ground of fraud or collusion, a separate suit must be instituted. Misc. F. A. No. 92 of 1951, D/- 25-3-1953 (Nag), Foll.
(Para 29)

Anno: C. P. C., O. 32, R. 3 N. 5.

(e) Civil P. C. (1908), S. 11 — Ex parte decree.

Where an application for setting aside an ex parte final decree is dismissed by the Court on the ground that there was no sufficient cause for non-appearance of the defendant on the date of hearing the decision cannot operate as res judicata in a subsequent suit by the legal representative of the defendant to set aside the decree on a different ground viz. that the decree was passed without notice on a date not fixed for hearing.
(Para 32)

Anno: C. P. C., S. 11 N. 19.

(f) Civil P. C. (1908), S. 151 — Setting aside ex parte decree.

Where the Court passes an ex parte final decree on a date not fixed for hearing and without notice to the minor, the guardian ad litem can apply for setting aside the ex parte decree under S. 151. (Para 34)

Anno: Civil P. C., S. 151 N. 2.

(g) Civil P. C. (1908), O. 32, R. 3 — Gross negligence of guardian ad litem.

Where an ex parte final decree for foreclosure is passed against a minor without notice to guardian ad litem of the minor it cannot be said that the guardian in not applying for setting aside the ex parte decree has acted negligently if there is no prejudice caused to the minor by such failure to apply. AIR 1926 All 36, applied; AIR 1926 All 757, Ref.
(Para 35)

Anno: C. P. C., O. 32, R. 3 N. 12.

M. R. Bobde and Y. V. Jakatdar, for Appellant; T. L. Shevde and S. B. Palsole, for Respondents.

CASES REFERRED : Paras

(A) (V3) AIR 1916 All 353: 33 Ind Cas 805 9
(B) ('09) 31 All 572: 36 Ind App 168 (PC) 10
(C) (V2) AIR 1915 All 62: 37 All 179 10
(D) (V23) AIR 1936 Pat 231: 14 Pat 824 10
(E) ('02) 24 All 383: 1902 All WN 76 (FB) 12
(F) ('02) 25 Mad 506: 12 Mad LJ 62 24
(G) ('02) 29 Cal 644 24
(H) ('01) 25 Bom 337: 27 Ind App 216 (PC) 24, 25
(I) (V10) AIR 1923 Nag 13: 69 Ind Cas 549 24
(J) (V9) AIR 1922 Nag 175: 67 Ind Cas 282 24
(K) (V38) AIR 1951 Nag 52: ILR (1951) Nag 422 26
(L) (V31) AIR 1944 Nag 181: ILR (1944) Nag 425 26, 30, 31
(M) (V39) AIR 1952 Nag 177: ILR (1949) Nag 674 26
(N) ('07) 3 Nag LR 55 26
(O) ('07) 3 Nag LR 146 26
(P) (V17) AIR 1930 Nag 136: 120 Ind Cas 332 26, 31
(Q) ('08) 35 Cal 767 (FB) 26, 30
(R) ('46) ILR (1946) 1 Cal 333 26, 30
(S) ('49) ILR (1949) 1 Cal 113 26
(T) (V16) AIR 1929 Mad 393: 118 Ind Cas 831 26
(U) (V17) AIR 1930 Mad 105: 120 Ind Cas 72 26
(V) (V11) AIR 1924 All 573: 79 Ind Cas 1041 27
(W) (V11) AIR 1924 PC 50: 46 All 95 (PC) 27
(X) (V27) AIR 1940 Cal 489: ILR (1940) 2 Cal 477 28
(Y) (V24) AIR 1937 Pat 384: 170 Ind Cas 146 28
(Z) (V19) AIR 1932 All 293: 54 All 646 (FB) 29
(Z1) (V29) AIR 1942 Cal 99: ILR (1941) 2 Cal 477 29
(Z2) ('53) Misc. F. A. No. 92 of 1951, D/- 25-3-1953 (Nag) 29
(Z3) ('05) 32 Cal 253: 9 Cal WN 81 (FB) 30
(Z4) (V26) AIR 1939 Oudh 111: 14 Luck 435 30
(Z5) ('13) 35 All 331: 40 Ind App 151 (PC) 34
(Z6) (V21) AIR 1934 Nag 234: 31 Nag LR 53 34
(Z7) (V15) AIR 1928 PC 137: 24 Nag LR 182 (PC) 35
(Z8) (V13) AIR 1926 All 757: 48 All 828 36
(Z9) (V13) AIR 1926 All 36: 48 All 44 36

JUDGMENT : This is plaintiff Tikaram's appeal against the dismissal of his suit to set aside the mortgage decrees for foreclosure, both preliminary and final, obtained against him during his minority.

(2) On the foot of the mortgage Ex. P-1, dated the 13th August 1917, executed by Ajoba for himself and as guardian of his then minor son Namaji for payment of antecedent debts, a preliminary decree for foreclosure (Ex. P-4) was obtained on 31st January 34. The final decree Ex. P-5 was passed on the 15th January 38. The plaintiff, who is the after-born son of Namaji and who was minor on the date of the suit and on the date of the final decree, was defendant No. 3 in the suit with Court Reader Bhole as guardian ad litem.

(3) On attaining majority the plaintiff instituted this suit on 11th July 44 for setting aside the decrees Exhibits P-4 and P-5, on the ground that he was unrepresented both in the suit and in the final decree proceedings, and alternatively on the ground that the guardian ad litem acted with gross negligence and in utter disregard of the plaintiff's interest. It was also pleaded that the mortgagees practised fraud on the Court in securing the appointment of Court Reader Bhole as guardian ad litem. The plaintiff prayed for the reopening of the suit from the stage of the appointment of the guardian or at any rate from the stage of final decree proceedings. The defendants 1 to 9 were the three mortgagees and representatives of the other co-mortgagees. Defendants 8 and 9 are dead and their legal representatives are made respondents. These persons will hereafter be referred to as mortgagees. Defendant No. 10 Yesubai is the widow of Ajoba and defendant No. 11 Gangabai is the step-mother of the plaintiff. No relief is or could be claimed

against them. They are respondents 10 and 11. They remained 'ex parte' throughout.

(4) The lower Court held that the mortgagees did not practise any fraud on the Court in the matter of appointment of a guardian ad litem, that Bhole was appointed guardian ad litem in his official capacity so that whoever happened to be the Court Reader for the time being was the guardian ad litem for the minor, that the guardian was not in any way negligent in defending the suit or in the matter of redeeming the mortgage and that the guardian had notice of the final decree proceedings and the minor was represented at all stages of the 'lis'. The lower Court thus rejected all the contentions of the plaintiff and dismissed the suit.

(5) The interest of the plaintiff's father was not adverse to that of the plaintiff in the suit. The mortgage having been executed for payment of antecedent debts, the defence of legal necessity was not available even to the plaintiff's father. He, however, raised all conceivable defences to the suit but did not succeed. The learned Counsel for the plaintiff was not able to point out to us any defence which was open to the plaintiff and which was not taken by his father Namaji except the one under Order 34, rule 4, sub-rule (3), Civil Procedure Code, which enables a Court in a suit for foreclosure in the case of an anomalous mortgage to pass a decree for sale in lieu of a decree for foreclosure at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms. The lower Court found that the evidence adduced by the plaintiff regarding the value of the mortgaged property and the income of his family consisted of mere surmises of interested persons and was of no value. The learned Counsel for the plaintiff has not shown that the finding is erroneous by taking us through the evidence. The land revenue was not being paid; and the danger of losing the mortgaged property by sale for the arrears of land revenue had to be averted by the mortgagees by making payments of land revenue. The plaintiff has not made out a case that if such a plea had been raised there was likelihood of its success. His father had not chosen to raise this plea obviously because there was little chance of success.

(6) No doubt, the preliminary decree would be null and void if the minor was not at all represented in the suit. The plaintiff proposed Namaji as the guardian ad litem, as he was the best person to represent the interest of the minor. He refused the notice and did not appear on the date of hearing. He did not even file his written statement and the Court proceeded 'ex parte' against him. On the 19th April 33 the 'ex parte' order was set aside and he was allowed to file his written statement; but he did not offer to act as guardian ad litem for his son. The Court appointed its reader Bhole as guardian in his presence on that date.

(7) As Namaji refused to accept notice the Court ordered issue of notices to the mother and the maternal uncle. The mother was already dead and the maternal uncle though served remained absent.

There is no substance in the argument of the learned Counsel for the plaintiff that the mortgagees deliberately issued notice to one Dhaniram while the name of the maternal uncle was Ghaniram. He relied on the evidence of P. W. 10 Dwarkanath who is Dhaniram's brother's son. His statement that Ghaniram was not called Dhaniram cannot be true in view of the report of the patwari, Ex. D-31, that Dhaniram died on 21st June 37 leaving behind two sons and in view of the subsequent entry in the mutation register of Mundapar in which the witness and these sons of Dhaniram are shown as co-sharers. The notice was not refused on the ground of mistake in name. The witness further admitted that neither his father nor his uncle ever showed any anxiety with regard to Tikaram (plaintiff) or any concern for his welfare. There was thus no relation of the minor who was willing to act as his guardian ad litem. On being so satisfied, the Court appointed Bhole. Bhole continued to be the Court Reader till the preliminary decree was passed. He was transferred to Nagpur on the 1st February 35.

(8) According to the plaintiff, his step-mother Gangabai and his grandmother Yesubai were also fit and willing to act as his guardian ad litem and ought to have been noticed. Having carefully read the evidence of these two ladies, we are satisfied that they are illiterate and 'pardanashin', and could not have personally instructed Counsel to defend the suit and would have been required to depend either on Namaji or his agent who was representing Namaji in the suit. Law does not require issue of notices to them. If they were really fit and willing, Namaji would have brought that fact to the notice of the Court.

(9) Assuming for the sake of argument that these persons were fit and willing to act as guardian ad litem, omission to issue notices to them or "failure to record the statement of Namaji whether he was or was not willing to act as guardian ad litem did not vitiate the appointment of Bhole or render the decree null and void. These would be irregularities which do not affect the decree unless the minor's interests are prejudiced. In — 'Rambrichh Ram v. Tarak Tewari', AIR 1916 All 353 (A) it was held that a decree obtained against a minor in similar circumstances binds him. After the 'karta' refused to act as guardian, the Court there appointed another person as guardian of the minor without issuing any notice to the minor or to the 'karta'. The guardian did not defend the suit but it was stoutly resisted by the 'karta' though the ultimate decision was against the defendants. In the minor's suit to set aside the decree it was held that the interests of the minor were effectively and properly represented by the 'karta' of the family and consequently the decree was binding on him though there was irregularity in the appointment of the guardian ad litem.

(10) In support of his contention that the decree is null and void because there was no representation of the minor, the learned Counsel relied on — 'Rashid-un-nisa v. Mahammad Ismail Khan', 31 All 572 (PC) (B); — 'Bhagwan Dayal v. Param Sukh Dass', AIR 1915 All 62 (C) and — 'Mathura Singh v. Rama Rudra Prasad', AIR 1936 Pat 231 (D). In the first case it was held that since a married woman could not in law be appointed guardian ad litem there was no representation of the minor, that consequently the minor's suit to set aside execution sales was tenable, and that such a suit is not barred under section 244 (now section 47), Civil Procedure Code, unless the minor was duly represented in execution proceedings. In AIR 1915 All 62 (C) the court Amin was appointed guardian without notice to the minor or his mother who was his

'de facto' and 'de jure' guardian. The Amin was not supplied with any funds to make a defence. He made no efforts to ascertain the defence and an 'ex parte' decree was passed against the minor. Though their Lordships did not hold that the 'ex parte' decree was null and void, they set it aside on the ground of prejudice to the minor for want of substantial representation. In AIR 1936 Pat 231 (D) it was held that an 'ex parte' decree passed against a ward on account of gross negligence of the manager of the Court of Wards can be collaterally impeached and cannot be pleaded as a bar to the suit instituted by the ward relating to the same subject-matter. None of these decisions helps the plaintiff. The appointment of Bhole was valid though it might be irregular; and unless prejudice on account of gross negligence of the guardian is proved the plaintiff is not entitled to relief.

(11) The learned Counsel, however, points to the finding of the lower Court that Bhole as a person was not appointed guardian ad litem but the reader of that Court was appointed guardian, so that any person who worked as the reader of the Court could act as the guardian of the minor. This contention of the mortgagees which prevailed in the lower Court was reiterated by the learned Advocate General appearing for them. He submitted that the guardian ad litem appointed by the Court was the reader of the Court whoever may be the person holding that office during the different stages of the 'lis'. He was thus a person to whom rule 11 of Order 32 could not apply. Under that rule, where the guardian for the suit desires to retire, or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him and may make such order as to costs as it thinks fit. The rule further provides that where the guardian for the suit retires, dies, or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

(12) This contention is not acceptable. Appointment of a guardian ad litem for a minor defendant is not a matter of mere form. The rules of Order 32 have to be strictly followed. The Court has to be satisfied that the person proposed as guardian ad litem is a fit and proper person to represent the interest of the minor. Rule 3(1) enjoins the Court to appoint such a guardian. An application for such appointment is required by sub-rule (3) of rule 3 to be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is willing so to act. No person can without his consent be appointed guardian. The Court is not to rely merely on the affidavit but has to issue notices of the application to the minor and his father or other natural guardian, and, in the absence of such a person, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule, the Court has to judicially determine, before making the appointment whether the proposed guardian is a fit and willing person. — 'Bhura Mal v. Har Kishan Das', 24 All 383 (FB) (E). When the Court finds that there is no other person fit and willing to act as such guardian, it may appoint any of its officers to be such guardian. The contention of the learned Advocate General that the Court is not guided by these rules in the appointment of its officers as guardian cannot be accepted. In our view, even in the appointment of such an officer the Court must satisfy itself that the officer is a fit and willing person to protect the interest of the minor and has no interest which is in any way adverse to that of the minor. Rule 11 of Order 32 is applicable to such guardian. He can retire and the Court can remove him. The reasonable construction of the order of the Court dated 19-4-1933 is that it appointed not the Court Reader but Bhole, as a person, guardian of the minor.

(13) We therefore hold that Bhole was appointed guardian as an individual and Court Reader as such was not appointed guardian. There was no irregularity in the appointment and the guardian was not negligent in the defence of the suit. The preliminary decree obtained against the plaintiff cannot therefore be set aside on any ground.

(14) The next question is whether the final decree can be set aside. The learned Counsel contends that if Bhole is deemed to be guardian of the minor, he has acted negligently in not protecting the interest of the minor and not averting the final decree.

(15) On the 2nd August 34 the mortgagees applied for a final decree; and on depositing Rs. 4000/- Namaji made an application for extension of time. On the 31st August 34 the Court extended time to pay Rs. 2000/- by the end of March 1935 and to pay the balance by the end of August 1935. Namaji did not make these payments.

(16) Ajoba died on the 29th December 34 and Bhole was transferred to Nagpur on the 1st February 35.

(17) On the 15th April 35 the mortgagees made a second application for making the decree final. On the 5th August 35 the case was adjourned to the 7th November 35 as the Court was busy in a Sessions case. On the 30th September 35 the mortgagees made an application (Ex. P. 7) for an early hearing of the case as the mortgaged property was being auctioned by the Collector in execution of the decree for arrears of land revenue obtained by the superior proprietor. During the pendency of the mortgage suit, the mortgagees had to pay about Rs. 2000/- to avert a similar sale in an earlier decree; and the amount was added to the mortgage claim. The mortgagees apprehended that on the establishment of a Debt Conciliation Board at Gondia on 1st November 1935 the mortgagor would apply to that Board. According to the mortgagees the mortgaged property was not then worth more than Rs. 15000/-. It was alleged that it was highly prejudicial to them to have to pay off the prior charge and then be subjected to the conciliation proceedings.

After notice to Namaji this application was heard on the 19th October 35. Namaji appeared by his agent and defendant No. 3 by guardian ad litem. Namaji made an application that the case be taken up on the 7th November 35 as already fixed as the creditor with whom he had entered into an agreement to pay off this mortgage decree had gone to Bombay and was not expected to return earlier. The learned Judge was not satisfied with the 'bona fides' of this application and remarked that it was apparently bogus and meant to protract the proceedings on some pretext or other. The Court, however, granted time to Namaji to state the terms of the agreement and the case was adjourned to the 22nd October 35. On that date Namaji paid Rs. 1500/- and offered to pay Rs. 800/- by the next date. The learned Judge was impressed by the statement of the mortgagees that they had no objection to grant further time provided the land revenue was paid

regularly. The Court therefore ordered Namaji to state what arrangement he was making for payment of the land revenue and adjourned the case to the 7th November 35. The application made by Namaji on the previous hearing was rejected and he was warned that if the payment was not made no further consideration would be shown to the defendants. By the 7th November 35 Namaji did not pay Rs. 800/- nor the arrears of land revenue. His counsel applied for an adjournment to make an application to the Board and obtain a certificate. Time was accordingly granted in spite of the protest of the mortgagees. The certificate of the Debt Conciliation Board was received by the 13th December 35 and the proceedings were kept pending. Dates were fixed from time to time to await the result of the Debt Conciliation proceedings.

(18) The mortgagees were the only substantial creditors before the Debt Conciliation Board. Without them the agreement under S. 12 could not have been reached. They submitted that the application should not be considered unless the debtor paid off all arrears of land revenue Time was therefore granted to the debtor to make such payment, but he having made a default the application was rejected by the Board on the 20th November 37. The case was already fixed by the civil Court for the 15th January 38. On that date the defendants remained absent. The plaintiffs produced a certified copy of the order of the Debt Conciliation Board dismissing the application of the debtor. As the defendants did not pay till then even the land revenue, for which time was granted on the 22nd October 35, the Court made the decree final.

(19) On the 17th January 38 Namaji made an application for setting aside this ex parte final decree and deposited Rs. 4000/- on the following day. He sought to set aside the ex parte decree on the ground that his agent Shama Charan, who represented him in the suit and subsequent proceedings, acting in collusion with the mortgagees allowed the ex parte decree to be passed without informing him of the date of hearing though the agent knew that Namaji had collected a large sum of money to pay off the mortgagees. On the 18th February 38 the Court stayed the execution for delivery of possession on conditions:

(i) that Namaji should deposit in Court all recoveries from tenants,

(ii) that he should realize rents and should not allow them to fall into arrears, and

(iii) that he would not grant any permanent lease to anybody.

Accordingly the defendant made deposits and satisfied the land revenue demand for 1937-38. He also paid off the land revenue for the earlier year.

(20) On the 11th March 38 respondent No. 10 Sm. Yesubai made an application as guardian of the minor Tikaram for setting aside the ex parte decree. She was directed to apply for her appointment as guardian after removal of Bhole. That application was ultimately rejected on 18th March 39 on the ground that it was frivolous and was barred by time. No appeal was filed against this order.

(21) On the 29th April 38, the date fixed for evidence on his application for setting aside the decree, Namaji remained absent and the case was adjourned to the 24th June 38. In violation of the stay order dated the 18th February 38 Namaji had granted permanent leases. He was therefore directed to deposit Rs. 1000/- by the 3rd May 38 and to pay a penalty of Rs. 50/- to the mortgagees with the direction that in default of such payment the mortgagees would be placed in possession. The case could not be reached on the 24th June 38 and was adjourned to the 27th July 38. On that date Namaji applied for stay of proceedings under the Central Provinces and Berar Postponement of Execution of Decrees Act (XVI of 1938) which was published in the Gazette on the 22nd July 38. The application was rejected as not maintainable and the case was adjourned to the 24th August 38. Namaji died on the 15th August 38 and the application was continued by his widow Sm. Gangabai for herself and as guardian of the minor Tikaram. The application was ultimately dismissed on the 18th March 39 after evidence was recorded. Miscellaneous First Appeal No. 89 of 1939, preferred by these legal representatives against this order, was dismissed by this Court on the 5th April 1944.

(22) From the foregoing survey of facts, it is manifest that the interest of the minor could be saved only by making payment of the decretal amount. Bhole was not in a position to pay the amount and had no power to alienate the minor's interest to pay off the decree even if he wished to, as he was not appointed guardian of the property of the minor. Such a guardian could not be appointed as the minor had an undivided interest in the coparcenary property. He could not even apply to the Debt Conciliation Board as he was a guardian only for the suit. Bhole could not have thus averted the final decree. The learned counsel for the plaintiff contends that he could have made an application under the Reduction of Interest Act and for instalments under the Moneylenders Act. As conceded by him, the interest would have been reduced from 13 annas to 12 annas p.c. p.m. That would have reduced the decretal amount by about Rs. 140/-. Namaji who was strenuously opposing the final decree proceedings would surely have made an application under this Act if it was to result in substantial relief. He had taken advantage of the other Act the moment it was published. As regards the Moneylenders Act it did not apply to mortgages till the 19th March 37 and on the facts as already stated the minor would not have obtained any instalments. The mortgage debt was made payable by very easy instalments of about Rs. 1300/- per year, spread over 12 years. These were always in arrears and whatever payments were made were hardly sufficient to satisfy the accrued interest. No repayment was made since 1927. An attempt was being made to make payments after the preliminary decree was passed; but it appears that money had to be raised by sale of property and in spite of efforts Namaji was not able to pay off the arrears of land revenue. If it was really possible for him to make that payment, he would not have allowed the application before the Debt Conciliation Board to be dismissed for non-payment. We are therefore satisfied that no useful purpose would have been served and the minor's interest would not have been materially protected by making applications either under the Moneylenders Act or under the Reduction of Interest Act. We are thus satisfied that the guardian Bhole was not negligent in protecting the interest of the minor after the preliminary decree was passed.

(23) The learned counsel for the plaintiff, however, contends that the final decree is null and void because the notice of the second application for making the decree final was not served on Bhole. Bhole has stated on oath that he did not appear in the case after the 1st February 35. The mention of defendant No. 3's appearance by

guardian on the 19th October 35 is incorrect if it refers to Bhole. A notice was not admittedly issued to Bhole. The learned Advocate General counters this argument by submitting that Bhole was not appointed guardian in his personal capacity but as a reader of the Court and that on his transfer the other Court reader was 'ipso facto' entitled to represent the minor and that he did so on the 19th October 35. This contention is already disposed of. If notice was necessary, it ought to have been served on Bhole.

(24) The learned Advocate General next contends that there is no provision for issue or service of notice of the proceedings for making the decree final. Reliance was placed on — 'Krishna Ayyar v. Muthuswami Ayyar', 25 Mad 506 (F); — 'Tara Pado Ghose v. Kamini Dassi', 29 Cal 644 (G); — 'Malkarjun v. Narhari', 25 Bom 337 (PC) (H) and — 'Panjab Rao v. Baliram', AIR 1923 Nag 13 (I). In the Madras case it was held that S. 89 of the Transfer of Property Act does not require any notice to be given and the final decree for sale cannot be set aside unless the defendant proves that he was prejudiced by want of notice. In the Calcutta case it was held that S. 87 of the Transfer of Property Act does not require any notice to be given to the judgment-debtor before an order absolute for foreclosure is made. The observations of Hallifax A. J. C. in the Nagpur case, relied on by the learned Advocate General, were obiter. It was proved that the defendant was served with the notice before the final decree was passed. Hallifax A. J. C. relied on his earlier decision in — 'Annaji v. Fakira', AIR 1922 Nag 175 (J), where it was held that the passing of a final decree without service of notice or even issue of such notice is not an illegality or even an irregularity that would affect the decree in any way. According to the learned Judge, on the expiry of the time for payment granted by the preliminary decree the Court is entitled to decide the suit forthwith under O. 17, R. 3, that is to say, pass the final decree unless the defendant makes an application for extension of time. The learned Judge, however, observed:

"It is certainly only just and proper to give notice to the defendant in practically every case, on the sound principle of always hearing the other side;....."

(25) In—'25 Bom 337 (PC) (H)', notice of the order for sale was served on a person who was erroneously held by the executing Court to be a legal representative of the deceased judgment-debtor and the property was sold. Their Lordships held that a judicial sale was not a nullity and could not be treated as invalid notwithstanding this irregularity, even though a material one, as the jurisdiction of the Court to execute the decree had been complete throughout.

(26) There is undoubtedly no specific provision in the Code of Civil Procedure for issue of notice to the defendants of an application for making a preliminary decree final. There are several other provisions in the Code for making applications for relief without any specific provision for issue of notices of such applications. Sections 151, 152, 153, rules 16 and 17 of Order 6, rules 53 and 60 of Order 21, rules 3, 4, 9 and 10 of Order 22, rule 1 of Order 25, and rule 1 of Order 44 are some of such instances which can be multiplied. It cannot therefore be argued that applications under any of these provisions can be decided without hearing the other side. The well-known maxim 'audi alteram partem' which is a fundamental rule of judicial procedure governs such cases. In — 'Kanhayalal v. Reginald of Mathalone', AIR 1951 Nag 52 (K), to which one of us (Deo J.) was a party, it was held that a revenue sale under the Berar Land Revenue Code without notice to the defaulter at some stage or the other was not binding on him though the Berar Land Revenue Code does not provide for a notice to the defaulter. It was held in — 'Raghubirprasad v. Pyarelal', AIR 1944 Nag 181 (L) and — 'Hirekhan v. Narbadabai', AIR 1952 Nag 177 (M), where 'Raghubirprasad v. Pyarelal (L)', was approved (at p. 180) that a notice of the application for final decree must be issued to the defendants. The decree is to be passed on hearing the parties. The day on which the period of redemption allowed by the preliminary decree expires is not the day fixed for hearing of the suit so that the final decree can be passed as a matter of course on the mortgagor's failure to pay the mortgage money into Court within that period. A mortgagor is entitled to make payment into Court at any time before a final decree debarring him from all right to redeem the mortgage is passed. The mortgagor is also entitled to extension of time on good cause being shown. It is therefore necessary that a notice must be issued to the mortgagor of the application for making the decree final. A similar view was taken in the old Judicial Commissioner's Court and is taken by the Calcutta, and Madras High Courts. Vide — 'Seth Bhagwandas v. Shridhar', 3 Nag LR 55 (N); — 'Laxmi Bai v. Ramchandra', 3 Nag LR 146 (O); — 'Pochanna v. Pochanna', AIR 1930 Nag 136 (P); and — 'Abdul Sattar v. Satya Bhushan Das', 35 Cal 767 (FB) (Q); — 'Braja Kishore v. Gour Chandra', ILR (1946) 1 Cal 333 (R); — 'Mahadeo Agarwalla v. Joy Narayan Senehiram Firm', ILR (1949) 1 Cal 113 (S); — 'Maruti Swamiar v. Subramania Ayyar', AIR 1929 Mad 393 (T); — 'Rasan Chettiar v. Rangayan Chettiar', AIR 1930 Mad 105 at p. 107 (U). We therefore hold that a notice to the guardian Bhole was necessary.

(27) We cannot, however, accept the contention of the learned Counsel for the plaintiff that the decree is consequently null and void. According to him this is a case of non-representation. He referred us to the commentary under the heading Non-representation at page 1020 of Mulla's Civil Procedure Code, 11th edition. On the appointment of a guardian a minor is represented in the suit. If there is no valid appointment, the minor is not represented and he is not a party to the suit. This case has to be distinguished from that class of case where the guardian is grossly negligent in the defence of the suit. The decree in such a case is not a nullity but is liable to be set aside on proof of gross negligence and prejudice to the minor. — 'Chandradip Tewari v. Jadunandan Singh', AIR 1924 All 573 (V), on which the learned Counsel relies does not support his submission. In a suit brought by a minor to set aside a mortgage decree passed against him, it was held that the decree would be binding on him even though he was not formally impleaded or was not properly represented in the suit if the mortgage was for legal necessity. The father was a party and defended the suit. As he was unwilling to act as guardian for the minor, the nazir of the Court was appointed guardian without notice to the minor. He was not supplied with any funds and did not raise any defence. According to the argument of the learned Counsel, this is a case of non-representation, but the decree was not held to be a nullity on that ground and it was held that it could be set aside if the debt was not binding on him. In similar circumstances, their Lordships of the Judicial Committee refused to set aside an 'ex parte' de-

cree against a minor because the mortgage was for antecedent debt binding on him. — 'Brij Narain v. Mangla Prasad', AIR 1924 All 50 (W).

(28) If a decree is passed in the absence of the defendant, it is 'ex parte' against him. A defendant against whom such decree is passed has four courses open to him :

(a) to apply under Order 9, rule 13, Civil Procedure Code, on the ground that he was not served with summons or that there was sufficient cause for non-appearance,

(b) to apply for review,

(c) to appeal against the decree, and

(d) to institute a suit on the ground of fraud which must be extraneous to everything which has been adjudicated upon by the Court.

The defendant cannot get round the rule of 'res judicata' by simply proving that he was not served or that the decision is erroneous. Thus, a suit is not maintainable merely on the ground that summons was not served. — 'Kunja Behari v. Krishna Dhone', AIR 1940 Cal 489 (X) and — 'Badri Narain v. Parsoti Pasban', AIR 1937 Pat 384 (Y). It is not the plaintiff's case that the non-service was due to any fraud on the part of the contesting defendants.

(29) The learned Counsel relied on the following observations of Sulaiman J. in — 'Siraj Fatma v. Mahmud Ali', AIR 1932 All 293 at p. 301 (Z) —

> "If therefore the guardian ceases to take any interest in the case or is grossly negligent so as to sacrifice the interest of the minor, it cannot be said that the minor is still properly represented in the litigation. Wilful and wanton neglect on the part of the guardian disqualifies him. This also therefore appears to me to be a basis on which the avoidance of a decree against the minor can be allowed."

As pointed out by Radha Binod Pal J. in — 'Tarit Bhusan Ray v. Sree Iswar Sridhar Salgram Sila Thakur', AIR 1942 Cal 99 (Z1), this is an extreme view and if introduced is likely to create an appalling confusion. It was not accepted by one of us (Deo J.) in — 'Dagdulal v. Ramprasad', Misc. F. A. No. 92 of 1951, D/- 25-3-1953 (Nag.) (Z2). As stated in — 'Dagdulal v. Ramprasad', (Z2) a minor can impeach a decree on the ground of fraud, collusion, or gross negligence of his next friend or guardian; and that where the decree is to be set aside on the ground of gross negligence, an application for review is the proper remedy but if it is to be set aside on the ground of fraud or collusion, a separate suit must be instituted.

(30) Before the Code of Civil Procedure, 1908, it was held that the Court has inherent power to set aside an 'ex parte' final decree. — 'Bibi Tasliman v. Harihar Mahto', 32 Cal 253 (FB) (Z3) and 35 Cal 767 (FB) (Q) (cited sup). A final decree for sale or foreclosure made 'ex parte' under the present Code of Civil Procedure would attract the specific provision of Order 9, rule 13. ILR (1946) 1 Cal 333 (R) (cited sup) and — 'Pratap Narain v. Bhagwati Singh', AIR 1939 Oudh 111 (Z4). That is also the view in some of the other cases cited supra. In AIR 1944 Nag 181 (L), however, it was held that the appropriate provision is Order 17, rule 2. Bhole did not make any such application to set aside the 'ex parte' decree.

(31) The learned Counsel for the plaintiff therefore submits that the guardian acted negligently in not making the application for setting aside the 'ex parte' decree. According to the learned Counsel, the proceedings in the civil Court were suspended on receipt of the information from the Board and the dates were fixed not for hearing of the application for final decree but for awaiting the result of the proceedings before the Board. On receipt of the information that the Debt Conciliation Board had dismissed the application, the civil Court was bound to fix a date for hearing the application. The 'ex parte' decree having been passed on a date which was not fixed for hearing and without notice to the minor is said to be a nullity. At any rate, it was contended, there was sufficient cause for setting aside the decree against the minor. If the guardian ad litem had made an application to set it aside, it would have been allowed. Reliance was placed on AIR 1930 Nag 136 (P) (cited sup) and AIR 1944 Nag 181 (L).

(32) We cannot hold that the application under Order 9, rule 13, if made, would necessarily have been allowed. In Miscellaneous Appeal No. 89 of 1939 against the dismissal of the application for setting aside the 'ex parte' decree, made by Namaji on 17-1-1938 and continued by the plaintiff and his step-mother after his death, this Court agreed with the lower Court that the case was fixed for hearing on the 15th January 1938, that Namaji was aware of this date and that there was no sufficient cause for non-appearance on the date of hearing. This Court further observed that if the judgment-debtor wished to have the final decree set aside on any other ground then it was necessary for him to appeal against that decree. With these observations the contention that the lower Court had no jurisdiction to fix the case for hearing on the 15th January 38 as the proceedings were stayed on account of the pendency of the debt conciliation proceedings, was disposed of. The learned Advocate General submits that this decision operates as 'res judicata' in this suit. We do not think so. The only matter decided by this Court was the dismissal of the application of Namaji under Order 9, rule 13, Civil Procedure Code. The legal representatives could continue the application and could not convert it into a new application on other grounds.

(33) Section 21 of the Debt Conciliation Act operates to suspend the proceedings in a civil Court in respect of any debt for the settlement of which an application has been made to the Board. Consequently, final decree proceedings were suspended at any rate, from the 13th December 35 when an intimation was received by the civil Court. The subsequent dates fixed by the Court must therefore be taken to be dates to await the result of those proceedings. No hearing of the case could have been intended on such dates. The order dated the 6th November 36 runs thus :

> "Plaintiff by Mr. Palsole and agent Lachmansingh. Defendant by R. B. Jakatdar. Plaintiff's pleader says that the case before the D. C. Board is pending for the 10th January 1938. Hence this case is adjourned to the 15th January 1938.

As the Court had no idea how long the proceedings before the Board would take, the case was adjourned to a date more than 14 months ahead. It could not have been adjourned for hearing of the application for final decree. That may or may not have been necessary. The Court could not and would not assume that the application would be dismissed. The reasonable construction of this order must therefore be that the case was adjourned to the 15th January 38 to await the result of the debt conciliation proceedings and

not for hearing of the case. If both parties had remained absent on the 15th January 38 the Court would not have been justified in dismissing the application for default because it was not fixed for hearing. The fact that the application before the Board was decided before that date did not convert it into a date for the hearing of the case. The final decree was thus passed on a date which was not fixed for hearing.

(34) It was therefore contended that the Court had inherent power to correct its own mistakes in making a decree final on the date which was not fixed for hearing and without notice to the minor. Reliance was placed on — 'Debi Bakhsh Singh v. Habib Shah', 35 All 331 (PC) (Z5), where the suit was dismissed in ignorance of the death of the plaintiff, and on — 'Narayan v. Mitharam', AIR 1934 Nag 234 (Z6), which holds that where there has been a miscarriage of justice owing to the erroneous procedure of the Court it is the duty of the Court to exercise its inherent powers to correct that miscarriage. We are therefore of the opinion that the guardian could have made an application under section 151, Civil Procedure Code, to set aside the 'ex parte' decree.

(35) The next question for consideration is whether the guardian Bhole has acted with gross negligence in not making an application under section 151 or under Order 9, rule 13, or Order 17, rule 2, Civil Procedure Code, to set aside the 'ex parte' decree. He cannot be said to have acted negligently if prejudice was not caused to the minor. The object of setting aside the decree was to obtain an extension of time to pay off the mortgage decree. Time cannot be extended simply because the defendant is a minor. The jurisdiction to grant an extension of time rests on good cause being shown. — 'Motilal v. Ujiar Singh', AIR 1928 PC 137 (Z7). In that case the following observations of the learned Judicial Commissioners were approved :

> "It is also beyond doubt that when the mortgagors asked for an extension of time they had no intention whatever of paying even at the end of the year for which they asked; they proposed to go on getting extensions in one way or another for as long as possible with a distinct hope that if the payment could be postponed long enough it might be avoided altogether. That certainly cannot be called 'good cause shown' for an extension."

As already observed, Bhole could not have applied for extension of time as he could not raise money for the minor and had consequently no intention to pay off the decree. As the evidence goes, there was no good cause even for Namaji. He was granted extension by the Court and the terms were not complied with. He had more than two years thereafter to make the payment but no attempt was made nor was any application made for extension of time. He was unable even to pay the land revenue. We must therefore hold that there was no prejudice caused to the minor by failure of Bhole to make an application for setting aside the 'ex parte' decree either under Order 9, rule 13, or under section 151, Civil Procedure Code.

(36) In 'Mahadeo Pande v. Somnath Pande', AIR 1926 All 757 (Z8), it was held that though a notice is not necessary when the mortgagor is 'sui juris', it is necessary when he is a minor. Absence of notice will not however invalidate the decree unless prejudice is caused to the minor and the decree will not be set aside unless prejudice is established. As stated in — 'Brij Raj v. Ram Sarup', AIR 1926 All 36 at p. 41 (Z9).

> "the test which the cases seem to lay down is whether or not there has been a culpable neglect of the interests of the minor. Has there been in the conduct of the suit any act or omission on the part of the guardian 'ad litem' which in the result has wrought prejudice to the minor's interests? That appears to be what is meant by the expression gross negligence or laches when used in this context."

(37) Under these circumstances the decree of the lower Court is correct. The appeal fails and is dismissed with costs.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 142 (Vol. 41, C.N. 53)

HIDAYATULLAH AND V. R. SEN JJ.

Laxman Waman Halde, Defendant-Appellant v. Balmukund Jainarain and another, Plaintiffs-Respondents.

First Appeal No. 13 of 1945, D/- 17-9-1952, from decree of Third Addl. Dist. Judge, Nagpur, D/- 3-11-1944.

(a) Debt Laws — C. P. and Berar Debt Conciliation Act (2 of 1933), S. 7 (2) — Failure to issue notice.

The failure to send a notice under S. 7(2) is not fatal to the subsequent proceedings but only leaves the matter of jurisdiction open to challenge in subsequent proceedings. AIR 1948 Nag 211 (FB), Foll. ((Para 16)

(b) Debt Laws — C. P. and Berar Debt Conciliation Act (2 of 1933), S. 16 — Jurisdiction of Civil Court — (Civil P. C. (1908), S. 9).

If the Debt Conciliation Board came to the conclusion that 40 per cent. of the creditors had come to a settlement by reason of the presence of some fictitious creditors, then the Board did not possess a real jurisdiction to issue a certificate. Such a fraud can be examined by the Civil Court. 1942 Nag LJ 194, Rel. on. (Para 23)

Anno: Civil P. C., S. 9 N. 50, 53.

(c) Contract Act (1872), S. 62 — Invalid novation.

In a novation there must be an immediate and present substitution of another contract and there is no true novation if there is reversion to the old contract. Further, if the new contract is unenforceable then the old contract revives. Case law Rel. on. (Para 29)

Anno: Contract Act, S. 62 N. 2, 7.

(d) Contract Act (1872), S. 10 — Evidence to establish contract.

The agreement was to take the place of the previous one, and it was the debtor who had to take the first initiative in the matter. Certain duties were laid upon the debtor and those duties were to be performed by him according to the terms of the agreement. Held that the agreement ceased to have effect after certain conditions were deliberately not complied with, and the original contract could be enforced. Case law Rel. on. (Para 32)

Anno: Contract Act, S. 10 N. 1, 3.

D. T. Mangalmurti, for Appellant; S. P. Kotwal, for Respondents.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Nag 3: 1941 Nag LJ 220 16

(B) (V35) AIR 1948 Nag 211: ILR (1948) Nag 1 (FB) 16

(C) (V24) AIR 1937 Nag 259: ILR (1938) Nag 489 18, 23

(D) (V26) AIR 1939 Nag 312: 185 Ind Cas 888 19

(E) (V26) AIR 1939 Nag 136: 1939 Nag LJ 142 19
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(H) (V10) AIR 1923 PC 47: 47 Bom 335 (PC) 27
(I) (V11) AIR 1924 PC 156: 3 Pat 625 (PC) 27
(J) (V20) AIR 1933 PC 29: 60 Cal 980 (PC) 27
(K) (V33) AIR 1946 PC 97: ILR (1946) Kar PC 94 27
(L) (V39) AIR 1952 Nag 220: ILR (1949) Nag 581 27
(M) (1857) 6 HLC 238: 27 LJ Ch 46 27
(N) (1912) 1912-1 Ch 284: 81 LJ Ch 184 27
(O) (V23) AIR 1936 Lah 476: 163 Ind Cas 123 29
(P) (V15) AIR 1928 Nag 289: 111 Ind Cas 402 29
(Q) (V12) AIR 1925 Nag 26: 85 Ind Cas 264 29
(R) (V33) AIR 1946 Nag 260: ILR (1946) Nag 500 29
(S) (V25) AIR 1938 Lah 757: 178 Ind Cas 754 29

JUDGMENT: This appeal is by the defendant against whom a decree for money has been passed by the Court below. The plaintiffs' case was that they had given a loan of Rs. 3000/- to one Waikar on the 10th August 1929 and the defendant was a surety for Waikar. The debt is based on Ticket Bahi (Exhibit P-6) and defendant's liability arises on a letter by which he undertook to pay this amount should Waikar fail to pay it. The letter is Exhibit P-1 and is also dated the 10th August 1929. According to the plaintiffs, this loan was to carry interest at 9 per cent per annum compound with annual rests and was to be repaid in seven months. The plaintiffs allege that there was an agreement to enhance the rate of interest to 10 per cent per annum compound in case of default.

(2) Plaintiffs state that this money was in fact received by the defendant and though repayment was asked for, the defendant avoided to pay this amount, acknowledging his liability and asking for time on each occasion. Such letters and acknowledgments are Exhibit P-2 dated the 15th June 1932, Exhibit P-3 dated the 25th June 1932 and Exhibit P-4 dated the 30th July 1932. According to the plaintiffs, the amount due on this debt was Rs. 3,850/- which, with interest on the date of suit, amounted to Rs. 7,800/-.

(3) The plaintiffs, in addition, claimed a further sum for which, according to them, the defendant had executed a promissory note on the 25th June 1932. The plaintiffs aver that the original debt was Rs. 2,500/- lent to the defendant on the 10th June 1929 on Ticket Bahi (Exhibit P-7). This sum the defendant was to repay with compound interest at 9 per cent per annum with yearly rests but on accounts being taken in the 25th June 1932, a sum of Rs. 1, 208/8/- was found against the defendant and he thus executed the promissory note (Exhibit P-8). Another acknowledgment of liability was made by the defendant on the 14th June 1935 (vide Exhibit P-5). This covered both the debts. In Exhibit P-5 there is a mention of interest on both these debts to be paid at -/12/- per cent per annum compound with annual rests.

(4) On the 21st September 1936 the defendant applied to the Debt Conciliation Board at Wardha. His application is Exhibit P-14. This application was, however, dismissed on the 23rd January 1938 by an order (Exhibit P-10) in which it was held that as the bulk of the property was situated in Saoner tahsil where another Board was working, it was proper for the defendant to make the application there.

(5) On the 6th October 1938 the defendant presented another application to the Debt Conciliation Board at Saoner (Exhibit P-15). It appears that no notice under section 7(2) of the Debt Conciliation Act in Form No. 3 was sent. A notice in Form No. 4 under section 8 of the Act was sent to the creditors to submit their statements of claims. The order sheets of the Debt Conciliation Board proceedings at Saoner are Exhibit P-11. On the 12th April 1939 the Board conciliated some of the debts and issued a certificate under section 15(1) of the Act in respect of the others, including the debt of the plaintiffs. This certificate is in dispute in the present case, the plaintiffs contending that the certificate is ineffective for various reasons, the defendant contending that it is effective.

(6) According to the plaintiffs, the certificate was ineffective because no notice in Form No. 3 under section 7(2) of the Debt Conciliation Act had been sent to the creditors; there were several sham creditors included in the list and the liability due to some others has been inflated; the amount of liability to the creditors who had agreed to conciliate debts did not amount to 40 per cent of the total liability of the applicants before the Board and therefore the Board had no jurisdiction to issue the certificate against the present plaintiffs. The plaintiffs gave details of how the debts were inflated, as also the details of those debts which they impugned as being entirely sham. According to them, the debts of Prabhakar Harkare and K. B. Fadnavis were entirely sham because they were friends of the defendant and were not in a position to advance the loans and the debts of Godubai and Sarubai (sisters of the defendant) and of Yadorao Subhedar, Bapurao Gopalrao Pande and Ramchandra Ganpatrao were inflated not only in the sums which were mentioned but also by way of addition of interest in the calculations which interest was not due. The contention of the plaintiffs is that if these sham and inflated debts are recast then the amount due to the creditors who had agreed before the Board did not represent 40 per cent. of the total liability of the debtor and the Board was therefore incompetent to act and accept the agreement and issue a certificate against the plaintiffs.

(7) It appears that the plaintiffs, after the certificate was issued, applied on the 10th July 1939 for a review of the proceedings but their application was rejected on the 12th April 1939. The record of the case does not disclose the grounds on which this review was sought, nor the order that was passed in the case.

(8) The plaintiffs admit that after the certificate was granted the parties entered into an agreement (Exhibit P. 26) dated 12th April 1940 by which certain arrangements were made for settling the liability of the defendant. That agreement is the subject-matter of dispute in this case and we shall refer to it in due course in detail. Shortly stated, the plaintiffs had agreed to take instalments from one of the debtors by name Nakade of the defendant and in the alternative to have Panchas appointed who were to pass an award granting to the plaintiffs Rs. 6000/- in 20 instalments of Rs. 300/- each, commencing from 1st July 1941. It was also a term of the agreement that if the defendant took no action in these two matters then the agreement was to be treated as cancelled and the original liability of the defendant would remain.

(9) The case of the defendant is that by the agreement (Exhibit P. 26) the plaintiffs had agreed to receive Rs. 6,375/- representing 15 instalments out of the twenty instalments of Rs.

425/- each, which Nakade had to pay to his creditor Halde the present defendant. He stated that he had applied on the 10th February 1943 to the Deputy Commissioner for permission to assign the debt of Nakade to the present plaintiffs but the application was lost and on the 14th August 1943 he made another application to the Deputy Commissioner requesting that a search be made for his first application. The defendant denied the fact that the debts conciliated did not represent 40 per cent. of the total liability of the defendant before the Board and also that any of the debts which had been shown by him in the schedule of his application were either sham or inflated.

(10) It may be pointed out that on the 25th January 1943 the plaintiffs served a notice upon the defendant calling upon him to pay the entire amount. That notice is Exhibit P. 12 and the reply to that notice which is Exhibit D. 3 was dated the 7th February 1943 by which the defendant pointed out that the agreement (Exhibit P. 26) was still subsisting. The defendant also wrote a letter on the 11th April 1943 (Exhibit D. 8) further pointing out that he was prepared to stand by the agreement (Exhibit P. 26). These dates are important because all action which the defendant has taken to secure the permission of the Deputy Commissioner was after the service of the notice (Exhibit P. 12) and also the last letter to which we have referred was sent a day prior to the filing of the suit on the 12th April 1943.

(11) On these facts, various issues were tried by the lower Court and the claim of the plaintiffs was decreed to the extent of Rs. 9,216/8/-, the difference being due to the award of interest at 9 per cent. per annum simple instead of compound. The lower Court held that the debts due to Prabhakar Harkare and Fadnavis were sham and also that the debts of Yadorao, Godubai and Sarubai were inflated. The learned Judge also stated that interest added to the amounts owing to the last three was not due, with the result that the total debts conciliated did not amount to 40 per cent. of the total liability of the debtor. According to the learned Judge, notices under Section 7 (2) of the Debt Conciliation Act were not sent to the creditors and though the proceedings were not fatal as a result, the certificate was inoperative because the Board had acted beyond its jurisdiction in granting the certificate when 40 per cent. of the creditors had not agreed to conciliate their debts before the Board.

(12) As regards the agreement, the learned Judge was of opinion that the agreement ceased to be of effect because the defendant was at fault in not implementing it and had failed to act according to it either by securing the permission of the Deputy Commissioner and assigning the debt of Nakade or by having Panchas appointed.

(13) In this appeal all the conclusions have been challenged before us. It may be pointed out that the appellant paid court-fee only on the difference between Rs. 6000/-, liability for which he admitted, and Rs. 9216/8/- which was the decretal sum. He also paid court-fee on the costs which had been awarded to the plaintiff amounting to Rs. 979/10/-.

(14) The plaintiffs have also filed a cross-objection by which they ask for interest at compound rate instead of interest at the simple rate already granted and for interest at 6 per cent. per annum from the date of the decree till realization.

(15) The points that arise for decision in this appeal and cross-objection are:

(i) Whether the failure to send a notice under Section 7(2) of the Debt Conciliation Act in Form No. 3 was fatal to the proceedings before the Board?

(ii) Whether the plaintiff can in this suit urge that the Debt Conciliation Board did not act with jurisdiction inasmuch as the defendant had fraudulently included in his application certain debts which were either sham or inflated?

(iii) Whether the plaintiffs could in this suit question the certificate on the ground that the creditors who came to an agreement before the Board did not represent the necessary 40 per cent. of the total liability of the defendant?

(iv) Whether any debts shown in the application to the Board were sham or inflated?

(v) Whether the agreement (Exhibit P-26) can be enforced against the plaintiffs and the present suit is, therefore, incompetent?

(vi) Was the lower Court in error in awarding interest at simple rate instead of the compound which was agreed?

(vii) Are the plaintiffs entitled to interest or costs of the suit, in view of the certificate, if the certificate is enforceable?

(16) POINT NO. (i) It was argued by the learned counsel for the respondents that the certificate was ineffective because the entire proceedings were void, inasmuch as no notice under Section 7(2) of the Debt Conciliation Act was issued before the Court took cognizance of the matter. This was considered by the trial Court and the ruling in — 'Nanhoo v. Zillimal', AIR 1942 Nag 3 (A) was distinguished. That ruling was, however, overruled in — 'Sewakram v. Nakchhed Madhoram', AIR 1948 Nag 211 (B) by a Full Bench of which one of us (Hidayatullah J.) was a member. It was there held that the failure to send a notice under Section 7(2) was not fatal to the subsequent proceedings but only left the matter of jurisdiction open to challenge in subsequent proceedings. This ground of attack has, therefore, no force.

(17) POINTS NOS. (ii) and (iii): It was next contended that the decision of the Court that the certificate was ineffective because the Debt Conciliation Board acted without jurisdiction in issuing it, inasmuch as the liability due to the creditors who had come to an agreement before it did not represent 40 per cent. of the total liability of the debtor, was erroneous. It was also argued that the trial Court could not reopen the question because this contention was not raised before the Debt Conciliation Board. The question before us is whether the Civil Court can question a certificate on the ground that the liability due to the creditors who had composed their debts did not represent 40 per cent. of the total liability of the debtor when such a question was not even raised before the Debt Conciliation Board.

(18) The law on the subject is somewhat conflicting, but for the purposes of this case it is not necessary to examine all the authorities or to advert to the points on which the difference exists. In — 'Shivdin v. Ramratan', AIR 1937 Nag 259 at p. 261 (C) the question of the powers of the Civil Court was elaborately gone into and it was laid down that the Civil Court undoubtedly possesses the power to examine certain matters in spite of the bar contained in Section 16 of the Debt Conciliation Act. It was there stated as follows:

"Further, if the Board in fact had no jurisdiction, then jurisdiction could not be conferred

on it by fraud. If for example the debtor fraudulently concealed part of his debts so as to bring the total under Rs. 25,000 or if he fraudulently represented that he had land in the area for which the Board had been appointed and the Board was thereby induced to attempt to effect a settlement between him and his creditors, that proceeding would be entirely invalid and the Civil Court would have jurisdiction to inquire into the facts to see whether the Board had jurisdiction. If, however, the Board had jurisdiction to attempt to effect a settlement and eventually an agreement was registered under sub-section (2) of Section 12, then, whether the procedure was correct or not and the decision right or wrong, we think that the civil Courts would have no jurisdiction to entertain a suit for the recovery of a debt recorded as payable under such an agreement. The Civil Courts would not have jurisdiction to look at the proceedings of the Board because Section 16 prohibits the civil Courts from entertaining any suit in respect of such a matter."

Again it was said in the same ruling:

"If the Board had no jurisdiction to try to effect a settlement, all proceedings before it would be completely invalid, and the civil Courts would have jurisdiction to inquire whether those proceedings were invalid for want of jurisdiction, but if the Board had jurisdiction to attempt to effect a settlement then the civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised, and the legality or validity of any orders passed in the exercise of the Board's jurisdiction could not be questioned in any civil Courts on any ground except perhaps fraud. As we have stated above, if the Board had no jurisdiction fraud would not confer it; but if the Board had jurisdiction, then the fact that it failed to exercise that jurisdiction properly would not entitle the Civil Courts to question the legality or validity of the orders passed by the Board in the exercise of its jurisdiction."

(19) In — 'Janbá Dayaram v. Manno Kashiram', AIR 1939 Nag 312 (D), Gruer J., referring to — 'Sadasheo Rao v. Roopchand', AIR 1939 Nag 136 (E), approved of the passage last cited, but held that where the Civil Court came to the conclusion that there was a miscalculation by the Board about the 40 per cent. of the debts due to the creditors, the Civil Courts could find that the Board had acted without jurisdiction in issuing the certificate because that involved not a question of initial jurisdiction to effect a settlement to which Section 7-A of the Act is applicable but a question of jurisdiction to issue the certificate. The learned Judge observed that the intention of the Legislature in Section 16 was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under Section 15. In the opinion of the learned single Judge, if fraud was practised on the Board, the Civil Courts could set the matter right, but not otherwise.

(20) It may be noticed that in the case before Gruer J. the decree-holder had alleged before the Board that one of the debts was a sham one, but the Board decided the question and accepted it as genuine. According to the learned Judge, since the Board had decided the matter, it was not open to the Civil Courts to re-examine the question for themselves in the absence of any allegation of fraud.

(21) A similar view was taken by Niyogi, Acting Chief Justice, and one of us (Hidayatullah J.) in — 'Babulal v. Kishandas', S. A. No. 144 of 1940, D/- 8-7-1946 (Nag) (F). There it was held that though fraud will vitiate all proceedings if the fraud was practised on the Board without its knowledge; but if the Board itself tried the question of fraud and gave its judgment on the merits of those allegations, the Civil Courts were excluded from reopening and re-examining the question.

(22) Direct authority for the proposition which we have before us is available, however, in a Division Bench case of Stone C. J. and Bose J. in — 'Bhupsingh v. Hiragir', 1942 Nag LJ 194 (G). In that case also, the Board had been induced to give a certificate because of an agreement between creditors who apparently represented forty per cent. of the total liability of the debtor. The learned Judges there laid down the law as follows:

"The issues raise the question whether a certain debtor, applicant before the Debt Conciliation Board, had falsely and fraudulently brought before the Board a number of fictitious creditors with the purpose of persuading the Board that 40 per cent. of his creditors were prepared to conciliate the debts, thereby inducing the Board to exercise various powers which it has when 40 per cent. of the creditors accept the conciliation, powers which the Board has not got if 40 per cent. do not agree....."

The learned Judges, after reciting the arguments of Shri R. K. Rao (Now Rao J.), observed as follows:

"..... we think that it should be made quite plain that an Act of this kind, designed to secure a particular class of debtors from the rapacities of creditors, was never intended to be used as an instrument of fraud. The Debt Conciliation Boards are not Courts but instruments of conciliation. The safeguards are missing. The rules relating to pleadings, interrogatories, discovery, issues, are not there. The lawyer has no right of audience. There is no appeal and no revision by any civil Court. The creditors are not compelled but persuaded, but the persuasion sometimes looks very like compulsion. This case is a perfect example, in our opinion, of a debtor deliberately setting out so to manipulate matters that what is intended to be beneficial legislation designed to give a helping hand to an indebted agriculturist is turned into an engine to defraud creditors....."

"The Act provides that when a debtor of a particular class makes an application in a particular mode to a particular body called the Debt Conciliation Board and that body entertains the application, the Board can call upon the creditors to say whether they agree to a settlement of debts. If they say No, the application has to be dismissed. If 40 per cent. or more say Yes, the others, that is to say, 60 per cent. or less, have to make their mind whether they are going to keep on saying No or whether they are now prepared to say Yes. If they say No, then the Board is empowered to issue a certificate which has the effect of placing them at a very great disadvantage. Consequently they are induced to say Yes. That is the form of compulsion which has caused so many rapacious creditors for a moment to assume the garb of reasonable men."

* * * * *

".....The debtor added more creditors to his application and showed against them debts

which amounted to more than 40 per cent. They disclosed a readiness to conciliate whereupon one of the two creditors who had shown not the slightest intention to conciliate bethought himself that he ran the risk of a certificate being given against him. He appears to have agreed to conciliate. Then a certificate was against the other. Then he agreed. Now it appears that the added creditors who formed the 40 per cent. of the total body of creditors were no creditors at all—their debts were imaginary and did not exist at all. All they were there for was in order that they should be, so to speak, paraded before the genuine creditors and the Board. The matters ended with the two genuine creditors signing an agreement....."

"The view that we take at this stage is that the proceedings of this Board and the proceedings of the genuine creditor simply have no legal effect at all once it is established that the kind of fraud that was practised here was practised. It has been urged, and this is the reason why the learned Judge of the Court below came to the conclusion he did, that it mattered not in the least that there had been a fraud (or an 'error in tactics') because in point of fact the creditor was not misled, he knew that these alleged creditors were bogus and that their debts were imaginary, he signed with his eyes open, the Board was not misled, it had been told of this attempted fraud. That however is not how the matter strikes us. We are here concerned with social legislation of an ex-proprietary nature intended to relieve a particular class of debtors setting up special conciliation procedure dependent to some extent on consent and shutting the doors of civil Courts to creditors. Ordinary litigation is stayed and decrees made are of no effect or are postponed if a Board has issued a particular certificate or taken a particular step in an endeavour to find an amicable solution which relieves a debtor of a portion of his indebtedness. It destroys the whole basis on which conciliation proceeds if a debtor, when coming before such a tribunal under the powers conferred by such an Act, fraudulently concocts debts so that an imaginary percentage of creditors appears to be willing to agree. Such a fraud throws the machinery set up out of gear. Where false creditors falsely appear to agree to a false agreement the Board necessarily brings into play powers which it would know it did not possess were it not for the fraud. Such a debtor has to be dealt with as a fraudulent person. The Board's conciliation falls to the ground. Agreements made must be set aside."

(23) While this ruling conflicts with the earlier ruling of Gruer J. and also partially with the reported case in — 'Shivdin v. Ramratan (C)' (op. cit. sup.), it does not conflict with those two cases on the point which we have to decide. If the Board came to the conclusion that 40 per cent. of the creditors had come to a settlement by reason of the presence of some fictitious creditors, then the Board did not possess a real jurisdiction to issue a certificate. That fraud can always be pointed out to the Civil Court, and we agree respectfully with Stone C. J. and Bose J. that such a fraud can be examined by the Civil Court. It was argued that the creditors had an opportunity of pointing this out to the Board itself, and having failed to do so, must be shut out on the principle of constructive 'res judicata'. In our judgment, the present plaintiffs are not shut out because they did not agree to the settlement and no question of pointing out the fraud then arose. The Civil Court always has the jurisdiction to question a proceeding on the ground of fraud upon the tribunal which decided the case. Nobody can take advantage of his own fraud; and it does not therefore lie in the mouth of the present appellant to say that his fraud should be allowed to succeed. In our opinion, the plaintiffs were entitled to point out that the necessary percentage of the creditors had not in fact agreed before the Board and the certificate was therefore wrongly issued.

(24) POINT NO. (iv): On the question whether any of the creditors shown before the Debt Conciliation Board were sham, the material was exceedingly slight on which to come to any such conclusion. There was, however, ample evidence to show that some of the debts were purposely inflated and interest was added where it is not proved to be due, with a view to making the amount due to the agreeing creditors 40 per cent. of the total liability of the debtor. The learned Judge of the Court below has shown in parallel columns how these debts were increased when the application was presented before the Debt Conciliation Board, Saoner. We do not think that it was possible for the plaintiffs to lead any better evidence that the production of the application made to the Debt Conciliation Board at Wardha. In the previous application the debts shown were less and there is no satisfactory explanation how debts got increased when the application to the Saoner Board was made. Further, there was no mention of interest when the application to the Wardha Board was made and large sums by way of interest were added to the principal when the application was made to the Saoner Board. Even with these additions, the amount due to the creditors who came to an agreement barely reaches 40 per cent. of the total liability of the debtor. The learned trial Judge has shown that if the inflated portion of the principal as well as the interest is left out of account, the Board could not issue the certificate, because the agreeing creditors did not in reality represent the necessary 40 per cent. We are of opinion that the amounts due to Godubai, Sarubai and Yadorao were inflated. There is no explanation why a smaller sum was shown before the Wardha Board and a larger sum shown before the Saoner Board. Further, the application before the Wardha Board did not show that interest was to be paid. In fact, the application made no mention of any interest. In the application before the Board at Saoner (Exhibit P-15) there is no mention of interest in the item dealing with Godubai. If the excess amount which has been shown in the application to the Saoner Board is deducted, as also the interest which has been added for the first time in the application made to the Board at Saoner, the total amount due to the creditors who came to an agreement does not represent the necessary 40 per cent. We are of opinion that if this fact had been considered by the Board it would not have allowed the agreement to be made nor could it have issued the certificate; and we find accordingly on this point.

(25) POINT NO. (v): The agreement which was reached between the parties (Exhibit P-26) was the subject of much discussion not only as to its terms but also as to its binding nature. The case of the appellant is that the agreement was a final one and was capable of being enforced without any other formality as it represented a binding agreement between the parties. The case

of the respondent, which has been accepted by the lower Court, is that the agreement was not a final and binding agreement but that the defendant had to take certain steps to make it into a binding contract, Exhibit P-26 was entered into after the termination of the proceedings before the Debt Conciliation Board, Saoner, and by this agreement the defendant agreed to transfer to the plaintiffs the right to recover the instalments from one Nakade, a debtor of the present defendant.

(26) The provision in this document reads as follows:

"In full satisfaction thereof i.e. in full satisfaction of both debts, it is decided that you should instead of me recover direct from the debtor Mr. Shankarrao Wasodeorao Nakade full amount of 15 instalments, Rs. 6,375/- from the year 1941 A.D. to 1955 A.D. (both years inclusive) out of 20 instalments of Rs. 425/- each per year decided to be taken by me under conciliation in respect of my debts due by my debtor Mr. Shankar Rao Wasudeorao Nakade, resident of Nagpur, before the Debt Conciliation Board, Umrer, in Revenue Case No. 833/33 of 1935-36 A.D., dated the 8th July 1937 A.D., on the 25th August 1937 A.D. on a further review by me. I will duly execute in your favour at your expense a registered deed of transfer later on to this effect on obtaining permission of the Deputy Commissioner, Nagpur, and I will get your name recorded in my place in the agreement of the said debtor (in the case before the Debt Conciliation Board) to the extent of right to recover Rs. 6,375/- on account of the 15 instalments referred to above.

* * * * *

You are at liberty to effect in the meantime a settlement direct with my debtor Mr. Shankar Rao in respect of all the instalments given to you by making some alterations if you like. In case I fail to obtain the permission of the Deputy Commissioner and execute a deed of transfer in your favour according to this agreement, I will pay your debt due to your shop as stated above of both the debts and it may be recovered from me; this is also decided."

(27) It was argued that there was no need to execute any further document and that this document by itself gave the right to the present plaintiffs to demand the instalments from Nakade and that having failed to act according to this agreement, they cannot now lay a claim to the original loan. Reliance was placed on — 'Harichand Mancharam v. Govind Luxman', AIR 1923 PC 47 (H); — 'Hukum Chand v. Ran Bahadur Singh', AIR 1924 PC 156 (I); — 'Currimbhoy and Co. Ltd. v. L. A. Creet', AIR 1933 PC 29 (J); — 'S. N. Mundade v. New Mofussil Co. Ltd.', AIR 1946 PC 97 (K) and — 'Shamji Bhai v Jagoo Hemchand', AIR 1952 Nag 220 (L). It is not necessary to refer to all these cases, inasmuch as they lay down the same principles and each case must necessarily be decided on its own facts. All these cases are decided upon the basis of two English cases, and in — 'Harichand Mancharam v. Govind Luxman (H)' (op. cit. sup.) their Lordships observed as follows:

"Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape."

From this it is clear that each case must necessarily be decided on its own facts. As regards the principle underlying such cases their Lordships observe:

"As observed by the Lord Chancellor (Lord Cranworth) in — 'Ridgway v. Wharton', (1856) 6 HLC 238 at pp. 263, 264 (M) the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In — 'Von Hatzfeldt-Wildenburg v. Alexander', 1912-1 Ch 284 (N), Lord (then Mr. Justice) Parker laid down that where the acceptance by the plaintiff was subject to a condition 'that the plaintiff's solicitors should approve the title to and covenants contained in the lease, the title from the free freeholder and the form of contract', the negotiations did not form a binding agreement between the parties."

These principles were re-affirmed in — 'S. N. Mundade v. New Mofussil Co. Ltd. (K)' (op. cit. sup.) at page 99 by Lord Du Parcq who approved of the dictum of Parker J. (as he then was) to the following effect:

"It is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through."

(28) Construing the document in this manner, we find that though the debt from Nakade was to be assigned subject to certain steps being taken, the document does not stop there; it provides for two other matters. It is provided that in case the defendant did not obtain the permission of the Deputy Commissioner and execute a proper registered document, certain other eventualities will happen. It is necessary to refer to them also. The agreement (Exhibit P-26) goes on to say:

"In case the Deputy Commissioner does not grant permission to effect such a transaction and there be consequently any legal difficulty in effecting the transaction decided between us two and this contract falls through, I will get an award passed out of Court through Panchas containing an agreement that I will in full satisfaction of the debt due by me to you, pay Rs. 600/- in 20 annual instalments of Rs. 30/- each, and the agreement shall be to pay these instalments beginning with the 1st instalment on the 1st April 1941 and make similar payments thereafter every year and make payment in twenty instalments upto the year 1960 inclusive. The Panchas for the award will be appointed with the consent of us both. It shall be mentioned in the award that I will pay you interest at the rate of annas 8 per cent. per mensem on defaulted instalments until satisfaction in case I, for any reason, fail to pay your instalment in time or you do not get an instalment on account of any legal objection having been taken by my creditors, and I will pay interest to you accordingly. Similarly, it is decided that I should bear the entire expenses required for the award-stamp and registration as well as for the obtaining of a decree from the Court accordingly and for registration."

(29) Now, in a novation there must be an immediate and present substitution of another contract and there is no true novation if there is reversion to the old contract. Further, if the new

contract is unenforceable then the new (sic) contract revives. The authorities on this point are numerous but reference may be made to: — 'Firm Guranditta Mal v. Firm Labhu Ram', AIR 1936 Lah 476 (O); — 'Krishnaji Kunbi v. Tukaram Kunbi', AIR 1928 Nag 289 (P); — 'Ganpat v. Mahadeo', AIR 1925 Nag 26 (Q); — 'Shankarlal v. Ambalal', AIR 1946 Nag 260 (R) and — 'Kishen Lal v. Gohli', AIR 1938 Lah 757 (S).

(30) This agreement was to take the place of the previous one, and it will be noticed that it was the debtor who had to take the first initiative in the matter. In both the first and the second new agreements certain duties were laid upon the debtor and those duties were to be performed by him according to the terms of the agreement. It is idle to say that the condition of taking the permission of the Deputy Commissioner was unnecessary as also the execution of a registered document. Neither party thought at the time that this was unnecessary, and in any event this was an agreement between the parties and if the debtor failed to act according to the terms of the agreement, certain other consequences were to ensue. It has been correctly pointed out by the trial Court that the debtor was at fault in not obtaining the sanction of the Deputy Commissioner. No doubt, the debtor produced a certified copy of a dak book to show that he had made such an application before the Deputy Commissioner; but that was after the notice was served on him demanding the entire sum.

(31) If the debtor did not act according to the first part of the agreement, it was again incumbent on him to get Panchas appointed. This also he failed to do. It will be noticed that the agreement was made on the 12th April 1940 and the present suit was brought on the last day of limitation, that is to say, on the 12th April 1943. Now, the plaintiffs in this case had given the longest time possible to the debtor to effectuate the first two conditions of the agreement, which admittedly he did not comply with. It is in the agreement (exhibit P-26) itself that on the failure of the defendant to perform his obligations according to the two alternative terms of the agreement certain other consequences were to ensue. This clause may now be quoted here. It is to the following effect:

"In case permission as stated in this deed of agreement is not granted or I fail to execute a deed of transfer in your favour according to the permission even after it is granted or an award fixing instalments is not caused to be passed as decided, this deed of agreement shall be considered null and void."

(32) The lower Court was correct in holding that the agreement ceased to have effect after these first two conditions were deliberately not complied with. The plaintiffs could not wait any longer since they brought their suit on the very last day of limitation. In our judgment, in these circumstances, they were not only at liberty but perfectly justified in enforcing the original contract and we hold that the suit based on the original agreement is valid and maintainable.

(33) Points Nos. 6 and 7 can now be disposed of together. On the view we have taken of this case, point No. 7 does not fall to be decided. As regards interest it is clear enough that Exhibit P-1 does not make any mention of compound interest and Exhibit P-4 the acknowledgment also does not say so. It is only on the 14th June 1935 that the defendant agreed to pay interest at compound rate. It is impossible to interpret the earlier documents in the light of the document of that date because the defendant was avoiding legal process and might have been induced to agree to compound interest then. In our judgment, interest from the 10th August 1929 on Rs. 3000/- must be calculated at 9 per cent. P. A. simple up to the 13th June 1935. From that date up to the date of the suit interest must be calculated at 9 per cent. per annum compound with yearly rests. On the sum due on the promissory note Exhibit P-8 (namely Rs. 1208-8-0) interest will have to be calculated at 9 per cent. P.A. compound till the filing of the suit.

(34) As regards interest during the pendency of the suit we do not think that interest at contract rate should be awarded. The plaintiffs have earned large sums by way of interest and for sometime in the first case and throughout the period in the second, compound interest at 9 per cent. P.A. has been charged. We disallow interest at contract rate during the pendency of the suit but order interest at 5 per cent. P.A. simple. The same rate of interest shall be chargeable till realisation.

(35) The appeal thus fails and is dismissed with costs. The cross-objection is allowed partly, the costs thereof to be borne as incurred. The costs of the lower Court shall be as ordered by that Court.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 NAGPUR 148 (Vol. 41, C.N. 54)

MANGALMURTI AND DEO JJ.

C. P. Coal Trading and Distribution Co. of Bombay, Applicant v. Commr. of Sales Tax, M. P. and another, Non-Applicants.

Misc. Petn. No. 155 of 1952, D/- 15-9-1953, for quashing order of Sales Tax Commr., M. P., Nagpur, D/- 9-5-1952.

(a) Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 2(c) — Dealer — (Contract Act (1872), S. 182).

A factor, when he sells goods on credit (for an additional commission, called a 'del credere' commission) and guarantees the solvency of the purchaser, is known as a 'del credere' agent. A factor is a mercantile agent who in the ordinary course of business sells or disposes of goods of which he is entrusted with the possession or control by his principal. When he is in possession of the goods, with the consent of the owner, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent is valid as if he were expressly authorized by the owner to make the same. A broker is an agent whose ordinary course of business is to negotiate and make contracts for his principal for sale and purchase of goods and other property of which he is not entrusted with the possession or control. He has not therefore the authority to deal with the goods which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

The petitioner functioned to procure customers for a Coal Company and guaranteed payment of the price of the coal sold to these customers. The consignments were addressed by the Company directly to the customers. The railway receipts were also sent directly to them. The petitioner had no concern with

the customers after they were introduced as solvent buyers except as guarantor for the payment of the price. There was never any sale by the Company in favour of the petitioner, nor had the petitioner ever sold goods as its own to the customers. The property in the goods never vested in it. In short, the dealings were, except for introduction and guarantee for solvency, directly between the Company and the consumers.

Held that on the facts the petitioner was not carrying on the business of selling on behalf of the Company and was not a dealer within the meaning of S. 2(c). It was therefore not liable to registration. (1871) 24 LT 45; (1914) 3 KB 1272, Rel. on. (Para 7)

Anno: Contract Act, S. 182 N. 3, 4, 5.

(b) Constitution of India, Art. 226 — Judicial order — (Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 8A (5)).

On 24-12-51 the petitioner made an application to the Commissioner for a declaration that it was not a dealer and was not liable to registration. By an order dated 7-11-1952, passed under S. 19 of the Sales Tax Act, the Commissioner held that on the facts stated by the applicant it was clear that the petitioner did not carry on the business of selling or supplying goods and was no more than an intermediary between the seller or the supplier on the one hand, and the buyers on the other, and received remuneration for its service as intermediary. The Commissioner characterised it as a broker and held that a broker is not a dealer. On 29-1-1952 the petitioner made an application to the Sales Tax Officer, for cancellation of the registration certificate. After recording evidence the Sales Tax Officer submitted the report dated 13-3-1952 to the Sales Tax Commissioner. The Officer held that the assessee was not liable to registration and to payment of the tax on the transactions made by the seller Company and that the tax on such sales was to be paid by the seller Company. The Commissioner did not accept this recommendation. He was of the view that the petitioner was a commission agent inasmuch as it was required to pay the price if the buyer did not pay it and that such a commission agent was covered by the definition of buyer in S. 2(c) of the Sales Tax Act. By the impugned order he directed the Sales Tax Officer to proceed with the case.

Held that the decision of the Commissioner was certainly a judicial order under S. 8A(5) of the Sales Tax Act and the communication to the Sales Tax Officer could be quashed by a writ of certiorari. 1952 Nag LJ 446, Distinguished. (Para 8)

M. R. Bobde and B. R. Mandlekar, for Applicant; W. K. Sheorey, for Non-Applicants.

CASES REFERRED :

	Paras
(A) (1871) 24 LT 45: 6 Ch 397	6
(B) (1914) 1914-3 KB 1272: 84 LJ KB 233	6
(C) ('52) 1952 Nag LJ 446: 1952-3 STC 112	9

ORDER : This is a petition under Art. 226 of the Constitution for a writ of 'certiorari', quashing the order passed on 9-5-52 by the Sales Tax Commissioner, Madhya Pradesh, Nagpur, and for a writ of mandamus to the Commissioner and the State "preventing them (the respondents) from treating the applicant as a dealer". The respondents have not filed a return and the learned Additional Government Pleader appearing for them states that they do not wish to file one as they do not dispute the facts of the case as stated in the affidavit of Rasiklal, the managing partner of the petitioner firm. The case has therefore to be decided on the facts stated in the affidavit.

(2) It is stated that the petitioner is a 'del credere' agent of Messrs. Newton Chickli Collieries, Limited, Parasia, (hereinafter referred to as the Company). The petitioner functions to procure customers for the Company and guarantees payment of the price of the coal sold to these customers. The consignments are addressed by the Company directly to the customers. The railway receipts are also sent directly to them. The petitioner has no concern with the customers after they are introduced as solvent buyers except as guarantor for the payment of the price. It is further stated that there was never any sale by the Company in favour of the petitioner, nor has the petitioner ever sold goods as its own to the customers. The property in the goods never vested in it. In short, the dealings were, except for introduction and guarantee for solvency, directly between the Company and the consumers. The petitioner used to get 4 annas per ton on the deliveries made to the railways and 6 annas per ton on the deliveries to other consumers.

(3) The petitioner who carries on business at Bombay, had opened a branch office at Parasia in this State for facility of business, and the transactions were apparently done through this branch office as stated above. On being called upon by the Sales Tax Officer, the petitioner applied for registration under protest and was registered as a dealer. In every declaration made under R. 26(2) of Sales Tax Rules the petitioner has stated that it is not a purchaser from the Company but is only its canvasser and that it is making the declaration in accordance with the registration certificate.

(4) On 24-12-51 the petitioner made an application to the Commissioner for a declaration that it was not a dealer and was not liable to registration. By an order dated 7-1-1952, passed under S. 19 of the Sales Tax Act, the Commissioner held that on the facts stated by the applicant it was clear that the petitioner did not carry on the business of selling or supplying goods and was no more than an intermediary between the seller or the supplier on the one hand, and the buyers on the other, and received remuneration for its service as intermediary. The learned Commissioner characterised it as a broker and held that a broker is not a dealer.

The facts as stated by the Commissioner were—

"he (the petitioner) is a 'del credere' agent of Messrs. Newton Chikhli Collieries Ltd., Parasia. His function is to find out customers for the collieries and guarantees payment for the coal sold to the customers who contract to buy from their principals. Coal is allotted under the Collieries Act by the Coal Commissioner, to the customers, and the applicant canvasses these consumers to buy coal from their principals. The property in goods never vests in the applicant."

These are the facts now stated before us and they are not disputed.

(5) Thereafter on 29-1-1952 the petitioner made an application to the Sales Tax Officer, Chhindwara, for cancellation of the registration certificate. After recording evidence the Sales Tax Officer submitted the report dated 13-3-1952 to the Sales Tax Commissioner. The facts found by

him are also as stated before us. The Officer held that the assessee was not liable to registration and to payment of the tax on the transactions made by the Company and that the tax on such sales was to be paid by the Company. He further reported that the Company and the petitioner had agreed that the assessment for the period from 29-4-49 to 21-10-49 should be made, for the sake of convenience of accounts, against the petitioner and thereafter till the date of cancellation of the registration certificate.

The learned Commissioner did not accept this recommendation. He was of the view that the petitioner was a commission agent inasmuch as it was required to pay the price if the buyer did not pay it and that such a commission agent was covered by the definition of "buyer" in S. 2(c) of the Act. By the impugned order he directed the Sales Tax Officer to proceed with the case.

(6) A factor, when he sells goods on credit (for an additional commission, called a 'del credere' commission) and guarantees the solvency of the purchaser, is known as a 'del credere' agent. 'Del credere' is an Italian phrase equivalent to the English word "guaranty" or "warranty". A factor is a mercantile agent who in the ordinary course of business sells or disposes of goods of which he is entrusted with the possession or control by his principal. When he is in possession of the goods, with the consent of the owner, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent is valid as if he were expressly authorized by the owner to make the same. No doubt, this power is subject to certain limitations provided by the Factors Act, 1889 (52 and 53, Vic. ch. 45).

As stated in — 'Ex parte White', (1871) 24 LT 45 (A) —

> "a 'del credere' agent is distinguished from other agent who is to sell according to the instructions of the principal, simply in this that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them, and, therefore, if he sells at the price at which he is ordered to sell by the principal and upon the credit which he is ordered to give by the principal, then no doubt, he guarantees that the customer will pay him at that time."

The later view is —

> "The liability of the 'del credere' agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event (of) default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the 'del credere' agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum."

Per Buckley L. J. in — 'Gabriel v. Churchill and Sim', 1914-3 KB 1272 at p. 1279 (B).

(7) The petitioner is not thus a 'del credere' agent. He has not the possession of the goods for the purpose of sale. Nor has he any of the rights of a mercantile agent. So both the petitioner and the Sales Tax authorities erroneously described it as a 'del credere' agent. The same description is repeated in the petition made here and in the affidavit filed in support of it. The learned Counsel for the petitioner did not realize the mistake and did not seek to amend the petition though the definition of 'del credere' agent was brought to his notice during the course of arguments. However, on the facts admitted by the parties the petitioner is no more than a guarantee broker. A broker is an agent whose ordinary course of business is to negotiate and make contracts for his principal for sale and purchase of goods and other property of which he is not entrusted with the possession or control. He has not therefore the authority to deal with the goods which a factor enjoys.

Nor has he authority to sue in his own name on contracts made by him. The business of the petitioner was to bring the buyer and seller together and its liability was to pay the price with a right to reimburse itself from the buyer. It was never placed in possession of the property, nor did the property in the goods pass to it at any time. At all material times the Colliery Control Order, 1945, was in force. Under Cl. 6 of the Order coal is delivered to a consumer at the rate fixed by the Order when a colliery owner signifies his willingness to sell direct to the consumer and an allotment is made by the Deputy Coal Controller to the consumer with his consent for such direct sale. A consumer has thus to apply for allotment of coal and the colliery owner has to express his willingness to sell direct to the consumer. If a broker is employed, a brokerage not exceeding six annas per ton may be paid by the colliery owner to the broker. The sales by the Company were thus direct to the consumers and the petitioner was a broker in the transactions. A broker is not a dealer within the meaning of S. 2(c) of the Sales Tax Act.

We therefore hold that on the facts admitted before us the petitioner was not carrying on the business of selling on behalf of the Company and was not a dealer within the meaning of S. 2(c) of the Act. It was therefore not liable to registration. The order dated 9-5-52 holding it a dealer under the Act is erroneous.

(8) The learned Counsel for the respondents contends that the communication dated 9-5-52 to the Sales Tax Officer is not an order and cannot be quashed by a writ of 'certiorari'. The determination of the Sales Tax Commissioner, dated 7-1-52, which is styled as an order, was made under S. 19 of the Act. As the petitioner was a registered dealer, it had to apply for cancellation of the registration certificate under R. 14A read with S. 8A(5) of the Act. That application had to be in Form XXVIII and addressed to the Sales Tax Officer. The Sales Tax Officer is not empowered to cancel the certificate. It has to be cancelled by the Commissioner. He had therefore to make a report on enquiry into the facts. He made such a report and the Commissioner was bound to pass an order cancelling or refusing to cancel the certificate. The decision dated 9-5-52 is certainly a judicial order under S. 8A(5) of the Act.

(9) The learned Counsel for the respondents relied on the decision of the Board of Revenue in — 'D. M. Ranade v. State', 1952 Nag LJ 446 (C) where it has been held that the determination under S. 19 of the Sales Tax Act is not binding on the parties before the Sales Tax Commissioner, who are free to accept or reject that advice and consequently no appeal lies against that order. This decision is inapplicable here.

(10) The petition therefore succeeds and is allowed. The order dated 9-5-52 is quashed and the Sales Tax Commissioner is directed to cancel the registration certificate of the petitioner. Parties will bear their costs as incurred as the

petitioner is responsible for this litigation by the wrong use of the term 'del credere' agent. The petitioner shall pay the costs of paper book if any. The deposited amount will be refunded after deducting the paper book costs.

A/D.H.Z. Petition allowed.

** **A.I.R. 1954 NAGPUR 151 (Vol. 41, C.N. 55)**

(FULL BENCH)

SEN, DEO AND BHUTT JJ.

Krishna Rajeshwar, Petitioner v. The Chief Secretary to the M. P. Govt., Police Dept., Nagpur and another, Respondents.

Misc. Petn. No. 303 of 1952, D/- 2-11-1953.

†****Constitution of India, Art. 226 — Application under — Limitation — (Letters Patent, Cl. 27 (Nag.)) — (High Court Rules and Orders — Nagpur High Court Rules, Chap. 4, Rr. 11 and 14). ILR (1952) Nag 934: AIR 1953 Nag 80; 1953 Nag LJ 189: AIR 1953 Nag 251; Misc. Petns. Nos. 162, 254, 224 and 164 of 1952, Overruled.**

The relief under Article 226 is discretionary and, invoking as it does the extraordinary powers of the High Court, must be sought as soon as an injury is caused or threatened.

The Court, under Article 226, however, owes duty not only to the contending party but also to the petitioner, and wide and untrammelled as are its powers, it cannot be precluded from rectifying a grave injustice simply because the petitioner could have moved in the matter earlier. It would, therefore, be wholly repugnant to the nature of the proceedings and of the powers of the Court that are invoked, in the absence of a rule framed under clause 27 of the Letters Patent, to postulate an artificial, much less an arbitrary, standard to determine whether a petition should be thrown out in limine or considered on merits. The object, in such cases, is the removal of grave and patent errors which infringe on human rights and unless, by undue delay or laches, inconsistent legal or equitable considerations have arisen which judicial conscience cannot with equanimity ignore, justice should not be denied simply because the Court has not been moved soon after the injury was caused or threatened and the delay has not been explained. Naturally, therefore, the question of delay or laches cannot be determined with reference to the number of days that have elapsed since the injury was caused or threatened, and while in certain cases long delay may not be deemed sufficient to defeat a just cause, in others, it may not in equity be fair to condone even a slight delay. It is presumably for this reason that the Constitution has not provided any limitation on the discretion of the Court in regard to the exercise of its powers under Article 226, and has left it to the Court itself to determine the limits to which it will go, depending upon the justice of each case. Inasmuch as judicial decisions cannot make law, they cannot also create any rule or practice without reference to any rule-making power. Thus the High Court cannot lay down a rule of diligence by reference to a number of days by a decision without framing it under its rule-making powers. A petition under Art. 226 for a writ of certiorari is not liable to be rejected in limine on the ground that it is filed beyond 45 days. So also the High Court cannot infer diligence when a petition for a writ of certiorari is filed within 45 days irrespective of the fact that an inexcusable delay might be involved even within those 45 days. Case law discussed.

(Paras 25, 27, 28)

K. G. Chendkey and A. S. Bobde, for Applicant; W. K. Sheorey, for Respondents.

CASES REFERRED: Paras

(A) (V40) AIR 1953 Nag 80: ILR (1952) Nag 934 — 5, 20, 21, 31
(B) (V40) AIR 1953 Nag 251: 1953 Nag LJ 189 — 6, 20, 21, 23, 31, 36
(C) (V40) AIR 1953 Nag 89: ILR (1952) Nag 839 (FB) — 6, 14, 21, 39
(D) ('52) MP No 162 of 1952 (Nag) — 7
(E) ('52) MP No 254 of 1952 (Nag) — 9
(F) ('52) MP No 224 of 1952 (Nag) — 10
(G) ('52) MP No 164 of 1952 (Nag) — 11
(H) ('53) MP Nos 285 and 291 of 1952, D/- 19-1-1953 and 27-2-1953 (Nag) — 14
(I) ('52) MP No 1771 of 1951, D/- 21-2-1952 (Nag) — 14
(J) ('52) MP No 14 of 1952, D/- 10-4-1952 (Nag) — 14
(K) (V40) AIR 1953 Nag 1: (MP No 17 of 1952, D/- 16-7-1952 Nag) — 14
(L) ('52) MP No 72 of 1952, D/- 22-9-1952 (Nag) — 14
(M) ('52) MP No 151 of 1952, D/- 13-11-1952 (Nag) — 14
(N) ('52) MP No 142 of 1952, D/- 18-11-1952 (Nag) — 14
(O) (V40) AIR 1953 Nag 284: (MP No 135 of 1952, D/- 20-11-1952 Nag) — 14
(P) (V40) AIR 1953 Nag 148: (MP No 101 of 1952, D/- 19-12-1952 Nag) — 14
(Q) ('52) MP No 64 of 1952, D/- 28-7-1952 (Nag) — 14
(R) ('52) MP No 49 of 1952, D/- 30-10-1952 (Nag) — 14
(S) ('52) MP No 78 of 1952, D/- 13-11-1952 (Nag) — 14
(T) ('52) MP No 187 of 1952, D/- 20-11-1952 (Nag) — 14
(U) (1871) 6 QB 652: 40 LJ QB 247 — 23
(V) (1917) 115 LT 930: 81 JP 85 — 23, 27, 45
(W) (V23) AIR 1936 Oudh 185: 12 Luck 52 — 26, 34
(X) (V29) AIR 1942 Pat 251: 21 Pat 197 — 26, 34
(Y) (V29) AIR 1942 Oudh 392: 200 Ind Cas 608 — 26, 34
(Z) (V23) AIR 1936 Sind 172: 30 Sind LR 271 — 26, 34
(Z1) (1861) 9 HLC 360: 11 ER 769 — 27
(Z2) (V27) AIR 1940 Rang 91: 1940 Rang LR 237 — 34
(Z3) (V37) AIR 1950 Ajmer 1 — 34
(Z4) (V37) AIR 1950 Pat 470 — 34
(Z5) (1889) 43 Ch D 310: 59 LJ Ch 148 — 37
(Z6) (1880) 5 AC 214: 49 LJ QB 577 — 37
(Z7) (1882) 9 QBD 741: 49 LJ QB 716 — 37
(Z8) (1889) 2 QB 445 — 37
(Z9) (1929) 141 LT 590: 45 TLR 512 — 37
(Z10) (1917) 115 LT 576: (1916) 2 AC 618 — 37
(Z11) (1952) 97 Law Ed (Adv) 200 — 38
(Z12) (1876) 1 AC 611: 35 LT 381 — 39
(Z13) (1816) 4 M & S 462: 105 ER 905 — 42
(Z14) (V13) AIR 1926 Nag 416: 95 Ind Cas 636 — 42
(Z15) (1874) 5 PC 221: 22 WR 492 — 42
(Z16) (1897) 1 Ch D 196: 66 LJ Ch 74 — 42
(Z17) (V40) AIR 1953 Nag 81: ILR (1953) Nag 267 — 43

(Order of Reference by HIDAYATULLAH and R. KAUSHALENDRA RAO JJ.)

This is a petition under Article 226 of the Constitution for a writ of 'certiorari' and a preliminary objection has been taken that the petition must be dismissed 'in limine' because it is filed more than 45 days after the impugned order and there is no explanation why there is this delay. We are referred to certain recent decisions of my Lord the Chief Justice and Mudholkar J. to which more detailed reference shall be made presently.

(2) There is no such rule in the Rules of the High Court. In the rules framed for petitions under Article 227 of the Constitution, there is no express rule but the rules applicable to civil or criminal revisions are made applicable 'mutatis mutandis' to petitions under that Article. The rules on the civil and criminal side are divergent about the period during which the petitions have to be filed if they are to be regarded as made with due diligence — that on the civil side allowing 45 days and the one on the criminal side allowing 60.

(3) There being no incorporation of the High Court Rules on the subject of civil and criminal revisions by reference in the rules framed for petitions under Article 226, as has been done in the rules regarding petitions under Article 227, it is manifest that the High Court has deliberately made a distinction between petitions under Article 226 and those under Article 227. It is also apparent that even when the rules were incorporated by a reference a distinction was made between civil and criminal matters.

(4) We have looked into the practice of this Court ever since this jurisdiction began and we are not aware that any petition was ever rejected prior to 12th November 1952 on the ground that the petitioner was not diligent because he had filed his petition beyond 45 days, the copying days excluded. No hard and fast period was ever laid down for testing diligence.

(5) The rule or practice (whichever one may call it) was initiated in Misc. Petn. No. 110 of 1952 (since reported in — 'Rajnandgaon Bus S. Co. v. Appellate Authority', AIR 1953 Nag 80 (A), hereinafter called the first case) in which case the Constitution Bench observed as follows :

"This application must be dismissed 'in limine' on the ground that this Court was moved too late. The order impugned in this case was passed on the 16th April 1951, and the application was not filed in this Court until the 26th April 1952, when the Court was closing for the long vacation, and was not heard in motion until the 21st July 1952. When we admitted this application we were not apprised of the delay. The office should have drawn the attention of the Court to the fact that the application was rather stale.

Though no period of limitation has been prescribed for an application under Article 226 of the Constitution, yet ordinarily it must be made as soon as any threat to any right is there. Even an application in the ordinary revisional jurisdiction of this Court has got to be made within 45 days of the order moved against. We would therefore in the ordinary circumstances adhere to that rule, namely that if an application has not been made within 45 days of the order impugned, it shall be deemed not to have been made with due diligence, and any applicant moving this Court beyond that time will have the burden on him of showing that in spite of due diligence the Court could not have been moved earlier."

(6) Later, in 'Mahomed Nurul Huda v. Kikabhai', AIR 1953 Nag 251 (B), (hereinafter called the second case), however, this decision had to be explained as the rule laid down there was contested. The Division Bench explained their earlier decision as under :

"We would make it clear that we have not prescribed a period of limitation at all. What we have laid down in that case is that a petition under Article 226 of the Constitution should be made by the party injured with due diligence, that is to say, as soon after the occasion for seeking the redress from this Court arises. If a person delays unnecessarily the making of a petition to this Court, then his petition is likely to be thrown out on that ground alone. The principle which we have enunciated in this case is not a new one. It is followed in England and has been followed by this Court in several other cases. No doubt, under Article 226 of the Constitution, wide and untrammelled powers have been given to this Court, but those powers are in the discretion of the Court; and when exercising the discretion committed to the Court, and particularly so when the discretion is a very wide one, the Court must necessarily set some limits to the exercise of that discretion. These limits are certainly not inflexible but they can be altered according to the circumstances of a particular case.

We have therefore stated in substance in that case that if a petition is made within 45 days of the order impugned, we would presume that it has been made with due diligence. If, however, it is not made within this period, then we would not presume that it has been made with due diligence and it would be for the petitioner to explain the circumstance which caused the delay in making the petition. This is the rule which we have laid down in that case and we do not think that it is at all in conflict with the decision or even with the majority view in — 'Bhailal Jagdish v. Additional Deputy Commr., Akola', AIR 1953 Nag 89 (FB) (C).

We would also like to reiterate that where a special law has been framed with the particular idea of expediting the disposal of a matter, we think it imperative on every party who is aggrieved by the order passed under such a law to approach this Court without undue delay. It seems to us that the period of 45 days, from which would be deducted (sic) the time taken up in obtaining a copy of the impugned order is sufficient for any person who is aggrieved by the order to come up to this Court. But apart from that, if there is any further delay, then he has got to explain it. We would, however, make it clear that this is not a rule of limitation but only a rule which raises a certain presumption and further that it is meant to apply only to petitions where the main relief sought is quashing an order of an inferior tribunal."

It may be pointed out that the Full Bench in 'Bhailal's case (C)' allowed a petition filed five months after the date of the impugned order without any advertence to the question of diligence and that that decision was less than a month before the first case.

(7) If the matter had rested there it might have been possible to say that there was really no rule of limitation and the number of days

was not inflexible and that every Bench was free to apply it or not, regard being had to the circumstances in each case. But some of the subsequent cases seem to affirm what was laid down in the first case without the qualification stated in the second case. A few instances are given here :

(8) Misc. Petn. No. 162 of 1952 (D) was filed on 23-7-1952, that is to say, 'four months before the earliest decision on this point', but it was dismissed on the 20th February 1953 on a strict application of the rule and without considering anything further. The learned Judges on this occasion observed as follows :

"It seems to us unnecessary to consider whether this is a good ground on which the order of the Additional Deputy Commissioner can be attacked because, in our opinion, the petition to this Court has not been made with due diligence. We have been reiterating in several cases lately that unless a petition under Article 226 is made with due diligence it is liable to be thrown out on that ground alone. Where a petitioner challenges an order of an inferior tribunal, we are prepared to presume due diligence in favour of the petitioner 'provided he comes to this Court within 45 days'. We are also prepared to allow such a petitioner the benefit of such time as is taken in obtaining a certified copy of the impugned order. But we are not prepared to extend the presumption in his favour beyond this.

In the present case, the petitioner, though he obtained a copy of the order of the Additional Deputy Commissioner on the 25th April 1952, did not care to prefer the petition till the 23rd of July 1952. It is said that he could not file the petition for a long time because of the intervention of the summer vacation. The summer vacation ended on the 6th July 1952 and the High Court reopened on the 7th. Had the petitioner preferred his petition on the 7th July, we would certainly have regarded him as prosecuting the petition with due diligence. Since he did not choose to do so, we must hold that the petitioner has not been diligent and on that ground we must dismiss his petition."

(9) Again in Misc. Petn. No. 254 of 1952 (E) filed on 16-10-1952 and before the enunciation of the rule on 12-11-1952, the application was thrown out on 23-2-1953 after it was admitted for a hearing on 10-11-1952.

(10) In Misc. Petn. No. 224 of 1952 (F) filed on 15-9-1952 before the rule of practice came into being (12-11-1952), the application of the rule or practice was insisted upon, regardless of the fact that on the day the application was made there was nothing to warn the petitioner that his diligence would be measured by a particular number of days. The learned Judges observed as follows :

"This application under Article 226 of the Constitution must be dismissed 'in limine' on the ground that the petitioner has not moved this Court with due diligence. The application was made on the 15th September 1952, though the order impugned was passed as long ago as 21st June 1952. Recently, we have been consistently refusing to interfere with an order which has become stale because the parties did not move this Court with due diligence. The application must therefore be dismissed, but in the circumstances, without costs."

(11) In Misc. Petn. No. 164 of 1952 (G) instituted in August 1952, the practice initiated in November of that year was referred to and the application was dismissed on 23-2-1953 as not complying with that practice. The order is as follows :

"This application is dismissed on the ground that it has not been presented to this Court with due diligence in conformity with the practice of this Court for the last several months. There will be no order as to costs."

We may point out respectfully that the practice commenced in November 1952 and not earlier.

(12) In another case the delay was first condoned but on a subsequent hearing the question was reopened and the petition dismissed under the rule. The effect of these decisions is to whittle down considerably, if not altogether, the exposition of the rule in the second case and to reinstate and re-affirm the rule as laid down in the first case. Since the rule or practice is made applicable to cases filed long before such rule or practice came into being it makes the rule or practice retrospective and in that sense goes beyond even a rule of limitation which does not apply to pending cases.

(13) The question therefore is whether such a rule as originally laid down or as explained later can be justified, especially as the High Court has deliberately refrained from framing a rule analogous to that made for petitions under Article 227. The rule itself has two aspects: It says (a) that diligence is to be presumed in all cases up to the 45th day, and (b) not thereafter unless the delay is explained. We see no warrant for restricting the power of the Court to dismiss an application for delay though filed within 45 days, regard being had to some special circumstance. Such a uniform presumption can only be laid down either by a statute or rule, and not by a dictum of the Court, in the purported exercise of judicial discretion.

(14) The decisions reported in the Nagpur Law Journal series and referred to above are sought to be supported on the ground of consistent practice. As we have already said, there is no decision of any other Bench taking a similar view and, with all due respect, an examination of the decisions during the last one year by the Bench which laid down the rule or practice does not disclose uniformity of practice. We will give here two examples.

In Misc. Petns. Nos. 285 and 291 of 1952, decided on 19-1-1953 and 27-2-1953 (Nag) (H) respectively by the same Divisional Bench, though the petitions were filed beyond 45 days (excluding the copying days) and the office had pointedly drawn the attention of the Court to this, the petitions were allowed without advertence to the rule laid down in the first case or applying the test of diligence as formulated in the second case. Reference may also be made to the following petitions which were allowed and in which the rule or practice was not considered though some of them were decided after 12-11-1952 :

(i) M. P. 1771 of 1951, D/- 21-2-1952 (I);

(ii) M. P. 14 of 1952, D/- 10-4-1952 (J);

(iii) Gabdoo v. S. Rajan, AIR 1953 Nag 1 (K);

(iv) M. P. 72 of 1952, D/- 22-9-1952 (L);

(v) AIR 1953 Nag 89 (FB) (C);

(vi) M. P. 151 of 1952, D/- 13-11-1952 (M);

(vii) M. P. 142 of 1952, D/- 18-11-1952 (N);

(viii) Shrikisan Hanumantrao v. Manaklal Hiralal, AIR 1953 Nag 284 (O) (Hidayatullah and Sen JJ.), and

(ix) Bajranglal v. Additional Deputy Commr., Akola, AIR 1953 Nag 148 (P).

The following cases were dismissed on merits without adverting to the fact that they were liable to be dismissed 'in limine' :

(i) M. P. 64 of 1952, dated 28-7-1952 (Q);

(ii) M. P. 49 of 1952, dated 30-10-1952 (R);

(iii) M. P. 78 of 1952, dated 13-11-1952 (S);

(iv) M. P. 187 of 1952, dated 20-11-1952 (T);

and two of these were within a day to a week of the decision in the first case.

(15) These decisions on petitions filed both before and after 12-11-1952 create much uncertainty about the existence of such rule or practice upon which it is said to be founded. The rule as formulated seems to apply only when the order impugned is of an inferior tribunal. Such a tribunal may be dealing with a civil or a criminal matter. The petition itself may be both under Articles 226 and 227. Is a petition questioning the jurisdiction of a criminal tribunal to be rejected 'in limine' if filed after 45 days before 60 days, and if 45 days, why not sixty? Is there any difference between petitions in civil matters and those in criminal matters? These questions naturally arise.

(16) A larger question is, however, involved. While the practice of the Court is regarded as the law of the Court even without any reason for it if it is ancient, the question is whether a rule of this character prescribing a certain number of days from which the diligence of a party can be inferred or negatived can be made through decisions which, if we may say with due respect, are neither ancient nor consistent. The resulting practice creates for all intents and purposes a rule of limitation. Copying days are counted, vacation of the Court is considered and then the result is reached whether the applicant is diligent or not. The watershed between diligence and lack of it is placed at the end of 45 days. There are other spheres in which delay is material. We are aware that delay defeats equity; that an application for stay can be rejected if delayed (Order XLI, rule 5, Civil Procedure Code), but no decision has thought of crystallizing the test to determine the delay with reference to a fixed number of days.

(17) We express no opinion on the point whether the High Court in the exercise of its rule-making power can frame such a rule with respect to petitions under Article 226. That is not the question here. We are only concerned with the propositions as laid down in the first case and as affirmed subsequently. In our opinion, those decisions, with all due respect, attempt what only a legislature or the High Court acting in its rule-making power can do. Even in a small country like England where communications are very well developed, the period is six months for moving the Court for a writ of 'certiorari' though the Court has the power to abridge or enlarge the period. We see no reason why for this right which is primarily to enforce fundamental rights, the period should be so short. We accordingly frame the following questions for consideration by a Full Bench :

(i) Whether the High Court can lay down a rule of diligence by reference to a number of days by a decision without framing it under its rule-making powers?

(ii) Whether a petition under Article 226 for a writ of 'certiorari' is liable to be rejected 'in limine' on the ground that it is filed beyond 45 days, unless the petitioner satisfactorily explains each day's delay thereafter? and

(iii) Must the High Court infer diligence when a petition for a writ of 'certiorari' is filed within 45 days irrespective of the fact that an inexecusable delay might be involved even within those 45 days?

(18) The papers will accordingly be laid before the Honourable the Chief Justice for constituting a Full Bench to consider the three questions framed above.

OPINION OF THE FULL BENCH

BHUTT J. :

(19) The following questions have been referred to the Full Bench in Miscellaneous Petition No. 303 of 1952 by the Division Bench consisting of Hidayatullah and Rao JJ., viz.—

(1) Whether the High Court can lay down a rule of diligence by reference to a number of days by a decision without framing it under its rule-making powers;

(2) Whether a petition under Article 226 for a writ of 'certiorari' is liable to be rejected 'in limine' on the ground that it is filed beyond 45 days, unless the petitioner satisfactorily explains each day's delay thereafter; and

(3) Must the High Court infer diligence when a petition for a writ of 'certiorari' is filed within 45 days irrespective of the fact that an inexecusable delay might be involved even within those 45 days.

(20) The matter arose in this manner. In — AIR 1953 Nag 80 (A), which was decided on the 12th November 1952, the Constitution Bench consisting of the Honourable the Chief Justice and Mudholkar J. laid down the following rule :

"Though no period of limitation has been prescribed for an application under Article 226 of the Constitution, yet ordinarily it must be made as soon as any threat to any right is there. Even an application in the ordinary revisional jurisdiction of this Court has got to be made within 45 days of the order moved against. We would therefore in the ordinary circumstances adhere to that rule, viz., that if an application has not been made within 45 days of the order impugned, it shall be deemed not to have been made with due diligence, and any applicant moving this Court beyond that time will have the burden on him of showing that in spite of due diligence the Court could not have been moved earlier."

This rule was amplified in AIR 1953 Nag 251 (B) and it was explained that it was not intended to prescribe a period of limitation and only raised a presumption of want of due diligence if a petition was made more than 45 days from the date of the impugned order after excluding the time taken in obtaining a certified copy thereof. Certain decisions of the Constitution Bench have, however, been quoted in the order of reference, from which, in the opinion of the Division Bench, it would appear that the rule has not been uniformly applied and that in other cases it has been applied as a strict rule of limitation and not as a flexible test of due diligence. Pertinent reference was in this connection made to the following points :

(1) That the rule could not lawfully be applied to pending cases which were instituted prior to the date when the rule was postulated, that is prior to 12-11-1952.

(2) That a uniform practice could only be laid down either by a statute or rule and not by a dictum of the Court in the exercise of judicial discretion.

(3) That a practice can be regarded as the law of the Court if it is ancient, and cannot be created by any judicial decision.

(21) The rule which is impugned is stated thus in — 'M. N. Huda v. Kikabhai (B)', (supra) :

"Even the second preliminary objection raised by the learned counsel is, in our opinion, a good one. As held in AIR 1953 Nag 80 (A), a petitioner who does not come up to this Court against an impugned order with due diligence is liable to have his petition dismissed on that ground alone. It was, however, argued on behalf of the petitioner that in view of the decision in AIR 1953 Nag 89 (FB) (C), the decision of this Court in the aforesaid case is not correct because by providing for a period of limitation we have tried to circumscribe a provision of the Constitution. The argument is based upon a misapprehension of our observations in the aforesaid case. We would make it clear that we have not prescribed a period of limitation at all.

What we have laid down in that case is that a petition under Article 226 of the Constitution should be made by the party injured with due diligence, that is to say, as soon after the occasion for seeking redress from this Court arises. If a person delays unnecessarily the making of a petition to this Court, then his petition is likely to be thrown out on that ground alone. The principle which we have enunciated in this case is not a new one. It is followed in England and has been followed by this Court in several other cases. No doubt, under Article 226 of the Constitution, wide and untrammelled powers have been given to this Court, but these powers are in the discretion of the Court; and when exercising the discretion committed to the Court, and particularly so when the discretion is a very wide one, the Court must necessarily set some limits to the exercise of that discretion.

These limits are certainly not inflexible but they can be altered according to the circumstances of a particular case. We have, therefore, stated in substance in that case that if a petition is made within 45 days of the order impugned, we would presume that it has been made with due diligence. If, however, it is not made within this period, then we would not presume that it has been made with due diligence and it would be for the petitioner to explain the circumstances which caused the delay in making the petition. This is the rule which we have laid down in that case and we do not think that it is at all in conflict with the decision or even with the majority view in 'Bhailal's case (C).'"

(22) During the course of arguments it was contended for the petitioner that applications under Article 226 of the Constitution are governed by Article 181, 1st Schedule, of the Indian Limitation Act, 1908, and can legally be made within three years from the date of the impugned order. It was accordingly urged that if an application is made within this period, it cannot be dismissed unless laches or acquiescence is proved strictly by the contending party. It was not disputed that this point was raised before the Division Bench but as it has not been referred to Full Bench, I refrain from pronouncing thereon.

(23) In 'M. N. Huda v. Kikabhai (B)' (supra) it has been assumed that the principle enunciated therein is followed in England. In England, however, formerly statute (1739) 13 Geo. II, c. 18, S. 5, since repealed, prescribed a period of six months for applications directed against orders of magistrates, and there was no general rule or practice requiring the applications for 'certiorari' to be made within any fixed period: 'R. v. Sheffield Corporation', (1871) 6 QB 652 (U). The matter is now covered by Crown Office Rules, rules 21 and 30 whereof are reproduced below:

"R. 21. No writ of certiorari shall be granted, issued or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such writ of certiorari be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing for the same has served the order 'nisi' or summons six days before the return day of the order 'nisi' or summons for the writ on the justice or justices, or on two of them, if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the granting, issuing or allowing such writ of certiorari."

"R. 30. The provisions of the foregoing rules 20, 21, 22, 23, 24 and 27, as far as they may be applicable, shall apply to the removal of all other orders and proceedings, which may be subject to removal by certiorari into the King's Bench Division for the purpose of being quashed."

When the period of six months was fixed by statute, it prescribed an inflexible rule of limitation and the Courts had no power to extend it. As now it is fixed by a rule of Court, it can be extended in suitable cases. Order LXIV, rule 7 of the Rules of the Supreme Court, which applies to all proceedings on the Crown side by Crown Office Rules, rule 259, however, gives to Courts power both to enlarge and abridge this period. This rule is reproduced below:

"The Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Accordingly, an application made within the prescribed period may yet be refused on the ground that there has been undue delay. In — 'R. v. Glamorgan Appeal Tribunal; Ex Parte Fricker', (1917) 115 LT 930 at 932 (V), an application for 'certiorari' made two months and a half after the alleged infringement of a common law right was refused on the ground of undue delay. It will thus be observed that no support can be taken from the English practice for the rule that has been laid down by the Constitution Bench.

(24) The rule, however, was sought to be supported by the practice followed in this Court in respect of applications for revision under section 115 of the Code of Civil Procedure, 1908, section 25 of the Provincial Small Cause Courts Act, 1887, or section 75(1) of the Provincial Insolvency Act, 1920, and section 435 of the Code of Criminal Procedure, 1898. These applications are

governed by rules 11 and 14, Chapter 4, of the High Court Rules, which are reproduced below:

"11. All petitions for revision made to this Court under section 115, Code of Civil Procedure, or section 25 of the Provincial Small Cause Courts Act or section 75(1) of the Provincial Insolvency Act will be treated as 'prima facie' made without such diligence as ought ordinarily to be shown to entitle the petitioner to relief in revision if the period from the date of the order of which revision is sought to the date on which the petition is filed in Court excluding the time properly spent in obtaining any copy required to be submitted with the petition is more than 45 days."

"14. All petitions for revision made to this Court under section 435 of the Code of Criminal Procedure shall be treated as 'prima facie' made without such diligence as ought ordinarily to be shown to enable the petitioner to relief in revision if the period from the date of the order of which revision is sought to the date on which the petition is filed in Court excluding the time properly spent in obtaining any copy required to be submitted with the petition, is more than 60 days."

These Rules were framed under the rule-making power vesting in the High Court by virtue of Letters Patent, clause 27, which is set out below:

"Regulation of proceedings. — And we do further ordain that it shall be lawful for the High Court of Judicature at Nagpur from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively."

The practice that is sought to be set up by the Constitution Bench, is not based on any provision of the High Court Rules. It has, therefore, to be determined how far this deficiency affects its validity.

(25) It appears to me clear that inasmuch as judicial decisions cannot make law, they cannot also create any rule or practice without reference to any rule-making power. Rules 11 and 14, Chapter 4, of the High Court Rules have thus legal basis which is wanting in the rule or practice sought to be set up by the Constitution Bench. In this connection it cannot be urged that the judicial decisions have only declared an existing practice for no practice had existed prior to the pronouncements and the decisions themselves purport to set up a practice for future. Further, the practice must be ancient and uniform before it can be the subject of a judicial decision. It is obvious that no such practice has grown, or can grow, since the commencement of the Constitution on January 26, 1950. The rule or practice in question cannot, therefore, have a legally binding effect in all cases.

(26) The learned counsel for the respondent referred to certain decisions in support of the contention that a practice of the Court can be laid down by judicial decisions. In — 'Birendra Bikram Singh v. Basdeo', AIR 1936 Oudh 185 (W), it was held that interference in revision being discretionary, a revision application made too late is not entertainable and an explanation should be called for delay if it is made more than 90 days after the passing of the impugned order. Similar view was held in — 'Goswami Krishnadevanand Ramji v. Kapildeo Ramji', AIR 1942 Pat 251 (X), . In — 'Kallu Mal v. Nawabganj Municipality', AIR 1942 Oudh 392 (Y), it was observed:

"There is no limitation prescribed for the application for revision, but according to the practice of the Oudh Chief Court if an application is unduly delayed it can be thrown out on that very ground, and ordinarily if an application is filed beyond the period prescribed for an appeal it ought to be considered to have been unduly delayed. Time requisite for obtaining copy of decree or order can be excluded."

In these cases, if the practice referred to was not based on any rule of the High Court as was the case in — 'Hassomal Villaitrai v. Kishinchand Chatomal', AIR 1936 Sind 172 (Z), it does appear to have acquired the sanctity of long usage. The practice in question, on the other hand, has not even come into existence. In this connection it was contended by the learned counsel for the petitioner that clause 27 of the Letters Patent would not apply to proceedings under the Constitution. These proceedings, however, are as much judicial in character as any proceedings under a Statute, and would accordingly be equally amenable to the rule-making power of the High Court.

(27) It was not disputed that the relief under Article 226 of the Constitution is discretionary and, invoking as it does the extraordinary powers of the High Court, must be sought as soon as an injury is caused or threatened. It was, however, contended on behalf of the petitioner that mere delay, unless it amounts to laches or acquiescence, cannot defeat an action under Article 226 of the Constitution. Reliance is placed in this connection on — 'Archbold v. Scully', (1861) 9 HLC 360 (Z1). Their Lordships were considering the case of a reversionary interest under a lease, which could be claimed in a Court of Equity unless there was any bar of the Statute of Limitation or any laches or acquiescence on the part of the Appellant.

That case does not deal with prerogative writs which are exceptional in nature. Uuless, therefore, a person has invoked the aid of Court without any undue delay, his petition is liable to be thrown out on that ground alone: — 'R. v. Glamorgan Appeal Tribunal; Ex parte Fricker', (V), (cit. sup.). Undue delay in such cases is liable to bring into being certain expectations for the future in the mind of the opposite party, which it may not be advisable to disturb, even if any inconsistent rights have not in the meantime sprung up.

(28) The Court, under Article 226 of the Constitution, however, owes duty not only to the contending party but also to the petitioner, and wide and untrammelled as are its powers, it cannot be precluded from rectifying a grave injustice simply

because the petitioner could have moved in the matter earlier. It would, therefore, be wholly repugnant to the nature of the proceedings and of the powers of the Court that are invoked, in the absence of a rule framed under clause 27 of the Letters Patent, to postulate an artificial, much less an arbitrary, standard to determine whether a petition should be thrown out 'in limine' or considered on merits. The object, in such cases, is the removal of grave and patent errors which infringe on human rights & unless, by undue delay or laches, inconsistent legal or equitable considerations have arisen which judicial conscience cannot with equanimity ignore, justice should not be denied simply because the Court has not been moved soon after the injury was caused or threatened and the delay has not been explained.

Naturally, therefore, the question of delay or laches cannot be determined with reference to the number of days that have elapsed since the injury was caused or threatened, and while in certain cases long delay may not be deemed sufficient to defeat a just cause, in others, it may not in equity be fair to condone even a slight delay. It is presumably for this reason that the Constitution has not provided any limitation on the discretion of the Court in regard to the exercise of its powers under Article 226, and has left it to the Court itself to determine the limits to which it will go, depending upon the justice of each case.

(29) My answer to each of the points of reference is in the negative.

DEO J.:

(30) I had the advantage of reading the opinion about to be delivered by my learned brother Bhutt J. and I agree that all the three questions should be answered in the negative. I wish to add my reasons as follows :

(31) The contention of the learned Counsel is that this reference is unnecessary as limitation for petitions for writs of 'certiorari' and ancillary reliefs under Article 226 is governed by Article 181 of the Limitation Act. No doubt the learned Additional Government Pleader admits that the learned Counsel for the petitioner relied on Article 181 of the Limitation Act and the matter was argued at some length. If the petitioner really thought that he had a good case under Article 181 and this reference was not necessary, he should have moved the Referring Bench to reconsider their order. As it is, we cannot decide this question. The reference was made under rule 12 of chapter 1 of the Rules of this Court because according to the Referring Bench the proceedings pending before it involve a reconsideration of the two Division Bench decisions viz. AIR 1953 Nag 80 (A) and AIR 1953 Nag 251 (B). We have, therefore, to answer the reference on the assumption that Article 181 of the Limitation Act is inapplicable.

(32) In the first case the learned Chief Justice who delivered the order of the Court (Mudholkar J. concurring) held that any application under Article 226 must ordinarily be made as soon as any threat to any right is there and the rule of 45 days for the exercise of ordinary revisional jurisdiction would be adhered to. That was a petition to quash an order passed by the Appellate Authority under the Motor Vehicles Act. The second case was under the Central Provinces and Berar Letting of Houses and Rent Control Order to quash the order of the Additional Deputy Commissioner passed in appeal. The petition was dismissed by the same Bench on the grounds that the petitioner was not a person entitled to the relief and that the petition was made after 45 days. Although the case could be disposed of on the first point, their Lordships took the opportunity to explain the rule laid down in the first decision.

The two decisions read together, however, lay down the same rule, namely, that a petition under Article 226, which is not made within 45 days of the order impugned, shall be deemed not to have been made with due diligence and the petitioner moving the Court beyond this period will have to satisfy it that in spite of due diligence the Court could not have been moved earlier. Otherwise, his petition is likely to be thrown out on that ground alone. In short, the Division Bench adopted for the purposes of Article 226 rule 11 of chapter 4 of the Rules of this Court which provides that

> "applications for revision under section 115 of the Code of Civil Procedure, section 25 of the Provincial Small Cause Courts Act or section 75(1) of the Provincial Insolvency Act shall be treated as 'prima facie' made without such diligence as ought ordinarily be shown to entitle the petitioner to the relief in revision if the period from the date of the order of which revision is sought to the date on which the petition is filed in Court excluding the time properly spent in obtaining any copy required to be submitted with the petition is more than 45 days."

(33) Rule 11 of the Rules of this Court is based on a practice of very long standing. Prior to 1921 the practice of the Court of Judicial Commissioner was to regard applications under section 115, Civil Procedure Code, or section 25, Provincial Small Cause Courts Act, made beyond 90 days including copying days, as unreasonably delayed. How long this practice continued cannot be ascertained for want of earlier office files. By an office order dated the 20th April 1921 this period was reduced to 60 days with effect from 1st October 1921. So far, the time was regarded as a period of limitation. On account of the representations of the Bar that copying time, which is always uncertain, should be excluded from this period, it was reduced to 45 days exclusive of copying time with effect from 1st October 1922. It was ordered that applications for revision made beyond this period would be treated as 'prima facie' made without such diligence as ought ordinarily be shown to entitle the applicant to relief in revision.

This order was circulated not only to the Bar Associations in the Province but to all District Judges with directions to widely publish it for the benefit of the litigant public. Still applications were made beyond this period and were entertained. This order was again widely published in 1929. Still in 1933 Pollock A. J. C. made a note that there was a wide-spread ignorance on the part of mofussil pleaders as to this rule. The District Judges were again directed to widely publish it. It was in 1933 that a similar rule was

made for criminal revisions. In 1934 the rule of 45 days was made applicable to the applications for revision under the Provincial Insolvency Act. In my experience, the applications for revisions were entertained beyond this period even without an application explaining the delay. This practice prevailing in the Judicial Commissioner's Court for at least 15 years is to be found in rule 11 of chapter 4 which is made in exercise of the rule-making power of this Court under clause 27 of the Letters Patent.

The rules regulating the procedure regarding petitions under Article 226 of the Constitution were made by this Court in October 1951; but the Court apparently did not think it necessary to make a rule laid down in the decisions under consideration.

(34) Similar practice to that embodied in the rule of this Court, not to entertain applications for revision unless they are ordinarily made within 90 days of the order complained of, excluding the time allowable under section 12 of the Limitation Act appears to prevail in some High Courts. It appears to have been the practice of the old Chief Court of Oudh to refuse to entertain an application under section 115, Civil Procedure Code, if it were made too late, and to demand an explanation from the applicant if it were made more than 90 days after the passing of the order. AIR 1936 Oudh 185 (W). Time requisite for obtaining copy of the order was to be excluded as the rules required filing of such copy. AIR 1942 Oudh 392 (Y). The rules of the Court of the Judicial Commissioner, Sind, prescribed a period of 90 days subject to the discretion of the Court to extend the period. AIR 1936 Sind 172 (Z). In — 'Daw Po v. U Po Hmyin', AIR 1940 Rang 91 (Z2) it was held that the petitioner was entitled to utilize the rule of practice of 90 days to the full and could not be denied relief because he did not move the Court promptly.

Under the rule framed by the Ajmer Judicial Commissioner's Court an application filed beyond the period prescribed therein is to be considered to have been filed with undue delay and thrown out on that ground alone. There is no provision to exclude the time allowable under section 12 of the Limitation Act, but relying on — 'Kallu Mal v. Nawabganj Municipality (Y) (supra) it was excluded in the case reported in — 'Bhuralal v. Kasim', AIR 1950 Ajmer 1 (Z3). It is the practice of the Patna High Court not to entertain petitions for revision filed beyond 90 days. AIR 1942 Pat 251 (X). In this case, however, prejudice was caused to the other party by the delay in moving the High Court under section 115, Civil Procedure Code. In — 'Basuki Prasad Singh v. Satya Kinkar', AIR 1950 Pat 470 (Z4) it was held that the High Court will not refrain from exercising jurisdiction under this section on the ground of mere delay and that the opposite party can be compensated in costs for such delay.

(35) The learned Additional Government Pleader contends that the Court should not entertain a petition for a writ of 'certiorari' under Article 226 if it is unnecessarily delayed as the power under that Article is discretionary and the yard-stick for measuring the delay is 45 days as stated in the decisions under consideration. As appears from the referring order, the rule in question must be taken to refer only to petitions for writs to quash judicial or 'quasi-judicial' orders and for consequential orders and directions, and not to other petitions under that Article, though the rule is stated in very wide terms and, on a literal interpretation, applies to all petitions under Article 226. Arguments were addressed to us on the correctness of the rule as applicable only to writs to quash judicial or 'quasi-judicial' orders.

(36) The learned Additional Government Pleader relied on the practice in England and also of this Court prior to the two decisions in question. As stated in the referring order, there is no decision of this Court prior to the first decision under consideration, dated the 12th November 1952, which has taken that view; and in the decisions of the same Division Bench after the 12th November 1952, mentioned in the referring order, and others collected by us, the same view is not consistently taken. It is no doubt stated in — 'M. N. Huda v. Kikabhai (B)' (cit. sup.) that

> "The principle which we have enunciated in this case is not a new one. It is followed in England and has been followed by this Court in several cases."

Though we brought these two statements to the notice of the learned Additional Government Pleader and asked him to refer us to the earlier cases which have taken the view taken in the two decisions under consideration, he has not brought to our notice any such decision of this Court, nor of any other High Court where a relief under Article 226 of the Constitution was refused merely because the application was made beyond 45 days or beyond any particular period and the delay was not explained. We also asked the learned Counsel to draw our attention to any such decision of any High Court under the Code of Civil Procedure in the absence of a rule similar to our rule 11; but he has not referred us to any such decision except those already noticed though he promised to give a list of such precedents.

(37) The English decisions on which the learned Counsel relied are based on rules 21 and 30 of the Crown Office Rules, prescribing a period of limitation of six calendar months, to be calculated from the date of the order or determination complained of, for every application for a writ of 'certiorari', except by the Attorney General acting on behalf of the Crown. (Halsbury's Laws of England, Vol. 9, paragraph 1515, page 898). As pointed out by my learned brother, under Order LXIV, rule 7, of the Rules of the Supreme Court and rule 259 of the Crown Office Rules the Court has power to enlarge or curtail this period. — 'Re Oliver and Scott', (1889) 43 Ch D 310 (Z5). The learned Counsel relied on — 'Julius v. Lord Bishop of Oxford', (1880) 5 AC 214 (Z6) and — 'the Queen v. Sheward', (1882) 9 QBD 741 (Z7). The former is not in point. In the latter it was held that as the time allowed for setting aside an award made under the Lands Clauses Consolidation Act, 1845, had expired before the application for writ was made to the High Court, writ of 'certiorari' ought not to issue though the application was made within six months.

The learned Counsel also mentioned (1889) 2 QB 445 (Z8), but this case could not be traced in

the Reports. In — 'Rex v. London County Council', (1929) 141 LT 590 (Z9) though there was considerable lapse of time their Lordships decided to hear arguments on merits before deciding whether the intrinsic nature of the case justified enlargement of time. After hearing arguments the rule was discharged. It was observed that the Court had power to enlarge the time in view of rule 7, Order LXIV. As pointed out by my brother Bhutt J., petitions made within six months had been refused on the ground of delay on examination of the whole case on merits. See — 'Toranto Corporation v. Consumer's Gas Company', (1917) 115 LT 576 (Z10).

(38) It appears from the decision in — 'Federal Trade Commissioner v. Mineapolis Honeywell Regular Company', (1952) 97 Law Ed (Adv) 200 (Z11) that in the United States the limitation for making a petition for 'certiorari' is 90 days from the date of the order impugned.

(39) No doubt, as stated by me in AIR 1953 Nag 89 (C), none of the remedies provided by Article 226 are as of right. Granting of a relief is in that sense discretionary. — 'Queen v. Churchwardens of All Saints Wigan', (1876) 1 AC 611 (Z12). Article 226 confers on the High Court powers wider than those possessed by a civil Court; and though these powers are expressed in wide terms they do not supplant the powers of the ordinary Courts. Since the power is extraordinary, it is necessary for the High Court to impose on itself certain limitations in the exercise of that power. But in imposing those limitations, it cannot ignore the necessity to redress injustice and preclude itself from rectifying errors of law or jurisdiction. It is not necessary for the purpose of this reference to enumerate all the limitations placed on this power by the High Courts in this country, following the well-known precedents in England. As already stated, we have not come across any decision, English or Indian, which imposed a limitation as was done in the two decisions under consideration.

(40) If the High Court desires to put a limitation on exercise of the power under Article 226 by prescribing indirectly a period of limitation, it was not disputed before us that it can certainly do so in the exercise of its rule-making power. Whether it should do so or not is another matter. I express no opinion as those questions are outside the reference. Rule 11 of the Rules of this Court, which has the force of law, prescribes such limitation in the exercise of different jurisdictions stated therein, but it cannot be adopted in the exercise of the jurisdiction under Article 226 without framing an express rule, merely because in both cases the exercise of power is discretionary. As already stated, this Court refrained from making such a rule in the exercise of its rule-making power. The learned Additional Government Pleader did not bring to our notice any precedent or principle which entitles a Bench of this Court to act on rule 11 aforesaid in the exercise of this extraordinary jurisdiction. To do so amounts, in my view, to assumption by a Division Court, whose duty is to interpret and apply the law, of the function of the High Court to make rules to regulate its procedure.

(41) The decisions are open to the serious objection of creating uncertainty in the minds of the litigant public as to their remedies. It is not in the interest of justice that individual judges should be left to measure delay by their own yard-sticks.

(42) The decisions under consideration apparently proceed on the doctrine of laches. Laches means "a neglect to do something which by law a man is obliged to do." Per Lord Ellenborough in — 'Sebag v. Abitbol', (1816) 4 M & S 462 (Z13). Lapse of time or delay in suing, unaccounted for by disability, ignorance, or other circumstances constitute laches. It is an application of the principle that delay defeats equities. It applies only to equitable claims not covered by statutory prescriptions either directly or by way of analogy. The Courts of equity in England have refused to assist a person who sleeps upon his rights and neglects to enforce them within a reasonable time and with reasonable diligence. Laches to bar the plaintiff's right must amount to waiver, abandonment or acquiescence; and to raise a presumption of any of these, the evidence of conduct must be plain and unambiguous. — 'Murarilal v. Balkishan', AIR 1926 Nag 416 (Z14). In — 'Lindsay Petroleum Co. v. Hurd', (1874) 5 PC 221 (Z15), Lord Blackburn has stated at page 229—

> "Two circumstances always important in such cases are the length of delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

These observations were quoted with approval in — 'Rochefoucauld v. Boustead', (1897) 1 Ch D 196 (Z16) where Lindlay L. J. (Lord Halsbury L. C. and Smith L. J. concurring) pointed out at page 209 :

> "The time which has elapsed since the plaintiff knew that her claim to the estate was disputed is so considerable that, before giving the plaintiff the relief to which she would otherwise be entitled, it is necessary to consider what her conduct has been, and whether anything has happened to render it unjust to the defendant to compel him to account now."

The delay was more than 12 years. Still plaintiff was granted a decree. The doctrine of laches is not an arbitrary or a technical rule of limitation. A suitor cannot be denied a legal remedy unless on account of his conduct it would be practically unjust to the other side to do so.

(43) In 'Avi J. Cama v. Banwarilal', AIR 1953 Nag 81 (Z17) I had stated that a relator seeking a writ of 'quo warranto' is disqualified by having acquiesced or agreed in the act which he afterwards comes to complain of when it suits his purpose. The same principle ought to apply to petitions for 'certiorari'. If the conduct of the litigant does not disqualify him from seeking the discretionary relief under Article 226, I do not see any principle in shutting him out merely because he makes an application after a particular period. In the exercise of this discretionary power the High Court has to keep in view not only the length of the delay but the nature of the acts done by either party during interval rendering unjust an interference with the order sought to be quashed. A petition cannot therefore be rejected 'in limine' on the ground of delay

without hearing the case on merits. My answer to the second question is in the negative.

(44) The rule enunciated in the two decisions under consideration is in effect a technical rule fixing an arbitrary period of limitation. Even if it be regarded as a rule of diligence, it cannot be laid down by the High Court in the exercise of its judicial power. It has to resort to its rule-making power. My answer to the first question is therefore in the negative.

(45) As already stated, the diligence in moving the High Court for a writ of 'certiorari' must be considered not merely with reference to the length of time but also with reference to the circumstances of the case. Keeping in view the dictum of Lord Blackburn, the delay of 45 days may, in certain cases, be considered inordinate. Lord Reading C. J., delivering the judgment of the Court in (1917) 115 LT 930 at p. 932 (V) observed :

> "In this case, apart from every other ground, the applicant could not succeed, for two months and a half had elapsed before he came to this Court. If it is desired to take such an objection an application must be made at once to this Court. In these matters a period of two months and a half is a very considerable one."

That was a petition for a writ of 'certiorari against an order of a military Appeal Tribunal which had asked the petitioner to leave the Court room while allowing the military representative to remain when they were deliberating on the case. His Lordship pointed out that such tribunals must act with extreme rapidity and any objection to their procedure or decision must be taken immediately by an application for 'certiorari'. My answer to the third question is also in the negative.

(46) Let the papers be returned to the Referring Bench.

(47) SEN J. : I agree that the three questions be answered in the negative.

A/D.H.Z. Answers in the negative.

A.I.R. 1954 NAGPUR 160 (Vol. 41, C.N. 56)

SINHA C. J. AND BHUTT J.

Tansukhdas Chhaganlal, Petitioner v. Smt. Shambai and another, Opposite Party.

Misc. Petn. No. 99 of 1953, D/- 13-8-1953 for quashing the order of Addl. Deputy Commr. Amravati, D/- 10-7-1952.

Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1947), Cl. 13 — Partnership business, a distinct personality.

Where, in the first instances 'A' alone was the tenant of the premises and he allowed other persons to enter into partnership along with himself to carry on business in those premises, the partnership which 'A' entered into along with the third parties was a personality in law distinct from that of 'A' himself. A thus brought himself within the purview of the law prohibiting subletting except with the permission of the landlord, and was therefore liable to ejectment on the ground of unauthorised subletting. AIR 1952 Nag 312, Distinguished. (Para 4)

V. B. Mandpe, for Petitioner; Y. S. Tambe, for Opposite Party No. 1.

CASE REFERRED: Para
(A) (V39) AIR 1952 Nag 312: 1952 Nag LJ 371 5

ORDER : This is a tenant's petition under Art. 226 of the Constitution impugning the concurrent orders of the Rent Control authorities granting permission to the landlord (non-applicant no. 1) to terminate the tenancy.

(2) It appears that the petitioner had been a tenant of respondent no. 1 for a number of years in respect of the premises in question. Subsequently he allowed several other persons to occupy the premises to run a business as a partnership, in which the petitioner also appears to have been a partner. The landlord commenced proceedings under the Rent Control Order for permission to terminate the tenancy on the ground that the tenant-petitioner had sublet the premises to several other persons without the landlord's permission.

(3) Both the Rent Controller and the Appellate Authority have agreed in holding that the petitioner has allowed third parties to come into the premises and that therefore the tenant was liable to ejectment on the ground of unauthorised subletting.

(4) In this Court the only question for determination is whether there is any mistake apparent on the face of the record in so far as the Courts below have treated the third parties in partnership with the petitioner as a distinct legal entity for the petitioner himself. There is no doubt that in the first instance the petitioner alone was the tenant of the premises. If he allowed other persons to enter into partnership along with himself to carry on business in those premises he certainly brought himself within the purview of the law prohibiting subletting except with the permission of the landlord. The partnership which the petitioner entered into along with the third parties was clearly a personality in law distinct from that of the petitioner himself.

(5) Our attention was drawn to the decision of this Court in — 'Rajniklal & Co. v. Vithal Pandurang', AIR 1952 Nag 312 (A), but that was a case where a single person was carrying on business in the name of a firm, which was treated as a mere 'alias' for the person himself. It was in those circumstances that this Court held that the firm was not a legal entity separate from the person himself. But in the instant case it is clear that the partnership as such was never the tenant of the landlord in respect of the premises in question. It must therefore be held that the Courts below have taken the right view of the situation. The application must therefore be dismissed with costs. Hearing fee Rs. 50/-.

B/H.G.P. Application dismissed.

A.I.R. 1954 NAGPUR 161 (Vol. 41 C.N. 57)

SINHA C. J. AND BHUTT J.

Shamji Naranji, Applicant v. State of Madhya Pradesh and another, Non-Applicants.

Misc. Petns. Nos. 259 to 262 and 301 of 1952, 51 and 79 of 1953, D/- 18-9-1953.

(a) Constitution of India, Art. 226 — Jurisdiction of High Court — Limits of.

Article 226 contemplates, for purposes of jurisdiction, the following two conditions viz., that

(i) the power to issue writs etc. extends only to the territories in relation to which the High Court exercises jurisdiction; and

(ii) the writs etc. can be issued only to the person, authority or Government within those territories, and these are the only two conditions which govern the question of the High Court's jurisdiction. (Para 5)

Merely because a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within the territorial limits of the High Court so as to affect the rights of the parties therein, such tribunal or authority cannot be regarded as functioning within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226. The same limitations apply to the case of Government. AIR 1953 SC 210, Rel. on; AIR 1952 Bom 449 and AIR 1952 Mad 659, Doubted. (Para 6)

(b) Government of India Act (1935), Seventh Schedule, List I, Item 36 — Rules under Reso. No. 7252, 7581-121 dated 15-9-1913, regulating grant of mineral leases and prospecting licences — Rights of Government to regrant lease or license — Discretion of Government to regrant leases or licences — (Mineral Concession Rules (1949), Rr. 17, 28) — (Constitution of India, Art. 226).

The rules regulating the grant of mineral leases and prospecting licenses framed under the Resolution No. 7252 — 7581-121 dated 15-9-1913 or the Mineral Concession Rules, 1949 do not create any right in the applicant to a licence or lease against the Government. (Para 15)

An owner is ordinarily entitled freely to decide whether or not, and when, he would like to make his property open for any disposition or grant, and even if he were to use this right capriciously, it cannot be the subject of any legal action. In the absence of any provision to the contrary in the rules relating to prospecting licences or mining leases it must, therefore, be held that when a prior license or lease had been relinquished or cancelled, the land did not automatically become available for regrant and it was open to the Government to decide whether it should or should not be granted again. (Para 15)

Held that the direction that no area would be treated as available for regrant unless entered in the standard register and the information was open to the public contained in the Commerce and Industry Department Notice, dated the 20th March 1951, (published in M.P. Gazette, March 23, 1951, Part I, page 189), could not be said to be in derogation of any provision of the Mineral Concession Rules, 1949 and that the State Government had the power to refuse to grant a prospecting license on the ground that the areas were not available for regrant. (Para 15)

Held further that under the old rules as well as new rules Government was not trammelled by any considerations of precedence when there was competition between an application for a license and that for a lease, and was free to select any of them according as it considered one operation more appropriate than the other in any given case. It could not therefore be urged that the Government should not have exercised its discretion or power in favour of one party as against the other and no writ could be issued under Article 226 for that purpose. AIR 1952 SC 192, Rel. on. (Para 16)

(c) Constitution of India, Arts. 311, 226 — Dismissal, removal and reduction in rank — Nature of — Termination of service in ordinary course — Article not applicable — No remedy under Art. 226.

The terms, viz., dismissal, removal and reduction in rank, which find place in Article 311, are presumably taken from the disciplinary Codes in which these expressions find place. They have, therefore, obvious reference to termination of service or reduction in rank as a result of the infliction of punishment. In this view, where there is termination of service without reference to punishment, the case would not be covered by Article 311. AIR 1953 SC 250 and AIR 1952 Raj 17, Rel. on. (Para 19)

Where, therefore, the retirement of the petitioner is directed in the ordinary course, it would not be a case of removal within the meaning of Article 311. The fact that his retirement has been ordered as a result of the finding regarding the date of his birth does not make any difference. Even if the finding be irregular or even perverse, the result that has followed from it does not amount to punishment and cannot, therefore, be deemed to be a matter which is covered by Article 311, and hence there can be no interference under Art. 226. (Paras 20, 21)

(d) (Public Services) — General Conditions of Service, Rule 144(3) — Scope of.

Rule 144(3) of the General Conditions of Service is apparently directed against the employee and not against the Department. Further, the provision contemplates a case where there is no dispute regarding the date of birth as entered in the service documents. Where this is a matter of dispute, the power to order retirement on the ground of superannuation, which vests in the Department, can only be exercised after the date which as entered in the service documents is ascertained. (Para 21)

M. R. Bobde and G. R. Mudholkar, for Applicant: T. P. Naik, Addl. Govt. Pleader, for Non-Applicants.

CASES REFERRED: Paras

(A) (V39) AIR 1952 Bom 449: ILR (1952) Bom 974 5, 6

(B) (V30) AIR 1943 PC 164: 70 Ind App 129 (PC) 5, 6

(C) (V40) AIR 1953 SC 210: 1953 SCJ 293 6, 7

(D) (V40) AIR 1953 All 477: 1953 All LJ 148 (FB) 6

(E) (V39) AIR 1952 Mad 659: 1952-2 Mad LJ 805 6

(F) (V39) AIR 1952 SC 192: 1952 SCR 583 16

(G) (V40) AIR 1953 SC 250: 1953 SCR 655 19
(H) (V39) AIR 1952 Raj 17: ILR (1951) 1 Raj 405 19

ORDER: This order shall govern the disposal of Miscellaneous Petitions Nos. 260 to 262 of 1952, 301 of 1952, 51 of 1953 and 79 of 1953, in which there is a common question regarding the jurisdiction of this Court under Article 226 of the Constitution.

(2) The facts of these cases briefly are these:

M. P. 259/52 —

In this case Shamji Naranji applied on the 1st December 1949 for a prospecting licence in respect of 44.50 acres of land situated in 'mouza' Parseoni. His application was rejected on the 19th April 1952 by the State Government on the ground that the area in question was not thrown open for regrant. This decision was maintained by the Union Government by order dated the 9th September 1952.

M. P. 260/52 —

In this case Shamji Naranji made an application on the 25th November 1949 for grant of a prospecting licence in respect of 97.33 acres of land in 'mouza' Ramdongri. The application was entertained by the Deputy Commissioner in respect of 88.58 acres of land, excluding the area which was covered by the application of Smt. Sonubai. On the 17th November 1950, the Deputy Commissioner informed the petitioner that it would be desirable if he withdrew the application for a prospecting licence and applied for grant of mining lease, intimating further that he would not lose his priority. Accordingly the petitioner made an application on the 15th March 1951 for grant of mining lease in respect of 88.58 acres of land excluding the area covered by the application of Smt. Sonubai. However, on the 20th June 1952, the Deputy Commissioner informed the petitioner that the instructions contained in his letter dated the 17th November 1950 were withdrawn in view of the Government of India Notification No. M-11-152 (71) dated the 31st January 1951. On the 25th February 1952 the State Government rejected the application on the ground that the area had not been thrown open for regrant. This decision was maintained by the Union Government by orders dated the 16th August 1952 and the 19th August 1952.

M. P. 261/52 —

In this case Bhawanji Naranji applied on 13th March 1950 for grant of prospecting licence in respect of 24.08 acres of land of 'mouza' Chaksheti. He was informed on the 24th October 1951 by the State Government that out of the area applied for 16.41 acres could not be granted to him as that land was covered by the application, dated the 27th March 1951, of Shri Shastri, respondent No. 2, for grant of a mining lease. This decision was maintained by the Union Government by an order dated the 31st March 1952.

M. P. 262/52 —

In this case Shamji Naranji applied on the 30th November 1949 for grant of prospecting licence in respect of 88.85 acres of land of 'mouza' Palee. He was informed by the Deputy Commissioner on 1/2-2-1950 that excluding the area covered by some prior applications, the rest of the land was available for grant. His representation dated the 9th February 1950 against the exclusion of a part of the area was not replied to, and on the 15th March 1952 the State Government rejected his application for grant of prospecting licence on the ground that the area had not been thrown open for regrant. This decision was maintained by the Union Government by an order dated the 10th October 1952.

M. P. 301/52 —

In this case K. S. M. Hassonji and Sons applied on the 29th December 1949 for grant of a mining lease in respect of 47.34 acres of 'mouza' Pali. He was informed by the Deputy Commissioner on the 31st January 1950 that the area applied for was open for grant but asked him for certain more particulars. This information was duly supplied and subsequently also other steps required by the Deputy Commissioner were taken from time to time by the petitioner. The State Government, however, rejected his application on the 15th March 1952 on the ground that the area had not been thrown open for regrant. This decision was maintained by the Union Government by an order dated the 10th October 1952.

M. P. 51/53 —

In this case Shri N. N. Ghosh was on the relevant date in the service of the Union Government and was working as a Station Master at Akaltara Railway Station within the territories of the State. He received a letter dated the 22nd October 1951 from the District Commercial Officer, Chakradharpur (Bihar), asking him to furnish proof of his age from the school authorities or to submit an insurance policy in the alternative. On the 22nd November 1951 he submitted a school certificate in which his date of birth was given as the 10th March 1902. However, the Superintendent, Commercial Eastern Railways, Chakradharpur, respondent No. 3, informed him by a letter dated the 11th July 1952 that the date of his birth was the 10th March 1898 and not the 10th March 1902. His various representations against this decision were rejected, his last petition in the matter having been dismissed on the 8th November 1952 by the General Manager, Eastern Railways, Calcutta, respondent No. 2.

M. P. 79/53 —

This case is similar to M. P. No. 301 of 1952 and relates to the grant of a mining lease in respect of 24.91 acres of land of 'mouza' Pali, which was applied for on the 28th November 1949 by M. E. R. Malak and refused by the State Government on the 15th March 1952. The review petition against the order was rejected by the Union Government on 14/18-2-1953.

(3) So far as Miscellaneous Petitions Nos. 301 of 1952 and 79 of 1953 are concerned, they relate to the grant for lands which form part of an area of 93.91 acres, which once formed the subject-matter of a mining lease in favour of one Narayandas Girdhardas. This lease was cancelled by the Provincial Government in the year 1944, and an entry to that effect was made in the Standard Register of mining leases in Form No. 2-A prescribed under the Mining Rules then in force. In Miscellaneous Petition No. 261 of 1952 the land excluded from the grant, viz., an area of 16.41 acres, was held previously under a mining lease by Shamji Naranji who is the brother of the petitioner Bhawanji Naranji and is the petitioner in the remaining mining cases. It was not disputed before us that this lease was also determined before Shri Shastri made his application. In other mining cases also arguments were advanced on the assumption that the lands which formed the subject-matter of the applications were formerly covered by some grants which had terminated before the applications were made. In none of the cases an entry was made in the Standard Register of mining leases that the lands

were thrown open for regrant. It was not, however, disputed that the fact that the previous grants were terminated was duly entered in the register which was open to the public for inspection.

(4) All the petitions were, 'inter alia', resisted on the ground that this Court has no power under Article 226 of the Constitution to issue the writs as the Union Government which passed the final orders in the mining cases and the Railway authorities who dealt with the case of N. N. Ghosh had not their location or residence within the territorial limits of the Court's jurisdiction.

(5) Article 226 of the Constitution contemplates, for purposes of jurisdiction, the following two conditions, viz., that

(1) the power to issue writs etc. extends only to the territories in relation to which the High Court exercises jurisdiction; and

(2) the writs etc. can be issued only to the person, authority or Government within those territories,

and these are the only two conditions which govern the question of the High Court's jurisdiction. The first condition attaches to the writs, orders or directions, that is they cannot travel beyond the territorial limits of the High Court's jurisdiction, and the second governs the person, authority or Government to whom the writs, orders or directions are issued, that is that they should be within the territories in relation to which the High Court exercises jurisdiction. In — 'Madras Electric Tramways Co. v. Ranganathan', AIR 1952 Bom 449 (A) it was, however, held, on the authority of the decision of the Privy Council in — 'Ryots of Garabandho v. Zamindar of Parlakimedi', AIR 1943 PC 164 (B), that the power under Article 226 to issue writs can only be exercised provided the High Court has jurisdiction either in respect of the subject-matter or in respect of parties. However, the decision in — 'Ryots of Garabandho v. Zamindar of Parlakimedi (B)', dealt with the question of jurisdiction of the Madras High Court vis-a-vis the Supreme Court governed by the Madras Charter of 1800 and would not be of general application to cases where jurisdiction is derived from other specific provisions.

(6) In 'Election Commission v. Saka Venkata Rao', AIR 1953 SC 210 (C) their Lordships dealt with the question whether the High Court was competent under Article 226 to issue a writ of prohibition to the Election Commission situate at New Delhi and answered it in the negative. While recognising that the powers under the Article were wide, they observed :

> "But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories' which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories."

Repelling the contention, based on the observations in — 'AIR 1943 PC 164 (B), that the High Court had jurisdiction because the question referred to the Commission related to the respondent's right to sit and vote in the Legislative Assembly at Madras and the parties to the dispute also resided in the State of Madras, their Lordships observed:

> "We cannot accede to this argument. The rule that cause of action attracts jurisdiction in suits is based on enactment and cannot apply to writs issuable under Art. 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction."

Their Lordships further disagreed with the view

> "that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of the parties therein, such tribunal or authority must be regarded as 'functioning' within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226."

The test of jurisdiction applied by their Lordships was the residence or location within the territorial limits of the High Court, of the person or authority to whom the writ was to be issued and obviously the same limitation would apply to the case of Government. After the decision of their Lordships of the Supreme Court, the correctness of the decisions reported in — 'Maqbulunisa v. Union of India', AIR 1953 All 477 (FB) (D); — 'Ranganathan v. Madras Electric Tramway (1904), Ltd.', AIR 1952 Mad 659 (E), or even — 'AIR 1952 Bom 449 (A), which proceeded on the assumption that because the person, authority or Government exercises jurisdiction or power within the territorial limits of the High Court, they should be deemed to be functioning within those territories — a contention which has been repelled by the Supreme Court is open to doubt.

(7) However, in 'Election Commission v. Saka Venkata Rao (C)', their Lordships of the Supreme Court have left open the question of jurisdiction in a case where the original authority is located in one State and the appellate authority in another State as in the mining cases before us. Jurisdiction in such cases will, in our opinion, depend upon the answer to the question as to which authority would be deemed to have passed the order to which finality is attached under the statute. There may also be cases where the order passed by the authority in one State has to be executed by the authorities permanently located in another State. How the two conditions of Art. 226 of the Constitution will work in all such cases will depend upon the facts of each case. For purposes of the instant proceedings we do not propose to consider finally the question of jurisdiction in all its ramifications as we are satisfied that on merits no interference is called for in any case.

(8) The issues involved in the instant cases may be summarised as below:

(1) M. P. Nos. 259, 260, 262 and 301 of 1952 and 79 of 1953: Whether the State Government has power under the Rules to refuse a prospecting license in respect of land which was once the subject of a grant that has lapsed.

(2) M. P. No. 261 of 1952: Whether the State has power under the Rules to give preference to an application for a mining lease over that for a prospecting license, even if it is of a later date.

(3) M. P. No. 51 of 1951: Whether a direction for the retirement of a civil servant, after determining the date of birth, on the ground

that he has attained the age of superannuation, constitutes removal within the meaning of Art. 311.

(9) Under item 36, List I of the Government of India Act, 1935, (corresponding to item 54 of List I of the 7th Schedule of the Constitution) the competent authority to legislate for the regulation and development of minerals was the Central Legislature, which, in exercise of its powers, enacted the Mines and Minerals (Regulation and Development) Act, 1948, (hereinafter called the Act). The Central Government acting under the powers conferred by Section 5 of the Act, framed certain rules for regulating the grant of prospecting licenses and mining leases. These rules are styled as 'The Mineral Concession Rules, 1949' (hereinafter called the New Rules). These Rules have recently been augmented by S. R. O. 1502, dated the 29th July 1953, published in the Gazette of India, August 1, 1953. As these rules were not in force at the time the impugned orders were passed, they are not relevant and have evidently no retrospective effect for purposes of these proceedings.

Prior to the enactment of 1948, grants were governed by the rules framed by the Government of India under resolution No. 7252-7581-121, dated the 15th September 1913, and the supplementary instructions issued by the Local Governments thereunder from time to time. These rules will hereinafter be called the Old Rules.

(10) Under Rule 22 of the Old Rules, the power to grant a prospecting license vested in the Collector, subject to the control of the Local Government. In the case of two or more applications affecting the same land, the prior right to a license, subject to any order to the contrary which the Local Government in its discretion passed in any particular case, lay with the applicant who was the first to file his application with the Collector (Rule 23). Under Supplementary Instruction 2 framed under Rule 23, no area which was once the subject of a grant could be treated as available for regrant unless the order passed on the notice of relinquishment tendered by the licensee or lessee or the order regarding the cancellation or the expiration was entered in the Standard Register, that is to say, unless the information that the area was available was open to the public.

Rule 27 prescribed the form of the Standard Register. Supplementary Instruction 1 made under this rule laid down:

"In the case of relinquishment or cancellation of a concession, the date on which it is available for regrant should be fixed by the Deputy Commissioner himself on receipt of Government orders and noted in column 23 of the register. Priority will count from the date so fixed unless the Local Government orders the disposal of the concession in accordance with rule 56."

Rule 56 empowered the Local Government to offer a fresh concession to the person whose prospecting license or mining lease was cancelled, or to sell the concession by auction or private treaty or otherwise.

(11) As regards the mining leases, the applications were directed under Rule 34 to be sent by the Collector to the Local Government which, under Supplementary Instruction 1, was the only authority to grant the lease. Rule 42 provided for the determination of priority in case two or more applications affecting the same land were made. It provided, in terms similar to rule 23, that the prior right to a lease, subject to any order which the Local Government passed in any particular case, should be deemed to lie with the applicant who was the first to file his application with the Collector. Supplementary Instruction 1 under this rule laid down that the remarks contained in Supplementary Instruction 1 under Rule 23 were applicable to applications for mining leases. It further provided:

"An application for a mining lease has no priority over one for a prospecting license if the latter is presented before it. Where, however, the priority of each is doubtful, due consideration may reasonably be paid to the readiness of an applicant to take out a mining lease in the first instance."

Rule 55 dealt particularly with the question of priority in case simultaneous applications for prospecting license and mining lease were made. Relevant extract from this rule is reproduced below:

"When both an application or applications for a prospecting license and an application or applications for a mining lease are presented in respect of the same area, the applicant or applicants for a mining lease not being in possession of a prospecting license in respect of that area, the prior right to the concession whether license or lease shall, subject to any order which the Local Government may pass in any particular case, be deemed to lie with the applicant who x x x shall have been the first to file his application with the Collector: Provided that if the prior right to the concession is held to lie with an applicant for a lease the Local Government may, in its discretion, grant him a license instead."

(12) It will appear from the above that the right to grant or refuse a prospecting license or a mining lease vested under the Old Rules in the Collector or the Local Government, as the case was one of license or lease. This was only an ordinary incident of ownership where the mines or minerals were the property of Government. The term 'right' was used in the rules dealing with the question of priority, but it is obvious that it was not meant to be used as against the Government. It was only as between the various applicants for grants in respect of the same area that the question of right could arise. Even then this was subject to the overriding power of the Local Government to pass an order to the contrary in any particular case.

(13) Similar provisions, excepting that of priority between an application or applications for a prospecting license and an application or applications for a mining lease, were made in the Mineral Concession Rules. 1949. Rule 17 of these Rules prescribes the right of the State Government to grant or refuse a license, in substitution of the power that formerly vested in the Collector subject to the control of the Local Government. Rule 20 prescribes a form of the Standard Register. The items to be specified in it, subject to certain additions or alterations, are analogous to those prescribed in rule 27 of the Old Rules. Rule 18 deals with the question of priority in case more than one application is received for a license, and is reproduced below:

"If more than one application regarding the same land is received, preference shall be given to the application received first, unless the State Government, for any special reason, and with the prior approval of the Central Government decides to the contrary."

(14) Similar provisions were made in respect of mining leases. Although there is no direct rule

regarding the right of the State Government to grant or refuse a lease, similar to rule 17, this right is implicit in rule 28 which is reproduced below:

"(1) The application shall be accompanied by a fee of Rs. 200/-. If the State Government refuses to grant the lease applied for or if the applicant refuses to accept the lease on account of any special condition imposed therein under sub-rule (3) of rule 41, the fee shall be refunded.

(2) When an application for a mining lease is refused by the State Government, intimation of the refusal shall be given to the applicant in writing."

Rule 32 is in terms similar to rule 18 and determines the question of priority when more than one application for a lease is received in respect of the same area. In the New Rules prior to their amendment there was no provision to determine priority in case applications both for a license and lease were received.

(15) These rules also do not create any right in the applicant, to a license or lease, as against the Government. It was, however, urged that in the absence of any provision in the New Rules requiring an entry to be made in the Standard Register that an area is made available for regrant, it should be deemed that in all cases where the prior grant had terminated, the land automatically became available for regrant. Such a construction would militate against the incidents of ownership and cannot be accepted. An owner is ordinarily entitled freely to decide whether or not, and when, he would like to make his property open for any disposition or grant, and even if he were to use this right capriciously, it cannot be the subject of any legal action. In the absence of any provision to the contrary, it must, therefore, be held that when a prior license or lease had been relinquished or cancelled, the land did not automatically become available for regrant and it was open to the Government to decide whether it should or should not be granted again. In this view, the following direction, namely,

"No area will, however, be treated as available for regrant, unless an entry to that effect is made in the standard register and the information is open to the public",

contained in the Commerce and Industry Department Notice, dated the 20th March 1951, (published in M. P. Gazette, March 23, 1951, Part I, page 189), cannot be said to be in derogation of any provision of the Mineral Concession Rules, 1949. It, therefore, follows that the State Government had the power to refuse to grant a prospecting license in Miscellaneous Petitions Nos. 259, 260, 262 and 301 of 1952 and 79 of 1953, on the ground that the areas were not available for regrant.

(16) Turning now to the question of priority between an application for a license and one for a lease, a point which is involved in Miscellaneous Petition No. 261 of 1952, there was, as already stated, no provision in the Mines Concession Rules, 1949, at the relevant date, similar to rule 55 of the Old Rules. It was, however, contended that in view of the Commerce and Industry Department Notice referred to above, the old practice in this regard should be deemed to govern the present case. The relevant extract from the Notice is reproduced below:

"3. In cases of applications received both for prospecting licence and mining lease in respect of the same area, the application for mining lease would not have any preference over the application for prospecting licence, except in the case of an area which was held on mining lease by someone previously and is available for regrant. No area will, however, be treated as available for regrant, unless an entry to that effect is made in the standard register and the information is open to the public."

The above para of the Notice excluded cases from the operation of the rule, in which the area was previously the subject of a mining lease. The land involved in Miscellaneous Petition No. 261 of 1952 was held under a mining lease by Shamji Naranji prior to its regrant and consequently that case is not governed by the rule laid down in the Notice. The intention of Government, when the decision was taken, obviously was that the land, if once held under a mining lease, should, if necessary, be made available for mining purposes in the interest of the development of the industry, and should not be relegated to the inferior prospecting operations. Rule 55 of the Old Rules, in its turn, was subject to any order which the Local Government passed in any particular case. This gave full discretion to the Local Government not to apply the rule of precedence in any case it thought fit.

Under the New Rules, as originally framed, Government was not, therefore, trammelled by any considerations of precedence when there was competition between an application for a license and that for a lease, and was free to select any of them according as it considered one operation more appropriate than the other in any given case. Even if, however, the instant case were to be decided with reference to the old rule, it cannot be urged that the Government should not have exercised its discretion or power in favour of one party as against the other. Such a contention is beyond the limits set out in — 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 (F) by their Lordships of the Supreme Court, within which High Courts can act under Article 226.

(17) This brings us to the last case, that is Miscellaneous Petition No. 51 of 1953, in which the question involved is whether the order directing the retirement of the petitioner on the ground that he has attained the age of superannuation is one of removal from service within the meaning of Article 311. In order to properly appreciate the case, it is necessary to understand some of the salient facts.

(18) The petitioner N. N. Ghosh entered railway service in the year 1919. According to the General Conditions of Service governing railway employees, he executed a service agreement as required by rule 143, in which ostensibly the date of his birth is shown as 10-3-1902. It is, however, contended by the Department that the year "1902" in the said date is an act of interpolation. Rule 144 of the General Conditions required him to declare his date of birth at the time he joined service, which was entered in his record of service in his own hand. In the record of service, the paper where the year was entered is torn. The Department has, however, filed a copy of the record of service in which the date of birth is entered as 10-3-1898. This date appears to find support from the age as found during his periodical medical examinations. In the years 1940, 1947 and 1948 his age was noted respectively as 43, 50 and 51 years by the certifying doctor, which corresponds with 1898 as the year of his birth. However, in the enclosure to letter No. E4/90

90. dated 6-9-1926, from the District Commercial Officer, Chakradharpur, to the Superintendent General, Calcutta, the date of his birth is shown as 10-3-1902. In the enclosure to a similar letter, dated 6-8-1919, the date of birth is shown as 10-2-1902, but it relates to another person by name "N. N. Ghose" whose staff No. is 11110 as against 12408 of the petitioner. According to the petitioner, the date 10-3-1902 entered in letter No. E4/90, dated 6-9-1926, was taken from the service documents.

It is also contended that the date as entered in the record of service is binding under sub-rule (3), rule 144 of General Conditions of Service. On the other hand, the Department contends that this date was inadvertently entered in the said letter from the interpolated documents and is not authentic.

(19) Under Chapter XVII of General Conditions of Service, rules regarding Conduct and Discipline are laid down. Rule 1702 prescribes the penalties among which removal from service is item (8). Rule 1708 lays down the circumstances in which this penalty may be imposed, none of which apply to this case. There are other Codes regulating the conduct and discipline of different classes of civil servants, amongst them being Civil Services (Classification, Control and Appeal) Rules which have similar provisions regarding punishment. These Rules were considered in the case of — 'Satish Chandra v. The Union of India', AIR 1953 SC 250 (G), in which it was held that the termination of service by notice in accordance with the terms of employment was neither dismissal nor removal within the meaning of Article 311. The implication of this decision is that Article 311 contemplates dismissal or removal by way of punishment which is meted out for some act or default of the civil servant. The terms, viz., dismissal, removal and reduction in rank, which find place in Article 311, are presumably taken from the disciplinary Codes in which these expressions find place. They have, therefore, obvious reference to termination of service or reduction in rank as a result of the infliction of punishment. In this view, where there is termination of service without reference to punishment, the case would not be covered by Article 311. This was also the view taken in — 'Kewal Mal v. Heta Ram', AIR 1952 Raj 17 (H).

(20) Applying the above principle in the instant case, there can be no doubt that if retirement of the petitioner was directed in the ordinary course, it would not be a case of removal within the meaning of Article 311. Does the fact that his retirement has been ordered as a result of the finding regarding the date of his birth, make any difference in the case? We think not. Even if the finding be irregular or even perverse, the result that has followed from it does not amount to punishment and cannot, therefore, be deemed to be a matter which is covered by Article 311.

(21) The provision of Article 226 was sought to be attracted in the case on the ground that there was a contravention of Article 311 in so far as no reasonable opportunity is said to have been given to the petitioner to show cause against the proposed action. As the case is not governed by Article 311, obviously the ground urged for interference under Article 226 fails. In passing, however, we may mention that this does not appear to be a case of wrongful assumption of jurisdiction by the Railway authorities who passed or upheld the order of retirement. It is true that rule 144(3) of General Conditions of Service lays down that

> "the date of birth as recorded in accordance with the rules shall be held to be binding and no alteration of such date shall be permitted subsequently."

This provision, however, is apparently directed against the employee and not against the Department. Moreover, the provision contemplates a case where there is no dispute regarding the date of birth as entered in the service documents. Where this is a matter of dispute, the power to order retirement on the ground of superannuation, which vests in the Department, can only be exercised after the date which as entered in the service documents is ascertained. The determination of this question cannot, therefore, be said to be outside the jurisdiction of the authorities who initially passed and subsequently upheld the order of retirement in the instant case.

(22) The result is that all the petitions fail and are dismissed with costs. Cost of the respondents shall be paid by the petitioners. Counsel's fee Rs. 50/- in each case.

A/D.R.R. Petitions dismissed.

***A. I. R. 1954 NAGPUR 166 (Vol. 41, C. N. 58)**

FULL BENCH

SINHA C. J., MUDHOLKAR AND BHUTT JJ.

Hari Vishnu Kamath, Petitioner v. Ahmad Syed Isak and others, Respondents.

Misc. Petn. No. 174 of 1953, D/- 4-11-1953.

†* (a) **Constitution of India, Arts. 226, 227, 329 — Writ against decision of Election Tribunal — (Representation of the People Act (1951), Ss. 80, 100) — (Representation of the People (Conduct of Elections and Election Petitions) Rules (1951), R. 47 (1) (c) — AIR 1951 Nag 58 (FB), Dissented from.**

Per Sinha C. J.: The High Court has no jurisdiction to entertain a petition to quash the decision of the Election Tribunal. When the Constitution itself has clearly indicated its intention by laying down that matters relating to elections shall be out of reach of litigation in the ordinary Courts of the land and has authorized Parliament to enact detailed rules bearing on that subject, the inference is clear that articles like 226 and 227 of the Constitution conferring as they do very wide powers of interference by the High Court should be out of the way so far as electoral matters are concerned. AIR 1953 Nag 357, Approved. (Para 20)

Article 329 (b) of the Constitution read with S. 80, Representation of the People Act leave no manner of doubt that only one challenge to the result of an election is contemplated by the Constitution, and that challenge is by an election petition. Once an election petition has been filed and has been determined by the Election Tribunal as set up by the Act of 1951 the remedy to persons interested in questioning the result of elections is exhausted and the door completely barred against any further questioning of the result of an election. (Para 16)

The same matter may be put in another form by saying that the Constitution and the Indain Parliament when enacting the Representation of the People Act, 1951 intended that there should be no conflict of decision on the question of disputed elections between the determination made by an Election Tribunal and that made by any other Court, including the High Courts in India. (Para 17)

The matter may be looked at from yet another point of view. It cannot be contended that the petitioner or any citizen of India in the position of the petitioner had any rights at the common law to be declared elected to the Union or the State Legislatures. Such a right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution. That very Constitution has provided a special remedy for enforcing that right. It is clear therefore that it is only that remedy and no other which is available to a person who challenges an election. AIR 1952 SC 64, Foll.; (1859) 6 CB (NS) 336; 1919 AC 368; 1935 AC 532 and AIR 1940 PC 105, Ref. (Para 18)

(Per Bhutt J.): The plain words of Art. 329 mean nothing else than that the exclusion of the jurisdiction of all Courts, including the High Court, in electoral matters is absolute and complete, and the provision of a machinery for determining them does not indicate that such matters become justiciable after the remedy provided in the Article is exhausted. However, giving the fullest amplitude to Art. 329 (b) of the Constitution, there may still be cases where the power of the High Court under Art. 226 may not be excluded. Such may, for instance, be jurisdictional or procedural defections, by the Tribunal during the conduct of the proceedings, which may seriously prejudice the course of the trial. Or there may even be a case where the order of the Tribunal is so patently and manifestly subversive of its real intendment that to give effect to its own decision may not amount to interference with the election. Interference in such cases may not violate and may even subserve the purpose of Art. 329 (b). Case law discussed. (Paras 102, 110, 113)

(Per Sinha C. J. and Bhutt J.): Article 227 of the Constitution was not intended to vest the High Courts with powers of judicial interference in contradistinction to administrative control. Such an administrative control can be exercised by the High Court only in relation to inferior tribunals. The Constitution does not contemplate an election tribunal to be of such character as to come within the purview of Art. 227 of the Constitution. AIR 1951 Nag 58 (FB), Dissented from. (Paras 28, 95)

(Per Mudholkar J.): Article 226 enables the High Court to issue a direction, order or writ to any person or authority within the territorial limits of its jurisdiction. Thus, for the issue of a direction, order or writ there must be in existence either a person or an authority within the territorial jurisdiction of the High Court. The Election Tribunal is no doubt an authority but having been appointed by the Election Commission for a specific purpose cannot be deemed to exist after that purpose is served. In other words, an Election Tribunal stands dissolved automatically after it gives its decision in the cases sent to it by the Election Commission for decision. Consequently no direction, order or writ can be made to it. Since that is the position Art. 226 is not available. Though Art. 226 cannot be availed of by the High Court, Art. 227 of the Constitution can be availed of. The Election Tribunal having been constituted for a limited purpose must be deemed to be a Tribunal of limited jurisdiction and thus amenable to the jurisdiction of the High Court under Art. 227 of the Constitution. Article 329 (b) provides that election disputes should be adjudicated upon by an Election Tribunal and none else. It follows therefore that the Election Tribunal alone can adjudicate upon election disputes and the High Court has no jurisdiction to enquire into them even under Art. 227 of the Constitution. Where what is however challenged is not the election itself but the decision of the Tribunal and the petitioner also wants the High Court to declare the election of the respondent void and further wants that he himself be declared elected, although neither of these two reliefs can be granted to the petitioner by the High Court in view of the provisions of Art. 329 (b) these reliefs are separable from the first relief which he has claimed, that is, of quashing the order of the Tribunal. Only such matters as are dealt with in Art. 329 are excluded from the consideration by the High Court under Arts. 226 and 227 of the Constitution. Finality is not given by Art. 329 (b) to the order of the Tribunal nor is the order placed beyond the purview of the High Court. To the limited extent, therefore, of considering whether the Election Tribunal has complied with the provisions of the law or has failed to exercise the jurisdiction vested in it by law, it must be held that the High Court, at any rate, has jurisdiction. The respondent was not elected as a result of the decision of the Election Tribunal but as a result of the counting of votes by the Returning Officer. If, therefore, the High Court were to set aside the order of the Election Tribunal the result of the election will not be affected. The only consequence of this order would be that the election petition will have to be decided afresh. (Paras 56, 57, 58, 61, 62, 65, 66, 67, 68, 69, 70)

(Per Sinha C. J. and Bhutt J.): Assuming that the election tribunals are not superior tribunals of exclusive jurisdiction, whose determinations are not amenable to the special powers given to the High Courts under Arts. 226 and 227 of the Constitution, where the tribunal held that the provisions of R. 47 (1) (c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 were mandatory and not merely directory and that therefore the votes found in the boxes at the polling stations at a certain place were invalid votes which should not have been taken into account in determining the majority of valid votes, but the Tribunal held that the result of the election had not been materially affected by the illegality complained of it cannot be said that the election tribunal has either exceeded its jurisdiction or refused to exercise a jurisdiction vested in it by the Representation of the People Act, 1951. The utmost that can be said is that it has gone wrong in determining a question which was within its province to decide. (Paras 41, 43, 46, 114, 115)

(Per Mudholkar J.): The Election Tribunal had come to the conclusion that the provisions of R. 47 (1) (c) were mandatory, that the Returning Officer ought to have rejected 371 voting papers because they did not bear the prescribed mark, that the Election Commission could not validate these voting papers, that the rejection of all such ballot papers would have deprived the respondent of the marginal advantage of 239 votes and that the petitioner should have thus got a majority of

valid votes. Having come to this conclusion what the Tribunal had to decide was whether the result of the election had been materially affected by the improper reception of these 371 votes. Instead of addressing itself to this question, the Tribunal proceeded to ascertain the effect of the disregard by the Polling Officer of R. 23 read with R. 28. The Election Petition was not founded on any allegation that the Returning Officer did not do his duty as required by R. 23 (1), which deals with the procedure before the recording of votes, or any rule other than R. 47 (1) (c). It was therefore not open to the Tribunal under S. 100 (2) (c), Representation of the People Act to consider whether the result of the election was affected by a non-compliance with a provision of the rules or the Act other than the one complained of. Therefore, in taking into consideration the non-compliance with the provisions of R. 23 it acted beyond its jurisdiction and in failing to consider the effect of the non-compliance with R. 47 (1) (c) it failed to exercise the jurisdiction vested in it by law. The finding which the members of the Tribunal had given regarding the nature of the provisions of R. 47 (1) (c) however did not affect its initial jurisdiction and therefore that finding could be questioned before the High Court. (Paras 72, 73)

(b) Constitution of India, Arts. 226, 227 — Territorial jurisdiction — (Representation of the People Act (1951), S. 88).

(Per Mudholkar J.): The main S. 88 and the proviso of the Representation of the People Act (1951) have to be read together and after they are so read, it is clear that the place of the trial must be situate within the State from which the election petition arises, and the High Court has jurisdiction to entertain petition under Art. 226 if the Tribunal is situate within the territorial jurisdiction of the High Court. (1897) AC 647; (1939) 4 All ER 464, Rel. on. (Para 76)

(Per Bhutt J.): The person, authority or Government, to whom the writ is issued must be amenable to the High Court's jurisdiction either by residence or location within those territories. The power is not exercisable if the person, authority or Government functions, without physical location or residence, within the High Court's territorial jurisdiction. AIR 1952 Bom 449; AIR 1953 All 477 (FB); AIR 1952 Mad 659, held no longer good law after AIR 1953 SC 210. (Para 89)

† (c) Constitution of India, Arts. 226, 227 — Parties to petition — (Representation of the People Act (1951), Ss. 105, 106, 107) — AIR 1953 Nag 357, Dissented from.

(Per Mudholkar and Bhutt JJ.): The Election Tribunal is not an 'amanuensis' of the Election Commission. On the other hand, it is the Commission which has to give effect to the decision of the Tribunal: The Commission has to register the decision of the Tribunal and have it published in the manner set out in S. 106, Representation of the People Act and in that sense it may perhaps be permissible to regard it as the 'amanuensis' of the Tribunal but not 'vice versa'. There is nothing in the Representation of the People Act nor in the Constitution which enables the Election Commission to adopt the order of the Tribunal and thus make it its own. On the other hand, Ss. 106 and 107 both make it clear that the function of the Election Commission in regard to the matter, after the decision of the Tribunal, is ministerial. The Election Commission is not a necessary party to the petition under Art. 226 challenging the decision of the Election Tribunal because no relief is sought against it, and indeed, no relief need have been sought against it. Though under S. 106, Representation of the People Act, the Election Commission is required to transmit copies of the order of the Tribunal to the Speaker of the House of the People and to cause it to be published in the Gazette of India and the Gazette of India is published under the authority of the Government of India and therefore the actual publication has to be ordered by the Government of India, these facts are not sufficient to warrant or necessitate even the joinder of the Government of India as a party to the petition. (1916) 1 KB 595, Rel. on. (Paras 78, 79, 80, 83, 116)

(Per Bhutt J.): It should not be understood that in no case would it be necessary to join the Election Commission. In a case where an election Commission proceeds to take steps to hold a fresh election, it may perhaps be necessary to implead the Commission in the proceedings in order to give relief to the petitioner. In such an event, it would be a question if the petition can be entertained, as an authority which is beyond the territorial limits of the High Court's jurisdiction would be involved. (Para 117)

(d) Constitution of India, Art. 327 — "Subject to the provisions of this Constitution".

It would not be correct to hold that Art. 327 is only subject to the preceding Articles 325 and 326 and not to other provisions of the Constitution for that would be reading in the words "Subject to the provisions of this Constitution" a limitation which is not explicit or implicit in the expression. (Para 100)

(e) Interpretation of Statutes — Law of foreign countries — (Civil P. C. (1908), Pre.) — (Constitution of India, Arts. 226, 329).

(Per Bhutt J.): In order to understand the limitation imposed by Art. 329 of the Constitution on the power of the High Courts under Art. 226, it is first necessary to read and interpret the relevant provisions of the Constitution itself. It is only when any doubt or incongruity arises on giving a plain meaning to the words that are used, that the law or practice of foreign countries may prove useful as a guide but not as an authority. (Para 96)

Anno: Civil P. C., Pre. N. 16 Pts. 1, 2, 3.

M. R. Bobde, B. R. Mandlekar, G. B. Badkas and L. M. Wakhre, for Petitioner; G. P. Pathak, R. M. Hajarnavis and S. M. Hajarnavis (for No. 1) and J. P. Dwiwedi and R. K. Pande (for No. 4), for Respondents.

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OPINION.

SINHA C. J.:

This application under Arts. 226 and 227 of the Constitution impugns the order of the Election Tribunal (respondents 6 to 8) constituted to determine the election petition filed by the petitioner challenging the declaration by the returning officer that the first respondent had been duly elected to the House of the People from the Hoshangabad Parliamentary constituency in the State of Madhya Pradesh. Respondents 2 to 5, besides the petitioner, were the other candidates who had been duly nominated for the same seat. Of them, respondents 4 and 5 had withdrawn their candidature. The votes polled by the petitioner and the first three respondents who actually contested the election were declared to have been as under:

(1) Petitioner	65201
(2) First respondent	65375
(3) Second respondent	20653
(4) Third respondent	13609

(2) The petition averred that in the ballot boxes used at Sobhapur polling stations, ballot papers bearing marks different from those prescribed for use at those polling stations were found, that they should have been rejected in view of the provisions of R. 47 prescribed under the Representation of the People Act, 1951; and that these votes were illegally counted as valid votes by the returning officer with the result that the first respondent was declared to have secured the largest number of valid votes whereas if the rule aforesaid had been properly applied and the votes aforesaid rejected the petitioner would have been declared to have secured the largest number of valid votes. Other irregularities were also alleged by the petitioner, but the petition has been mainly founded on the irregularity or illegality aforesaid.

(3) In view of the allegations aforesaid the petitioner contended that the declaration of respondent no. 1 as having been duly elected was illegal and void; that the result of the election was materially affected by the illegality committed by the returning officer in counting those invalid votes polled at the Sobhapur polling stations; and finally that on a proper and legal counting of the votes in accordance with the prescribed rules the petitioner was entitled to be declared to have been duly elected to the seat in question.

(4) The tribunal by a majority of 2 to 1 held that the provisions of R. 47(1)(c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 were mandatory & not merely directory and that therefore the votes found in the boxes at the polling stations at Sobhapur were invalid votes which should not have been taken into account in determining the majority of valid votes. But the Tribunal held that the result of the election had not been materially affected by the illegality complained of. This decision of the Tribunal has been questioned by the petitioner as illegal and without jurisdiction. The petitioner has gone to the length of contending that the Tribunal could not have come to any other conclusion under the law than that the petitioner had been duly elected and that the election of respondent no. 1 was void. The petition prayed (1) that a 'writ' in the nature of a 'certiorari' be issued to quash the order of the Election Tribunal, and (2) that the election of the first respondent be declared void and in that seat the petitioner be declared to have been duly elected.

(5) Preliminary objections were taken on behalf of the first respondent to the hearing of the application on the grounds that the application was misconceived, that no 'writ' of the nature prayed for by the petitioner could be issued against the respondents, that this Court could not recall the notification of the order of the Election Tribunal issued by the Election Commission of India, in the absence of the Election Commissioner, and finally that this Court had no jurisdiction under Arts. 226 and 227 of the Constitution to go into the matter of election petitions.

(6) On merits also the first respondent contested the position taken by the petitioner in his election petition and in this Court with respect to the conclusions of the Election Tribunal and its powers. It was denied that the Election Tribunal had proceeded on a wrong view of the law or that it had assumed jurisdiction which it did not possess or that there was any error of law apparent on the face of the record, or that there had been any miscarriage of justice.

(7) Though in terms the petition prays for a 'writ' of 'certiorari' quashing the order of the Election Tribunal and for a declaration that the election of the first respondent be declared void and that in that seat the petitioner should be declared to have been duly elected, the learned counsel for the petitioner contended that his position was that the Election Commission had gone beyond its jurisdiction in coming to the conclusion that the election had not been materially affected by the irregularity in counting votes which in law had been found to be invalid. The contention on behalf of the petitioner was not that the Election Tribunal had not the jurisdic-

tion to go into the merits of the controversy between the parties, but that it had gone beyond its jurisdiction in dealing with the question whether the result of the election had been materially affected by the irregularity or the illegality committed by the returning officer in counting such votes as have been found to be invalid in view of the prescribed rules.

(8) The learned counsel on behalf of the first respondent, who only was represented before us, contended that in view of the provisions of Art. 329 (b) of the Constitution this Court could not go into the merits of the decision arrived at by the Election Tribunal. It was further argued that even assuming that this Court had the jurisdiction to examine the conclusions arrived at by the Election Tribunal it should be held that the Election Tribunal had not gone beyond its jurisdiction in arriving at its conclusions. A good deal of argument was directed on both sides to the question whether R. 47 was mandatory or only directory.

(9) It is manifest that this Court has first to determine whether it has any jurisdiction under Arts. 226 and 227 or under either of them to go into the merits of the decision arrived at by the Election Tribunal or whether it can go into the question of the extent of the jurisdiction of the Election Tribunal if it is found that the jurisdiction of this Court is barred by Art. 329(b) of the Constitution to go into the questions raised by the election petition before the Election Tribunal. It is therefore necessary to decide at the very outset whether this Court has the jurisdiction to entertain this petition either under Art. 226 or Art. 227 of the Constitution and examine for itself the conclusions arrived at by the Election Tribunal or even the question of the extent of the jurisdiction of the Election Tribunal; and if so, whether the Election Tribunal had in coming to any of its conclusions usurped a jurisdiction not vested in it by law.

(10) The relevant portions of Art. 329 are in these words :

"Notwithstanding anything in this Constitution—

.....

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

In order to determine the exact scope of these provisions, we have to examine the scheme of the Constitution in relation to election matters. Part 15 deals with elections. Article 324 vests in the Election Commission the superintendence, direction and control of elections to Parliament and to the Legislature of every State. It also vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls, and the appointment of Election Tribunals for the decision of doubts and disputes arising out of or in connexion with such elections. Article 327 contemplates that Parliament shall have power to legislate with respect to all matters relating to or in connexion with election to either House of Parliament or to the State Legislatures as also to make by law provision for the preparation of electoral rolls, the delimitation of constituencies, and other connected matters.

Similar power is contemplated by Art. 328 for the Legislature of a State, in so far as Parliament has not made provision with respect to elections to the Legislature of a State, including the preparation of electoral rolls and other allied matters. It is in pursuance of the power contained in Art. 327 that Parliament has enacted the Representation of the People Act, 1950 (43 of 1950) providing for the allocation of seats and delimitation of constituencies in the House of the People and the Legislatures of the States, the qualification of voters and the preparation of electoral rolls, and has enacted the Representation of the People Act, 1951 (43 of 1951) to provide for the conduct of elections to Parliament and to the Legislatures of States, the qualifications and disqualifications for membership, and the decision of doubts and disputes arising out of or in connexion with such elections. Article 329 of the Constitution has provided that such of the provisions of the two Acts aforesaid as are specified in Art. 329, Cls. (a) and (b), shall not be questioned in any Court.

(11) Article 329 starts with the 'non-obstante' clause 'Notwithstanding anything in this Constitution'. A good deal of argument was directed to the scope of the application of this clause. On behalf of the petitioner it was contended with reference to the provisions of Cl. (b) of Art 329 that what has been excluded from the jurisdiction of the Courts is the matter of elections and not the decision of the election Tribunal. On behalf of the first respondent, on the other hand, it has been contended that the matter of election to Parliament and to the Legislature of a State has been entirely placed beyond challenge in any Court of law, and it has further been added that 'election' in Art. 329 (b) has been used in its widest significance, that is to say, election ending up with the final declaration of the return of a member to either House of Parliament or to the Legislature of a State, so that even the result depending upon the decision of the Election Tribunal is also within the meaning of Cl. (b) of Art. 329.

(12) The following observations of their Lordships of the Supreme Court in — 'N. P. Ponnuswami v. Returning Officer Namakkal Constituency', AIR 1952 SC 64 at pp 67-68 (A), may be usefully reproduced here:

'As we have seen, the most important question for determination is the meaning to be given to the word "election" in Art. 329 (b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense the word is used to connote the entire process culminating in a candidate being declared elected.

In — 'Srinivasalu v. Kuppuswami', AIR 1928 Mad 253 at p. 255 (B), the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term "election" may be taken to embrace the whole procedure whereby an "elected member" is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan J. expressed his agreement in — 'Sat Narain v. Hanuman Prasad', AIR 1946 Lah 85 (C); and I also find myself in agreement with it. It seems to me that the word "election" has been used in Part 15 of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expres-

sion "conduct of elections" in Art. 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part 15 including Art. 329(b)."

(13) It is equally clear from the observations of their Lordships at p. 69 in the case cited above that the jurisdiction of the High Court to issue 'writs' under Art. 226 of the Constitution is barred by the express words of the 'non obstante' clause in Art. 329(b) of the Constitution. Their Lordships made the following observations in this connexion :

"It will be noticed that the language used in that article and in S. 80 of the Act is almost identical, with this difference only that the article is preceded by the words "notwithstanding anything in this Constitution". I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress."

(14) As already observed, the Representation of the People Act, 1951 has been enacted by the Indian Parliament by virtue of the power conferred upon it by Art. 327 of the Constitution. Section 80 of that Act is in these terms :

"No election shall be called in question except by an election petition presented in accordance with the provisions of this Part." (that is to say Part 6 of the Act dealing with 'Disputes regarding Elections').

The provisions of that Part of the Act will have to be adverted to in some detail presently. But it is clear that the provisions of S. 80 of the Act and the other provisions of that Part have to be read along with Art. 329(b) of the Constitution and only then their full import can be appreciated.

(15) It has further been observed by their Lordships of the Supreme Court in — 'Ponnuswami's case (A)', that Part 15 of the Constitution, in which Art. 329 is the culminating provision, is really a Code in itself which envisages a complete body of rules making provision for the conduct of elections and the setting up of the only machinery for holding elections and for enquiring into and deciding disputes relating to or arising out of such elections.

(16) Thus, on reading the provisions of Art. 329(b) of the Constitution with S. 80 of the Representation of the People Act there is no manner of doubt that only one challenge to the result of an election is contemplated by the Constitution, and that challenge is by an election petition. Once an election petition has been filed & has been determined by the Election Tribunal as set up by the Act of 1951 the remedy to persons interested in questioning the result of elections is exhausted & the door completely barred against any further questioning of the result of an election.

(17) The same matter may be put in another form by saying that the Constitution and the Indian Parliament when enacting the Representation of the People Act, 1951 intended that there should be no conflict of decisions on the question of disputed elections between the determination made by an Election Tribunal and that made by any other Court, including the High Courts in India. Otherwise, as it has happened in the instant case, the Election Tribunal has rightly or wrongly come to the conclusion that the first respondent has been validly elected and that any illegalities or irregularities committed by the Returning Officer in the counting of votes and in declaring the result of the election have not materially affected the result of the election.

On the other hand, before us, the petitioner's counsel have vehemently attacked the decision of the Election Tribunal on the main question whether respondent no. 1 had been rightly declared elected. They went to the length of contending that there was no other decision open to the Election Tribunal than that the petitioner should be declared to have been duly elected. If this Court were to accept that contention, clearly there would be a conflict of decisions between this Court and the Election Tribunal. This would lead to the very same anomaly that the Constitution and the Indian Parliament in clear terms intended to avoid.

(18) The matter may be looked at from yet another point of view. It cannot be contended that the petitioner or any citizen of India in the position of the petitioner had any rights at the common law to be declared elected to the Union or the State Legislatures. Such a right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution. That very Constitution has provided a special remedy for enforcing that right. It is clear therefore that it is only that remedy & no other which is available to a person who challenges an election. Reference may be made to the observations of their Lordships of the Supreme Court at p. 69 of the report quoted above, where their Lordships have made reference to the leading decision in — 'Wolverhampton New Water Works Co. v. Hawkesford', (1859) 6 CB (NS) 336 (D), followed with approval by the House of Lords in — 'Neville v. London Express Newspapers Ltd.', 1918 AC 368 (E) and by the Judicial Committee in — 'Attorney-General Trinidad and Tobago v. Gordon Grant and Co.', 1935 AC 532 (F) and — 'Secretary of State v. Mask & Co.', AIR 1940 PC 105 (G).

(19) Reading the whole Art. 329 it becomes clear that the jurisdiction of all Courts has been barred in respect of all laws relating to the delimitation of constituencies and allotment of seats to such constituencies, as also to election matters in respect of the Union Legislatures and the State Legislatures, so that not only matters immediately concerned with election, used in its widest sense, but also matters of allotment of constituencies and delimitation thereof, which come much earlier than elections, have been placed beyond question in the ordinary Courts. The Constitution has therefore expressed in no uncertain terms its intention of treating these matters as wholly distinct and separate from ordinary civil rights which can form the subject-matter of adjudication in the civil Courts of the land.

In other words, Cls. (a) and (b) of Art. 329 of the Constitution must be read as supplementary and complementary to each other and thus exhausting the whole field of demarcating the constituencies and erecting a machinery for holding the elections, and lastly providing for a special tribunal of exclusive jurisdiction to adjudicate upon disputes relating to and arising from elections. Hence, the two Acts, viz., the Representation of the People Act, 1950 and the Representation of the People Act, 1951 between them exhaust the entire field relating to all the aforesaid matters.

(20) Those Acts have been enacted by the Indian Parliament by virtue of the power conferred upon it by Arts. 327 and 328 of the Constitution. It has been argued that those articles do not begin with the 'non obstante' clause with which Art. 329 begins but that they are 'subject

to the provisions of this Constitution'. These words must be read with reference to the context as meaning the other provisions of the Constitution bearing upon those matters: for example, the provisions in Arts. 324, 325 and 326 contained in this very Part 15 of the Constitution; that is to say, it is not open to the Parliament to enact laws relating to election which would make a discrimination on grounds of religion, race, caste, sex or any of them; nor should any such law infringe the fundamental rule that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage and other provisions in the Constitution which have declared the fundamental rights of the citizens of India.

But the words 'subject to the provisions of this Constitution' do not necessarily import the right of the citizen to have recourse to Arts. 226 and 227 of the Constitution to challenge matters covered by the legislative enactments aforesaid. When the Constitution itself has clearly indicated its intention by laying down that matters relating to elections shall be out of reach of litigation in the ordinary Courts of the land and has authorized Parliament to enact detailed rules bearing on that subject, the inference, in my opinion, is clear that Arts. like 226 and 227 of the Constitution conferring as they do very wide powers of interference by the High Court should be out of the way so far as electoral matters are concerned. I would, therefore, agree with the Division Bench of this Court in the case of — 'Ramkrishna v. Thakur Daoosingh', AIR 1953 Nag 357 (H), in holding that this Court has no jurisdiction to entertain a petition to quash the decision of an Election Tribunal.

(21) It was contended on behalf of the petitioner that though the petition may comprise reliefs which have the effect of setting aside respondent no. 1's election and of granting a declaration in favour of the petitioner that he should be deemed to have been duly elected, and even assuming that those reliefs are not available to the petitioner in view of Art. 329(b) of the Constitution, the petitioner is still entitled to question the decision of the Election Tribunal and to ask this Court to quash that decision. In my opinion, this argument amounts to asking the Court to do indirectly what it cannot do directly.

In this connexion the following observations of their Lordships of the Judicial Committee of the Privy Council in — 'Raleigh Investment Co., Ltd. v. Governor General in Council', AIR 1947 PC 73 at p. 80 (I), are apposite bearing both on the question of the reliefs sought in this case, and on the question of the jurisdiction of the Election Tribunal holding that the result of the election has not been materially affected by the irregularity or illegality in counting the votes complained of:

> "In form the relief claimed does not profess to modify or set aside the assessment. In substance it does, for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment, and the claim for an injunction is merely verbiage. The cloud of words fails to obscure the point of the suit. An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be 'ultra vires' is not a nullity like an order of a court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise. Their Lordships therefore regard the suit as in truth directed exclusively to a modification of the assessment."

(22) In that case a suit had been instituted by the appellant questioning the jurisdiction of income-tax authorities on the ground that certain provisions of the Act were 'ultra vires' the Indian Legislature. Section 67 of the Indian Income-tax Act barred the jurisdiction of the Courts to go into the merits of the assessment made under the Act. In those circumstances their Lordships held that the suit, though not in form one to modify or set aside an assessment but only for a declaration, was in substance one meant for the same relief. If we accept the contention of the petitioner in this case and quash the orders passed by the Election Tribunal, the necessary result of such a quashing would be that the election which has been finally declared by the Election Tribunal to have been valid would again be thrown into the melting pot. That will amount to permitting a second challenge to the result of the election, which, as already indicated, was not intended by the Constitution.

(23) It is true that their Lordships of the Supreme Court in — 'Ponnuswami's case (A)', have reserved their opinion as to the powers of the High Court under Art. 226 of the Constitution to deal with the decision of an Election Tribunal as it was not necessary to express any opinion on that aspect of the matter. But the judgment of the Supreme Court read as a whole is more consistent with the view that judicial interference with the decisions of Election Tribunals, which have been declared to be final by the Representation of the People Act, 1951, is barred, than with contrary view.

It has however been argued that though the power of this Court to review the decision of the Election Tribunal on its merits may have been barred, that jurisdiction still remains where this Court finds that the Election Tribunal has usurped a jurisdiction which it did not possess or that it has failed to exercise a jurisdiction vested in it by law. Assuming that it is so, there are practical difficulties in giving effect to that contention. An Election Tribunal is not a permanent tribunal but is constituted by the Election Commission 'Ad hoc'. An Election Tribunal is constituted to deal with particular election petitions, and as soon as those have been dealt with and determined by the Election Tribunal it ceases to exist. In the instant case it is common ground that the Election Tribunal as such has ceased to exist, though the persons constituting that Tribunal may still be in existence. If the Tribunal has ceased to exist, as is the case, how can any 'writ' be issued to such a tribunal?

Realizing that difficulty the learned counsel for the petitioner urged that this Court acting under its powers of superintendence under Art. 227 of the Constitution may still judicially review or revise the decision of the tribunal which has ceased to exist. In my opinion, the difficulties which stand in the way of the petitioner in invoking the aid of Art. 226 of the Constitution are there even in respect of the power of this Court under Art. 227 of the Constitution. If this Court cannot quash an order of a tribunal which has ceased to exist, it should equally be true of its powers, whatever they are, under Art. 227 also. It has been said with reference to this article that though the tribunal may have ceased to exist the order is there still in existence. If this High

Court can exercise jurisdiction in respect of the decision of the Tribunal under Art. 227 of the Constitution, it should equally be open to this Court to exercise its powers under Art. 226, in so far as the question of quashing the decision is concerned.

(24) In my opinion, there are more serious difficulties in the way of the petitioner praying in his aid the provisions of Art. 227. The first question that arises in connexion with the provisions of this article 'vis-a-vis' the decision of the Election Tribunal is whether the Election Tribunal is such a tribunal as could come within the purview of Art. 227. Under Art. 324 of the Constitution, the appointment of election tribunals like the one we are dealing with in this case is vested in the Election Commission to be appointed by the President. The Constitution envisages the Election Commission to be an independent body, independent of all other organs in the State.

The Constitution does not contemplate the subordination of the Election Commission to the Executive or the Judiciary. The appointment and removal of the Chief Election Commissioner is placed by the Constitution on the same footing as that of a Judge of the Supreme Court. The Election Commission has to function under the directions of the Chief Election Commissioner. The Election Commission consisting of the Chief Election Commissioner and such other Election Commissioners as the President may appoint, is vested with the superintendence, direction and control of all matters relating to elections including the appointment of election tribunals.

Part 15 of the Constitution, as already indicated, along with the Representation of the People Act, 1950 and the Representation of the People Act, 1951 is a complete Code in itself in electoral matters. Under S. 85, Representation of the People Act, 1951, the Election Commission has been vested with the power of dismissal of an election petition which does not comply with the terms of S. 81, S. 83, or S. 117 of the Act. The law does not contemplate any appeal from such an order of dismissal, and it is only when the Election Commission has not exercised the power under that section that the Act envisages the appointment of an election tribunal for the trial of that election petition. Section 105 of the Act declares the order of the Tribunal under the Act to be final and conclusive. The Act does not make any provision for an appeal or revision or review of the order passed by the Election Commission under S. 85, apparently because that body is intended to be supreme within its own province. No authority higher than that of the Election Commission in election matters has been contemplated by the Constitution.

(25) It is also noteworthy that though the Election Commission has the power to appoint an election tribunal it has not been vested with revisional or appellate powers over the decision of such a tribunal, which under S. 105 of the Act has been declared to be final and conclusive. There is no provision similar to S. 105 of the Act with reference to an order of the Election Commission dismissing an election petition under S. 85 of the Act. Such an order of the Election Commission is treated as of an administrative character and final. An election petition assumes a judicial or quasi-judicial character only after it has been passed by the Commission, and is then dealt with by an Election Tribunal. That is an indication of the intention of Parliament that the Election Commission and an election tribunal shall be the ultimate authority within its own jurisdiction.

(26) Neither Part 15 nor the Representation of the People Act, 1951 contemplate judicial or administrative subordination of the Election Commission or of an Election Tribunal to the High Court. Hence, the inference is permissible that the Constitution did not intend to make Art. 227 applicable to an election tribunal, assuming that Art. 227 was intended by the Constitution to vest every High Court with powers of judicial control.

(27) Clause (2) of Art. 227 of the Constitution gives an indication as to the kind of superintendence the High Court is expected to exercise over inferior Courts and tribunals. Can it be said of the High Court that it can call for returns from or issue general rules and prescribe forms for regulating the practice and proceedings of election tribunals or such other matters as are described in that clause? I think not. If Cl. (2) of Art. 227 is not applicable to an election tribunal, in my opinion, Cl. (1) of that article is equally out of the way of such a tribunal.

(28) In this connexion the observations of the majority of the Full Bench in — 'Sheoshankar v. State Government of M. P.', AIR 1951 Nag 58 (J), were brought to our notice, but with all respect to the learned Judges who made those observations I am inclined to take the view that Art. 227 of the Constitution was not intended to vest the High Courts with powers of judicial interference in contradistinction to administrative control. Such an administrative control can be exercised by the High Court only in relation to inferior tribunals. In my opinion, the Constitution does not contemplate an election tribunal to be of such character as to come within the purview of Art. 227 of the Constitution.

(29) In my opinion, the position of an election tribunal 'vis-a-vis' the High Court is that of a Superior Tribunal of exclusive jurisdiction to another Superior Court. The observations of their Lordships in — 'The Queen v. The Judges and Justices of the Central Criminal Court', (1883) 11 QBD 479 (K), were approved by the Judicial Committee in — 'Goonesinha v. De Kretser', AIR 1945 PC 83 (L), in these terms :

> "It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court — '(1883) 11 QBD 479 (K)' — and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordships' opinion, be a Superior Court."

(30) In the leading case of — 'Theberge v. Laudry', (1876) 2 AC 102 (M), the Judicial Committee refused to grant special leave to appeal from the decision of the Election Court, which was held to be a special Court with exclusive jurisdiction. After examining the provisions of the Act of Parliament called the Quebec Controverted Elections Act of the year 1875, the Lord Chancellor delivering the opinion of the Judicial Committee made the following observations :

> "Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly.
>
> Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly in complete independence of

the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the superior Court which the Legislative Assembly had put in its place,.....'

(31) The rule laid down in that leading case was followed in a later case from Malta: See — 'Strickland v. Giuseppe Grima', AIR 1930 PC 227 (N). In that case the decision of the court of Appeal in Malta, which had been constituted as the Election Tribunal, was questioned before their Lordships of the Judicial Committee by special leave. At the hearing their Lordships sustained the preliminary objection raised by the respondent that the appeal was incompetent on the ground that Art. 33 of the Letters Patent conferred on the Court of Appeal a special jurisdiction which was entirely outside the ordinary jurisdiction of the Courts. Article 33 of the Letters Patent, quoted at p. 231 of the report did not contain the words to the effect that the decision shall be final and conclusive.

But even then their Lordships held the decision of the Election Tribunal to be so in these words:

"To their Lordships, these words appear to be clear and distinct. They direct that all questions touching the membership either of the senate or Legislative Assembly created by the Letters Patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any Court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island. Even if their Lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusion that His Majesty had advisedly designated his Court of Appeal in Malta finally to determine all these questions.

It appears to their Lordships that the section being found in letters patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect given to it. But this view is, their Lordships find, fully confirmed by the authorities, of which — '(1875)2 A. C. 102 (M)', is the most notable."

(32) The latest decision of their Lordships of the Judicial Committee on the question of the finality of the decision of an election tribunal is to be found in — 'George Edmund DeSilva v. Attorney-General of Ceylon', AIR 1949 P C 261 (O). This was a case of an application for special leave to appeal from the decision of an election tribunal constituted under the Ceylon (Parliamentary Elections) Order in Council, 1946.

Their Lordships again refused to grant special leave in these words:

'....the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election Judge to hear election petitions is not substituted for that of the legislative body itself but is created 'de novo' upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case in — 'AIR 1930 P. C. 227 (N)'.

Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted'.

(33) The distinction between the jurisdiction of an election tribunal and that of the ordinary Courts and the effect of the words 'final and conclusive' with reference to the decision of the latter category has been clearly brought out by their Lordships of the Judicial Committee in — 'Wi Matuas Will', In re, 1908 A. C. 448 (P). Repelling the objection of the respondents to the jurisdiction of the Privy Council to interfere in the matter based on S. 93 of the New Zealand Act (58 vict., No. 43) that the decision of the Appellate Court shall be final and conclusive their Lordships, after referring to the decision in — '(1876) 2 AC 102(M)', made the following significant remarks:

"The difference between these cases and the present is of the broadest and most essential kind. In them the subject-matter of the protected jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributor of justice. In the one case — '(1876) 2 AC 102 (M)', the subject-matter was actually a part of the privilege of Parliament, and therefore entirely alien to the region of prerogative. In the other case the duties imposed on the Court were truly not judicial, but administrative, in their nature, and historically they had been originally vested in an administrative commission."

(34) A reference to the history of the practice followed by the Mother of Parliaments in relation to disputed elections also confirms the inference that the determination of election disputes is not a matter for the ordinary Courts which are meant to determine disputes relating to civil rights. Until the year 1770 when the Grenville Act (10 Geo. 3, c. 16) was passed election disputes were determined by Parliament itself. By that Act the responsibility for determining such disputes was entrusted to a Select Committee of members of Parliament. Even that procedure was not found to be efficient and the right of Parliament to decide such election disputes was transferred by the Parliamentary Elections Act, 1868 (31 & 32 Vict. C. 125) to one Judge and later to two Judges by the Parliamentary Elections Corrupt Practices Act, 1879 (42 & 43 Vict. C. 50).

The previous fragmentary law on the subject was consolidated into the Representation of the People Act of 1949 (12 & 13 Geo. 6 c. 68). This Act has repealed either in whole or in part the old Acts including the Parliamentary Elections Act, 1868, the Ballot Act, 1872, the Parliamentary Elections and Corrupt Practices Act, 1879, the Corrupt and Illegal Practices Prevention Act, 1883, and many others. Part III of the Act deals with

legal proceedings in connexion with disputed parliamentary elections. Section 110 provides for the constitution of the election court, which has been entrusted with the function of trying Parliamentary election petitions. The election court is to consist of two Judges who 'have the same powers, jurisdiction and authority as a Judge of the High Court.....'. Section 137 makes provision for a right of appeal on a question of the law by special leave of the High Court and the decision of the Court of Appeal 'shall be final and conclusive'.

(35) It may be noticed here that the Representation of the People Act, 1951 in India does not make any provision for appeal on any ground whatsoever. Whereas according to the English statute the election court consists of two High Court Judges 'on the rota', the personnel of the Election Tribunal in India is to be drawn from (1) persons who are or have been High Court Judges, (2) persons who are or have been District Judges and are in the opinion of the High Court fit to be appointed as members of such a tribunal and (3) advocates of High Courts of not less than ten years' standing and fit in the opinion of the High Courts to be so appointed; with this proviso that the Chairman of the Tribunal has to be either from the first or the second category aforesaid. Such a tribunal as is contemplated by S. 86 of the Act is a special Court or tribunal vested with the exclusive jurisdiction of determining election disputes and other matters entrusted to it. Such a tribunal, in my opinion, is not a Court or tribunal subordinate to the High Court.

One may ask the question: Did the Parliament consider election tribunals created under the provisions of S. 86 of the Act infallible? Otherwise, why was no provision made for an appeal from their decisions, even though the right of appeal may have been a limited one, limited to certain questions of a specified kind, as in England? One is tempted to answer the question by saying that Parliament may have thought that such an election tribunal may not be more fallible than other Courts or tribunals, if there is any lacuna in this respect it is for Parliament to remove that. But in view of the provisions of Part 15 of the Constitution read with the Representation of the People Act, 1951, the inference is clear that the makers of the Constitution did not contemplate that election disputes should be treated on the same footing as ordinary civil disputes which can be the subject-matter of one, two or three appeals.

(36) The argument that the determination of an election petition should be subject to scrutiny by the High Court either under Art. 226 or Art. 227 of the Constitution in order to ensure fuller justice, in my opinion, loses sight of the fundamental difference between the determination of a political right specially created by the Constitution and an ordinary civil right based on the common law or created or recognized by statute.

(37) At this stage it may not be out of place to take notice of another ground for holding that election disputes should not be protracted and subject to scrutiny by the Civil Courts, because laws' delays have been for long the subject-matter of general criticism, if not of ridicule. Taking the instant case, it has to be remembered that the polling for the election in question took place at the end of December 1951 and the beginning of January 1952. An elected body whose term of office is confined to five years can ill afford to keep election disputes pending for years. It has therefore been thought necessary by the Legislature to provide for a special tribunal of exclusive jurisdiction to determine election disputes as expeditiously as feasible in the circumstances.

(38) An impassioned appeal was made to us in the name of justice, and it was argued that unless the power of the High Courts to interfere in election disputes was recognized there was not only a possibility but a probability of justice being sacrificed in some cases. In my opinion, justice as ordinarily understood has reference to matters of civil or criminal disputes and not to election matters which are of a political nature.

(39) It is noteworthy that not a single instance has been brought to our notice to show that either in England or in anyone of its colonies or dependencies the ordinary Courts have interfered with the decision of an election tribunal created by a legislation setting up a democratic constitution. No such case has been brought to our notice even from the United States of America where the judiciary has found itself exercising powers of judicial interference of the widest character. That is so because it is now one of the established principles of a democratic constitution that the matter of election to a democratic legislature and disputes relating to such elections should be expeditiously dealt with by a tribunal of exclusive jurisdiction, not amenable to judicial interference by the ordinary Courts. That must be the reason why there is no decision of the House of Lords or of the Judicial Committee of the Privy Council which has interfered with the decision of an election tribunal.

(40) It has been contended on behalf of the petitioner that the British Constitution envisages Parliament as supreme in all respects, and therefore election disputes in relation to such a Parliament are determined by an election court which is not subject to the ordinary processes of the civil Courts. It is further contended that the Indian Parliament and the State Legislatures are not so supreme and that therefore the election courts of exclusive jurisdiction created by such Legislatures should not have that kind of finality attaching to the decisions of such election tribunals. But the Australian and the Canadian Constitutions and other such federal Constitution contemplate the creation of the Legislatures of enumerated powers, but even in those countries no instances of judicial interference with the decisions of election tribunals have been brought to our notice. Such an utter lack of precedents of this kind may justly be attributed to the well established rule referred to above.

(41) Assuming that I am wrong in holding that the election tribunals are superior tribunals of exclusive jurisdiction, whose determinations are not amenable to the special powers given to the High Courts under Arts. 226 and 227 of the Constitution, the position has to be examined whether in the instant case there is any usurpation of jurisdiction by the election tribunal or a refusal to exercise jurisdiction vested in it by law. It was contended on behalf of the petitioner that the adverse decision of the tribunal affecting the petitioner contained in para. 69 of the majority judgment was tantamount to a failure on its part to exercise jurisdiction vested in it by law, viz., S. 100(2)(c), Representation of the People Act, 1951, which is in these terms:

> "that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of

any rules or orders made under the Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void."

Thus, the tribunal had to decide the question whether the irregularity or illegality complained of in the instant case had materially affected the result of the election. That is a question which the tribunal had to determine for itself. The determination of this question was not dependent upon the determination of any collateral facts. Assuming, without deciding, that the tribunal misdirected itself in taking into consideration other matters in coming to its conclusion it cannot be said that the tribunal has refused to exercise a jurisdiction vested in it by law. The utmost that can be said is that it has gone wrong in determining a question which was within its province to decide.

(42) In this connexion our attention was called to the decision of their Lordships of the Judicial Committee of the Privy Council in — 'The Colonial Bank of Australasia v. Willan', (1874) L R 5 PC 417 (Q) in which it has been laid down that even where 'certiorari' has been taken away by statute the superior Court is not absolutely deprived of its power of judicial interference and that even in such cases a 'writ' can issue on the limited ground either of a manifest defect of jurisdiction in the tribunal that made the order or of manifest fraud in the party procuring it.

In the course of their judgment their Lordships have made the following observations which are relevant to the controversy before us :

"Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide."

(43) In the instant case objections to jurisdiction are not founded either on the personal incompetency of the tribunal or that the nature of the subject-matter of the enquiry was beyond their province or that some essential preliminary condition had not been satisfied. It is the election tribunal itself and none other which was seized of the matter and which was expected to exercise exclusive jurisdiction in respect of the entire controversy. The objection, therefore, in the instant case may be of the last kind envisaged in the passage quoted above, viz., that though the election tribunal was competent to try the issue and had rightly assumed jurisdiction over the subject-matter and had properly entered upon the enquiry, it had in so doing misdirected itself as to the result of the enquiry.

That misdirection may be due to the tribunal having made a mistake of fact or of law or of procedure or even of taking into consideration extraneous matters. But, even assuming that all these defects are there in the exercise of its exclusive jurisdiction the tribunal was still within its powers in coming to the conclusion to which it did. Hence, as pointed out by their Lordships, this Court assuming that it is a superior Court in relation to the tribunal, cannot quash that adjudication without assuming the functions of a Court of appeal and retry a question which the tribunal itself was competent to decide.

(44) In that view of the matter, in my opinion, the following observations quoted at p. 444 in that judgment have no place so far as the present controversy goes:

"It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merit of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior Court."

(45) Reference was made to the decision in — 'Rex v. Shoreditch Assessment Committee', 1910-2 K B 859 (R) and to the passage at p. 880 containing the observations of Farwell L. J. But that case has reference to a Court which had to make enquiry as to the fulfilment of a condition precedent to its assumption of jurisdiction, and it was in that context that the observation was made that a tribunal of inferior jurisdiction cannot by its wrong decision give itself jurisdiction. As already indicated, the election tribunal is not a Court or tribunal of that description.

(46) In view of those considerations, in my opinion, it cannot be said that the election tribunal in the instant case has either exceeded its jurisdiction or refused to exercise a jurisdiction vested in it by the Representation of the People Act, 1951. That being so, it is manifest that no relief can be granted to the petitioner by this Court.

(47) In this view of the case, it is not necessary to consider the other questions canvassed at the Bar, viz., whether the Election Commission or the Union Government was a necessary party to the petition or whether the provisions of R. 47 of the Rules under the Representation of the People Act, 1951 were mandatory or only directory. I would therefore dismiss this application. There will be no order as to costs.

(48) MUDHOLKAR J.: This is a petition under Arts. 226 and 227 of the Constitution for issue of a writ in the nature of 'certiorari' for quashing the order of the Election Tribunal, Hoshangabad, dismissing the petitioner's petition for setting aside the election of the respondent no. 1. In addition to this relief, the petitioner also seeks a declaration to the effect that the respondent no. 1 was not duly elected to a seat in the House of the People from the Hoshangabad Constituency and a further declaration that the petitioner has been duly elected to the seat.

(49) The facts which led up to this petition are briefly these: The petitioner and respondents 1 to 5 were duly nominated for election to a seat in the House of the People from the Hoshangabad Parliamentary Constituency. Respondents 4 and 5 withdrew their candidature and so there were only four candidates left in the field. The polling for the election to the above seat took place on 31-12-1951 and on January 7, 17 and 24, 1952. The

counting of the votes commenced on 25-1-1952 and ended on 3-2-1952. After the counting, the Returning Officer declared the respondent no. 1 duly elected by a majority of 174 votes. The votes which were declared to be secured by each of the candidates are as follows:

Respondent no. 1	—65375
Petitioner	— 65201
Respondent no. 2	— 20653
Respondent no. 3	— 13609

(50) The election of the respondent no. 1 was called in question by the petitioner by an election petition presented on 23-4-1952 before the Election Commission and a tribunal consisting of the respondents nos. 6, 7 and 8, with respondent no. 6 as the Chairman was appointed by the Election Commission for deciding the election petition. The Tribunal after recording evidence dismissed the petition and its decision was published in the Gazette of India Extraordinary Part II, S. 3, dated 15-4-1953.

(51) The election of the respondent no. 1 was challenged on the following amongst other grounds:

"That in the ballot boxes used at polling stations Sobhapur nos. 316 and 317 in Sohagpur part of the Constituency ballot papers bearing marks different from those which were authorised for use at those polling stations were found. These ought to have been rejected by the Returning Officer under R. 47 of the Representation of the People Rules, 1951. These were, however, improperly accepted and illegally counted by the Returning Officer. If these votes found in the boxes, both of the petitioner and the respondent no. 1 had been rejected as required by R. 47 'ibid' the respondent no. 1 would not have secured the marginal advantage of 239 votes, which he actually did at these two polling stations.

That the Returning Officer did not properly verify the account of votes submitted by the Presiding Officers of the polling stations as required by R. 49 'ibid'. The petitioner cited in this connection 16 instances among many such, in which the ballot papers found in the ballot boxes of the candidates at those polling stations were found to have exceeded the number of the ballot papers which should have been found in the boxes at those stations according to the account in Form 10. There were thus serious mistakes in the amount of votes throughout the Hoshangabad Parliamentary Constituency, and therefore a total recount of valid votes was necessary."

(52) According to the petitioner the election of the respondent No. 1 was void and illegal and that the result of the election was materially affected by the improper acceptance and illegal counting of the votes at Sobhapur polling stations by the Returning Officer and also by reason of the omission of the Returning Officer to verify the accounts of the ballot papers submitted to him. The petitioner further contended that in fact he had secured a majority of valid votes and therefore he was entitled to a declaration that he was duly elected. The petitioner also pointed out that in accordance with R. 28 of the Representation of the People Rules, the Election Commission had finally decided that ballot papers to be used for the purpose of voting at election to the House of the People from all constituencies in Madhya Pradesh shall have a thick green bar printed near the left margin of the ballot paper and a distinguishing mark.

He stated that in the ballot boxes used at the polling stations Nos. 316 and 317 of the Sohagpur part of the Hoshangabad Constituency ballot papers bearing different marks from those prescribed by the Election Commission were found. His contention is that all such ballot papers ought to have been rejected by the Returning Officer under the provisions of R. 47(1)(c) of the Rules. The petitioner pointed out that the respondent No. 1 polled 301 such votes and the votes polled by him at the above two polling stations were 62 and that after the rejection of all these invalid votes the petitioner would secure a majority of valid votes.

(53) It may be mentioned that while counting was going on the Returning Officer brought to the notice of the Election Commission that the ballot papers which were intended for the election to a seat in the Legislative Assembly, bearing a chocolate coloured bar, were through mistake given to the voters at the two aforesaid stations for voting at the election to the House of the People. There was no marked difference between the distinguishing mark on the two sets of ballot papers and it was because of this that the mistake was committed by the polling officers at these polling stations. It would also appear that a mistake of this kind had been made at some other polling station also. Before the receipt of the reply from the Election Commission the votes given on the ballot papers not bearing the distinguishing mark for the election to the Parliament were rejected at these polling stations. In the meanwhile, the reply of the Election Comission was received and the Returning Officer was informed that the votes recorded even on the ballot papers meant for the seat to the Assembly should be regarded as valid.

(54) The petitioner's contention was that the Election Commission had no right to validate the votes and this contention was upheld by the Election Tribunal. The Election Tribunal further held that R. 47(1)(c) which requires that invalid votes should be rejected is mandatory but

"non-compliance with that rule or even acceptance of other votes which are void will have no consequence except when thereby the result of the election is materially affected."

It then further observed:

"Here the petitioner wants us to consider the effect of the non-compliance of R. 47(1)(c). That non-compliance is founded upon the initial disregard of R. 23 'ibid' read with R. 28. Indeed these sections are so intimately connected that one cannot be considered apart from the other. In this case we have not only to see how the disregard of a particular rule has affected the petitioner. We have to consider how the non-compliance of the two rules affected the election as a whole. In our view we can go further.

In fairness we must consider the cumulative effect of all violation of law or disregard of rules to see if the result of the election was thereby materially affected. The true test in our opinion of determining whether the result of the election is materially affected by the non-compliance of any rules is to see what would have happened if these rules were strictly obeyed and not violated.

In this particular case, by sheer mistake, caused no doubt by the faintness of the distinguishing mark, the officers employed at the Sobhapur Polling Station gave to the Parliamentary electors ballot papers meant for use at the State Assembly election. If that mistake had not been committed and there was no non-compliance of R. 23 (read with R. 28) we are

sure that the correct ballot papers would have been found in the box of the respondent no. 1. In effect the initial non-compliance of the R. 23 read with R. 28 committed by the election officers makes for the disregard of R. 47(1)(c) and to the same extent too.

In other words if Rr. 23 and 28 had not been disregarded, the respondent no. 1 would have got all those votes which it is claimed must be rejected. The total effect of the disregard of the above R. 47(1)(c) and R. 23 read with R. 28 is that the respondent no. 1 would have been where he is now except that petitioner would get about 80 more votes on account of mistake in calculation. We, therefore, hold that the result of the election has not been materially affected by the non-compliance of this rule and there is, therefore, no case for declaring the election of the respondent no. 1, to be void."

and upon this view dismissed the election petition. The third member of the Tribunal held that R. 47(1)(c) was directory and not mandatory and also held that non-compliance with this rule did not render the votes invalid or the election void.

(55) The petition before us is opposed by the respondent no. 1 on various grounds. In the first place it is said that the jurisdiction of this Court to entertain the petition is barred by Art. 329(b) of the Constitution. It is stated that R. 47(1)(c) is directory and not mandatory and that therefore non-compliance with that rule did not render the votes invalid or the election void. Then it is stated that the Election Commission having invalidated the votes the Election Tribunal was bound to treat them as valid. It is then contended that the Election Tribunal has ceased to exist and that therefore there was no Tribunal to which this Court would issue a direction. It is also said that the Election Commission is a necessary party to the petition because the order of this Court cannot be given effect to unless it is a party to the petition therefore it is contended that the Election Commission not having been made a party to the petition the petition is untenable. Finally, it is said that the petitioner has no substantial right to assert or to enforce, that therefore it cannot be said that any injustice has been done to him and that therefore this Court ought not to interfere.

(56) At the outset it is necessary to consider whether quite apart from the provisions of Art. 329 of the Constitution Art. 226 can be brought in aid in a case of this kind. Article 226 enables this Court to issue a direction, order or writ to any person or authority within the territorial limits of its jurisdiction. Thus, for the issue of a direction, order or writ there must be in existence either a person or an authority within the territorial jurisdiction of this Court. The Election Tribunal is no doubt an authority but having been appointed by the Election Commission for a specific purpose it cannot be deemed to exist after that purpose is served. In other words, an Election Tribunal stands dissolved automatically after it gives its decision in the cases sent to it by the Election Commission for decision. It is common ground that no election petition is pending at this date before the Hoshangabad Tribunal of which respondents 6, 7 and 8 were members. It must, therefore, be held that the Tribunal does not exist any longer and that consequently no direction, order or writ can be made to it. Since that is the position Art. 226 is not available.

(57) Though Art. 226 cannot be availed of by this Court it seems to me that Art. 227 of the Constitution can be availed of. In — 'AIR 1951 Nag 58 (FB) (J)' Mangalmurti J. and I observed as follows:

"The main purpose of Art. 227 appears to be to empower the High Court to call for returns from all Courts and tribunals, make general rules, prescribe forms for regulating the practice and proceedings of such Courts, settle tables of fees and so on. Article 226 does not touch these or similar matters. It is in order to indicate the plenitude of the power conferred upon the High Court with respect to Courts and tribunals of every kind that the Constitution conferred the power of superintendence on the High Court.

It is true that the absence of a provision similar to that contained in sub-s. (2) of S. 224, Government of India Act of 1935 enables the High Court, under this Article, to exercise revisional jurisdiction with respect to the decisions given by all Courts and tribunals and that to this extent there is a certain amount of overlapping between Cl. (1) of Art. 227 and Art. 226. That, however, is inevitable. Of course, the power of superintendence conferred upon a High Court is not as extensive as the power conferred upon it by Art. 226.

Thus ordinarily it will be open to the High Court, in the exercise of the power of superintendence only to consider whether there is an error of jurisdiction in the decision of a Court or tribunal subject to its superintendence, whereas there is no limitation under Art. 226."

The Election Tribunal having been constituted for a limited purpose must be deemed to be a Tribunal of limited jurisdiction and thus amenable to the jurisdiction of this Court under Art. 227 of the Constitution. In this connection I would refer to — '1910-2 K B 859 at p. 880 (R)', where Farwell L. J. observed:

"Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it."

Similarly, in — 'Shripad v. Harsiddhbhai Divatia', AIR 1948 Bom 20 (S), Bhagwati J. held that though Election Commissioners are appointed by the Governor for deciding election disputes they are amenable to the writ jurisdiction of the High Court. Finally, I would refer to — 'Shankar Nanasaheb v. Returning Officer, Kolaba', AIR 1952 Bom 277 at p. 281 (T), where it has been held that the power of superintendence given to the High Courts over Tribunals by Art. 227 extends even to an Election Tribunal.

(58) The next question is whether Art. 329(b) is a bar to the exercise of the powers conferred on this Court by Art. 227 of the Constitution. On behalf of the respondent no. 1 it is argued on the analogy of the law in England that Parliament being the sole judge of its own composition a Court of law has no jurisdiction to decide any matters pertaining to its composition, such as the question whether a particular person was duly elected to Parliament or not. In the first place, I would like to point out that the analogy of the law in England cannot be used in India for the reason that there the Parliament is supreme whereas here neither the Parliament nor the State Legislature is supreme. Ours is a Constitution of enumerated powers and whether the Parliament has power over a particular matter has to be ascertained by reference to the Constitution.

(59) The learned counsel for the respondent no. 1 refers to Cl. (3) of Art. 105 of the Constitution

and says that the privileges of the Parliament in India in regard to matters such as these are the same as those of the British Parliament. Clause (3) of Art. 105 reads thus:

"In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

(60) It is true that formerly controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested. In order, however, to prevent so notorious a perversion of justice, as May points out in his Parliamentary Practice (15th Edn. P. 184) the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own Members, should be appointed so as to secure impartiality and the administration of justice according to the laws of the land.

Accordingly the Grenville Act was passed in the year 1770 and the persons who were appointed used to be the members of the House and even though they were drawn by lots there were allegations of partiality and incompetence. In 1839, therefore, an Act was passed establishing a new system, upon different principles, increasing the responsibility of individual Members, and leaving but little to the operation of chance. This principle was maintained until 1868, when the jurisdiction of the House in the trial of controverted elections was transferred by statute to the Courts of law.

Finally, by Part III of the Representation of the People Act, 1949, the trial of controverted elections is confided to judges selected from the judiciary in the appropriate part of the United Kingdom. Thus, in so far as electoral matters are concerned, at the commencement of the Constitution the House of Commons in England had no privilege and the validity or otherwise of an election of its members had to be determined by the Statutory Tribunals created by the Representation of the People Act, 1949. It would, therefore, follow that the Parliament of this Country does not possess a privilege of determining the validity of elections to either House.

(61) What is next to be ascertained is the effect of Art. 329(b) of the Constitution on the powers of this Court.

Article 329(b) reads thus:

"Notwithstanding anything in this Constitution—

x x x

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

The 'non-obstante' clause in this Article indicates that the provisions of this article shall prevail despite anything to the contrary in any other provision of the Constitution. As was observed by a Division Bench of this Court consisting of the Chief Justice and myself in — 'Vasant Rao v. Election Commission of India, New Delhi', AIR 1953 Nag 237 (U):

"Thus, where a certain power has been conferred on one tribunal and a similar power is conferred on another, there is no inherent repugnancy between the powers of those tribunals. When the intention is that each can exercise its powers independently of the other, it becomes necessary to use a 'non-obstante' clause."

Had Art. 329(b) not been there then election disputes could have been brought to the High Court directly under Art. 226. Article 329(b) provides that such disputes should be adjudicated upon by an Election Tribunal and none else. It follows therefore that the Election Tribunal alone can adjudicate upon election disputes and the High Court has no jurisdiction to enquire into them even under Art. 227 of the Constitution.

(62) What is however challenged here is not the election itself but the decision of the Tribunal. No doubt the petitioner also wants this Court to declare the election of the respondent no. 1 void and further wants that he himself be declared elected. I have no doubt that neither of these two reliefs can be granted to the petitioner by this Court in view of the provisions of Art. 329(b). At the same time, I am clear that these reliefs are separable from the first relief which he has claimed, that is of quashing the order of the Tribunal.

(63) Shri Pathak strongly relied on the decision of the Supreme Court in — 'AIR 1952 SC 64 (A)' in support of the contention that not only Art. 329(b) of the Constitution but also Ss. 80 and 105, Representation of the People Act bar the jurisdiction of this Court, even to consider whether the Election Tribunal has acted within the scope of its jurisdiction or not or has refused to exercise the jurisdiction committed to it. In that case the question was whether the High Court had jurisdiction to issue a writ of 'certiorari' under Art. 226 of the Constitution and to quash the order of the Returning Officer rejecting the nomination paper of the candidate and directing the Returning Officer to include the name of the candidate in the list of valid nominations to be published. Their Lordships held that the scheme of Part 15 of the Constitution, in which Art. 329(b) occurs, and the Representation of the People Act seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court.

(64) In the course of the judgment Fazl Ali J. who delivered the judgment of the Court observed:

".....any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court.

If the grounds on which an election can be called in question could be raised at an earlier

stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art. 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it."

Dealing with the Representation of the People Act, 1951, his Lordship observed:

"Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder.....Section 80, which is drafted in almost the same language as Art. 329(b), provides that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this part.' .....Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive' ....., and it should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage."

Further his Lordship observed:

"It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.....That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

"It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Art. 226 of the Constitution. This argument however is completely shut out by reading the Act along with Art. 329(b). It will be noticed that the language used in that article and in section 80 of the Act is almost identical, with this difference only that the article is preceded by the words 'notwithstanding anything in this Constitution.' I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress."

Observing that the more reasonable view seems to be that Art. 329 covers all "electoral matters" his Lordship summarized the conclusion arrived at by him thus :

"(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress."

After referring to the decision of the Privy Council in — '1876-2 AC 102 (M)', his Lordship observed :

"The points which emerge from this decision may be stated as follows:

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

At the same time his Lordship made it clear :

"It should be mentioned here that the question as to what the powers of the High Court under Arts. 226 and 227 and of this Court under Art. 136 of the Constitution may be, is one that will have to be decided on a proper occasion."

I have quoted extensively from the judgment of his Lordship in order to show that the view taken by him is that in so far as 'electoral matters' are concerned, the jurisdiction of this Court is barred by Art. 329(b) of the Constitution and by Ss. 80 and 105, Representation of the People Act, which Act has to be read as part of the Constitution.

(65) Their Lordships were not dealing with a case of the present type where the question to be considered is whether the Election Tribunal has acted within the ambit of its authority or whether it has refused to exercise the jurisdiction vested in it by law. There is nothing in the judgment of their Lordships which indicates that the jurisdiction of this Court or indeed of a civil Court to examine into cases where the provisions of an Act have not been complied with by the statutory tribunal is taken away. Indeed, it was observed in this judgment :

"It was conceded at the bar that the effect of this difference in language is that whereas any law made by Parliament under Art. 327, or by the State Legislature under Art. 328, cannot exclude the jurisdiction of the High Court under Art. 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Art. 329."

This concession of the counsel appears to have been accepted as proper by their Lordships. Thus it would follow that only such matters as are dealt with in Art. 329 are excluded from the consideration by this Court under Arts. 226 and 227 of the Constitution. Finality is not given by Art. 329(b) to the order of the Tribunal nor is the order placed beyond the purview of the High Court.

(66) A reference may be made to the decision in — 'AIR 1940 PC 105 at p. 110 (G)', which has been referred to in the judgment of the Court, though in another connection. Their Lordships of the Privy Council have stated :

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either

be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

To the limited extent, therefore, of considering whether the Election Tribunal has complied with the provisions of the law or has failed to exercise the jurisdiction vested in it by law, it must be held that this Court, at any rate, has jurisdiction.

(67) It is argued that interference with the decision of the Election Tribunal will affect the election. I may point out that the Respondent no. 1 was not elected as a result of the decision of the Election Tribunal but as a result of the counting of votes by the Returning Officer. If, therefore, this Court were to set aside the order of the Election Tribunal, the result of the election will not be affected. The only consequence of this order would be that the election petition will have to be decided afresh.

(68) I am aware of the decision of a Division Bench of this Court in — 'AIR 1953 Nag 357 (H)', where it has been held that the fact that an election petition has been filed and dismissed or allowed does not remove the bar of Art. 329(b) as that clause itself contemplates only one mode of procedure and not two. The learned Judges in that case had to consider whether this Court had jurisdiction to interfere under Art. 226 or 227 of the Constitution with an order of an Election Tribunal declaring void the election of the candidate declared to be elected by the Returning Officer and declare the petitioner before it duly elected. The learned Judges held that the intention of the Constitution seems to be that election matters should be left to the machinery provided for the consideration of election petitions in the law to be made under Art. 327, and that no other authority should do what the Tribunal and the Election Commission are required under law to decide.

They seem to be of the view that in certain circumstances the proceedings before the Tribunal, including the decision of the Tribunal, are to be included in the process of election. It may be that in certain circumstances the decision of the Election Tribunal may be regarded as a part of the election. Where, however, the Election Tribunal has exceeded its jurisdiction or failed to exercise jurisdiction vested in it by law, it cannot be said that its decision affects an election and is on that account a part of the process of election.

(69) No doubt, the learned Judges have also held that by reason of the non-obstante clause in Art. 329(b) the jurisdiction of the High Court under Arts. 226 and 227 is excluded. I am prepared to grant that in a case where the question is not whether the Tribunal has exceeded its jurisdiction or refused to exercise it, this Court may not be able to interfere. Where, however, the question raised pertains to jurisdiction, the bar created by Art. 329(b) would not come in the way of the exercise of the powers conferred upon this Court by Art. 227.

(70) What Art. 329(b) takes out of the jurisdiction of this Court is any matter 'pertaining' to an election but where, as here, the matter relates only to a decision of a Tribunal which is not a part of the process of election that provision cannot operate as a bar. As has been observed in — 'Rex v. Shoreditch (R)', (cit. sup.) :

> "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise."

Thus, if an Election Tribunal decides a petition on a fantastic ground, that is, a ground which is not provided for in the Representation of the People Act, or where it refuses to exercise its jurisdiction when upon the facts it is bound to exercise it, then certainly this Court can and must interfere. I am thus of the view that the power of this Court to interfere in a case like the present is not taken away by the provisions of Art. 329(b).

(71) It is then said that S. 105, Representation of the People Act takes away the jurisdiction of the High Court even to consider whether the Tribunal has exercised its jurisdiction or has refused to exercise it. That section reads thus :

> "Every order of the Tribunal made under this Act shall be final and conclusive."

It must be remembered that this section is to be found in the law enacted by Parliament and no Act of Parliament can take away the power which the Constitution has conferred on this Court. It is however argued that the Act has been made by the Parliament under the powers conferred under Art. 327 of the Constitution and therefore the whole, or at any rate, S. 105 thereof, must be deemed to be a part of the Constitution. In my opinion, this argument is wholly untenable. It may be mentioned that there is no 'non obstante' clause in Art. 327 of the Constitution. On the other hand, Art. 327 is 'subject' to the other provisions of the Constitution. The law which the Parliament enacts cannot, therefore, derogate from any provision of the Constitution.

(72) The question then is whether the Election Tribunal has committed any error pertaining to jurisdiction, that is to say, whether it has refused to exercise jurisdiction vested in it by law or has usurped jurisdiction. As already pointed out the Election Tribunal has come to the conclusion that the provisions of R. 47(1)(c) are mandatory, that the Returning Officer ought to have rejected 371 voting papers because they did not bear the prescribed mark, that the Election Commission could not validate these voting papers, that the rejection of all such ballot papers would have deprived the respondent no. 1 of the marginal advantage of 239 votes and that the petitioner could have thus got a majority of valid votes. Having come to this conclusion what the Tribunal had to decide was whether the result of the election had been materially affected by the improper reception of these 371 votes. Instead of addressing itself to this question the Tribunal proceeded to ascertain the effect of the disregard by the Polling Officer of rule 23 read with R. 28. (See para 69 of the judgment of the Election Tribunal reproduced in paragraph 7 of this order.)

The Election Petition is not founded on any allegation that the Returning Officer did not do his duty as required by R. 23(1), which deals with the procedure before the recording of votes, or any rule other than R. 47(1)(c). It was therefore not open to the Tribunal under S. 100(2)(c), Representation of the People Act to consider whether the result of the election was affected by a non-compliance with a provision of the rules or the Act other than the one complained of. Therefore, in

taking into consideration the non-compliance with the provisions of R. 23 it acted beyond its jurisdiction and in failing to consider the effect of the non-compliance with R. 47(1)(c) it failed to exercise the jurisdiction vested in it by law.

(73) It was argued at great length that the provisions of R. 47(1)(c) are directory and not mandatory and that the opinion of the majority of the members of the Tribunal that they are mandatory is erroneous. In my opinion, it is not open to us to consider whether the view taken by the majority is correct or not. The reason for saying so is that the Tribunal had jurisdiction to decide every question of fact and law raised before it and its decision on such a question could not be questioned by this Court under Art. 227 of the Constitution except when the question decided by it affected its initial jurisdiction. The finding which the majority of the members of the Tribunal have given regarding the nature of the provisions of R. 47(1)(c) does not affect its initial jurisdiction and therefore that finding cannot be questioned before this Court.

(74) It was argued that this Court had no jurisdiction to entertain this petition because the Tribunal cannot be deemed to be situate within the territorial jurisdiction of this Court. In support of this argument Shri Hazarnavis, junior counsel for the respondent no. 1, referred to S. 88 Representation of the People Act. That section runs thus :

"The trial shall be held at such place as the Election Commission may appoint :

Provided that a Tribunal may, in its discretion, sit for any part of the trial at any other place in the State in which the election to which the petition relates has taken place."

(75) According to the learned counsel the Election Commission could fix any place whatsoever for the trial of the election petition and that it was not bound to fix the trial of the petition at a place within the limits of the State in which the petition arose and that the mere fact that the Election Commission fixed Hoshangabad as the place for the trial of this petition is not sufficient to give this Court jurisdiction over the tribunal. In support of this contention the learned counsel relied on — 'Ryots of Garabandho v. Zamindar of Parlakimedi', AIR 1943 PC 164 (V).

(76) The argument of the learned counsel ignores from consideration the proviso to S. 88. In my opinion, the main section and the proviso, have to be read together and after they are so read, it is clear that the place of the trial must be situate within the State from which the petition arises. I am fortified in this view by the observations of Lord Herschell in — 'West Derby Union v. Metropolitan Life Assurance Society', 1897 AC 647 at p. 655 (W), which were quoted with approval by Viscount Maugham in — 'Jennings v. Kelly', 1939-4 All ER 464 at p. 470 (X):

"Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it."

After quoting this his Lordship added :

"My Lords, that is precisely the method of construction which, in my view, is applicable in the present case. I will add that the words beginning 'Provided that' are, in my opinion, additional and explanatory words, necessary for the purpose of giving a more definite meaning to the preceding words — namely, for the purpose of removing doubt as to its scope — and they might easily have been incorporated in the earlier part of the section, at the risk of making it rather more cumbrous than it is."

His Lordship then observed :

"It cannot, I think, be disputed that in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. A number of striking examples will be found in Maxwell on the Interpretation of Statutes, 8th Edition, pp. 27, 28. This principle is equally applicable in the case of different parts of a single section, and nonetheless so because the latter part is introduced by the words 'provided that' or like words. There can, I think, be no doubt that the view expressed in Kent's Commentaries on American Law, 12th Edn. Vol. I, p. 463, cited with approval in Maxwell on the Interpretation of Statutes, 8th Edn. p. 140, is correct.

'The true principle undoubtedly is, that the sound interpretation and meaning of the statute on a view of the enacting clause, saving clause, and proviso taken and construed together, is to prevail'."

In my opinion, this is sufficient to dispose of the point urged by Shri Hazarnavis.

(77) The learned counsel then argued that in the absence of the Election Commission as a party to this proceeding, the order of this Court cannot be given effect to. He further argued that the Election Commission being a necessary party to the petition and being outside the jurisdiction of this Court the petition itself was untenable. Reliance was placed on the decision in — 'Ramkrishna's case (H)', (cit. sup.) in support of the proposition.

The learned Judges observed :

"The order of the Election Tribunal when adopted by the Election Commission and notified, becomes an order of the Election Commission. The Election Tribunal is nothing more than an amanuensis of the Election Commission, and the order made by the Election Tribunal, when adopted by the Election Commission, becomes not only conclusive but takes effect to all intents and purposes as the act of the Election Commission.

To issue a process against a body which is now 'functus officio' to quash its order, would, in the events which have happened, be a process against the Election Commission itself. That is not possible because it has now been authoritatively ruled that the Election Commission is not subject to the writ process of the High Court within the territorial jurisdiction of which the Commission is not situate. It cannot be denied that in the present matter the Election Commission is not within our territorial jurisdiction and we cannot therefore by a writ compel the Election Commission to choose a course other than what it has. No Court does indirectly which it cannot do directly."

(78) With great respect to the learned Judges I would point out that the very assumption that the Tribunal is an 'amanuensis' of the Election Commission is unjustified and therefore the conclusion based on it is erroneous. The Tribunal does, no doubt, owe its constitution to the Commission, but it is appointed to decide a petition according to its own lights. It is in no sense a servant of the Commission nor can the Commission dictate to it as to how it should decide a petition. On the other hand, it is the Commis-

sion which has to give effect to the decision of the Tribunal : The Commission has to register the decision of the Tribunal and have it published in the manner set out in section 106 of the Representation of the People Act and in that sense it may perhaps be permissible to regard it as the 'amanuensis' of the Tribunal but not 'vice versa'.

(79) The order which takes effect upon the publication is the order of the Tribunal and not of the Commission. This is clear from S. 107, Representation of the People Act which runs thus:

"An order of the Tribunal under S. 98, or S. 99 shall not take effect until it is published in the Gazette of India under S. 106."

There is nothing in the Act nor in the Constitution which enables the Election Commission to adopt the order of the Tribunal and thus make it its own. On the other hand, Ss. 106 and 107 both make it clear that the function of the Election Commission in regard to the matter, after the decision of the Tribunal, is merely ministerial. If this Court quashes the order of the Tribunal, the very basis for the publication of the decision of the Tribunal will disappear and the Election Commission as a constitutional body will be bound to treat the petition as still pending and non-existent — is of no consequence.

I may add that when this Court finds that an inferior Tribunal has committed an error pertaining to its jurisdiction and that consequently its order is unsustainable, it can itself quash the order of that Tribunal and that it is not necessary for it to "issue a process" against it to quash its order. Indeed, where the High Court holds that an inferior Tribunal has usurped jurisdiction or erroneously refused to exercise it, it does not leave it to that Tribunal to quash its own order but the High Court itself quashes it. I am not even aware of any case in which an inferior Court was directed to quash its erroneous order. Thus, the fact that the Tribunal is now 'functus officio' — and may therefore be deemed to be non-existent — is of no consequence.

(80) In my judgment, the Election Commission is not a necessary party to this petition because no relief is sought against it, and indeed, no relief need have been sought against it. As I have already observed, though under the provisions of the Representation of the People Act the Election Commission has got to perform certain functions in relation to election petitions and also in relation to the decisions of the election petitions, that fact is not sufficient to make the Election Commission a necessary party to a petition challenging the decision of the Election Tribunal. It may further be pointed out that the Election Commission was not a party to the election petition itself, and where an act of the Election Tribunal is challenged it is difficult to understand how the Election Commission becomes a necessary party to the petition.

(81) At this stage I may refer to the argument advanced by Shri Pathak, senior counsel for the respondent no. 1, to the effect that the Election Commission having given the decision that certain voting papers were valid is interested in supporting that decision and is therefore a necessary or at least a proper party. What I have said above regarding the jurisdiction of this Court on the question of the interpretation of R. 47(1)(c) would also apply to the decision of the majority of the Tribunal in regard to the action taken by the Election Commission. Since the correctness or otherwise of the decision of the Tribunal on this point cannot be questioned before us, the Election Commission is neither a necessary nor a proper party to the petition.

(82) Further, since the Election Commission is not a necessary party nor even a proper party to the petition, the fact that it is situate beyond the jurisdiction of this Court would not render the petition untenable.

(83) During the course of the argument it was suggested that the Union Government was also a necessary party to the petition because our decision cannot be given effect to except through the instrumentality of the Government. It is true that under S. 106, Representation of the People Act, the Election Commission is required to transmit copies of the order of the Tribunal to the Speaker of the House of the People and to cause it to be published in the Gazette of India. It is also true that the Gazette of India is published under the authority of the Government of India and therefore the actual publication has to be ordered by the Government of India. These facts however are not sufficient to warrant or necessitate even the joinder of the Government of India as a party to the petition.

(84) The best answer to the argument would be found in the judgment of Lord Reading C. J. in — 'Rex v. Speyer', 1916-1 K B 595 (Y). In that case Sir Edgar Speyer and Sir Ernest Cassel were called upon by two orders of this Court of the Kings Bench Division, made at the instance of Sir George Makgill, to show cause why an information in the nature of a quo warranto should not be exhibited against them to show by what authority they respectively claimed to be members of His Majesty's Privy Council for Great Britain. The Attorney-General, upon whom notice of the orders obtained by Sir George Makgill had been served, took the preliminary objection on behalf of the Crown that these proceedings were entirely misconceived and that this Court had no jurisdiction to entertain them. One of the grounds on which the objection was based was that no judgment in favour of the relator could be enforced because it would be an order upon the Crown. This ground was based on the assumption that if the Court were to pronounce a judgment of ouster in this case it would be making an order upon the Sovereign.

Dealing with the argument Lord Reading observed:

"If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign. To use the words of Cockburn C. J. in — 'Reg v. Lords Commissioners of the Treasury', (1872) 7 Q B 337 at p. 394 (Z),

'We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power.'

But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown

It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not in-

volve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made.

Although it may be interesting and useful for the purpose of testing the proposition under consideration to assume the difficulties suggested by the Attorney-General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown."

This Court derives its powers and jurisdiction with respect to inferior tribunals from the provisions of the Constitution itself and I have no doubt whatsoever that any decision given by this Court will be respected and given effect to by the appropriate authority or authorities.

(85) What remains to be considered is the argument that the petitioner has no substantial right to assert and that no injustice has been done to him. The petitioner made the election petition and therefore he was entitled to have it decided according to law by the Election Tribunal. Upon the view I take the Election Tribunal has failed to exercise its jurisdiction by not determining the question which it was bound to determine and therefore it must be said that the petitioner has not been able to obtain justice. He has therefore a clear right to move this Court under Art. 227 of the Constitution.

(86) I would, therefore, allow the petition and quash the order of the Election Tribunal and leave it to the Election Commission and the Government to perform their statutory duties in the matter of the election petition which has not been decided. The petitioner is entitled to the refund of the deposit made by him and also to his costs. No counsel's fee as no certificate has been filed.

BHUTT J.:

(87) I have had the benefit of perusing the orders of my Lord the Chief Justice and my brother Mudholkar J. With respect I would like to make the following observations.

(88) The points arising in this controversy are—

(1) Whether, independently of Art. 329, the matter is justiciable either under Art. 226 or 227?

(2) Whether, in view of Art. 329, the matter is taken out of the jurisdiction of the High Court under Arts. 226 and 227; if so, to what extent?

(3) Whether the decision of the Election Tribunal is without jurisdiction or in excess of jurisdiction; if so, is it liable to be quashed?

(4) Whether the Election Commission is a necessary party; if so, has the High Court no jurisdiction in the matter?

(89) 'Point (1)' — The real question in this connection is to determine precisely the respective limit of the power of the High Court under Art. 226 and Art. 227 of the Constitution. As was held by their Lordships of the Supreme Court in — 'Election Commission v. Saka Venkata Rao', AIR 1953 SC 210 (Z1), the power under Art. 226 is conditioned by only two limitations, viz., —

(i) that the power is to be exercised throughout the territories in relation to which the High Court exercises jurisdiction; and

(ii) that the person, authority or Government, to whom the writ is issued, is amenable to the High Court's jurisdiction either by residence or location within those territories.

In other respects the power of the High Court under this Article is unfettered. Since the pronouncement of the Supreme Court on the scope of the Article, the view held earlier in — 'M. E. T. Co. v. Ranganathan', AIR 1952 Bom 449 (Z2); — 'Maqbulunisa v. Union of India', AIR 1953 All 477 (FB) (Z3) and — 'Ranganathan v. Madras Electric Tramway Co.', AIR 1952 Mad 659 (Z4), viz., that the power is exercisable if the person, authority or Government functions, without physical location or residence, within the High Court's territorial jurisdiction cannot be regarded as law.

(90) However wide the powers are under Art. 226, they, by their very nature, can only be exercised within certain limits. In — 'Veerappa v. Raman & Raman Ltd.', AIR 1952 SC 192 (Z5), their Lordships of the Supreme Court observed:

"Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

These limits were applied in — 'Parry & Co. Ltd. v. Commercial Employees Association', AIR 1952 SC 179 (Z6). In this connection their Lordships observed:

"The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within the jurisdiction of the Labour Commissioner to decide and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus there was absolutely no ground here which would justify a superior Court in issuing a writ of 'certiorari' for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions."

In — 'Rashid Ahmed v. Municipal Board, Kairana', AIR 1950 SC 163 (Z7), their Lordships further observed:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Art. 32 are much wider and are not confined to issuing prerogative writs only."

Similar considerations would prevail under Art. 226.

(91) From the rulings cited above, the following principles emerge, viz., —

(i) Jurisdiction may be exercised where the tribunal

(a) has acted wholly without jurisdiction or in excess of it;

(b) has refused to exercise a jurisdiction vested in it;

(c) has acted in vioalation of the principles of natural justice; or

(d) has committed an error apparent on the face of the record;

and such act, omission, excess or error has resulted in manifest injustice.

(ii) In exercising the jurisdiction the High Court is not empowered to convert itself into a Court of appeal and examine for itself the correctness of the decision and decide for itself what the proper view is or what order has to be made.

(iii) Where the tribunal has acted with jurisdiction the High Court will not interfere on the mere ground that the decision is erroneous.

(iv) Where there is an alternative remedy under the statute, its existence will be taken into consideration before exercising jurisdiction.

(92) In the cases referred to above, the tribunals are mentioned as inferior tribunals and the High Court as a superior Court. The question whether under Art. 226 of the Constitution, the High Court is empowered to issue writs only to subordinate or inferior tribunals, or whether the tribunals, by virtue of their location within the High Court's territorial limits, become amenable to its jurisdiction, was not, however, specifically raised or considered. The term 'inferior' or 'subordinate' has reference to a statute which may make the orders or proceedings of the tribunals concerned subject to the appellate or revisional authority of a Court. Article 226, however, does not specify that the High Court can exercise its power in respect of the orders or proceedings of such inferior or subordinate tribunals only.

It appears that where a tribunal, however, wide or exclusive its powers, is constituted under a statute it would be amenable to the High Court's jurisdiction under Art. 226, provided the two conditions mentioned above are fulfilled. The power of the High Court, in this regard, can only be taken away by the Constitution itself to the extent and in the manner provided therein either expressly or by necessary implication. No statutory finality attaching to the orders or proceedings of the tribunals can otherwise eliminate or abridge its power, subject, of course, to the limitations determined by the Supreme Court by its judicial decisions.

(93) Turning to Art. 227, the decisions holding the view that the term "superintendence" used in Cl. (1) imports judicial control, although of a limited nature, are the following:

(i) 'AIR 1951 Nag 58 (FB) (J)';

(ii) 'AIR 1952 Bom 277 (T)'; and reliance was also placed upon

(iii) 'AIR 1948 Bom 20 (S)'.

In the first two cases the interpretation is inferential and is based on the omission from Art. 227 of a clause similar to sub-section (2), S. 224, Government of India Act, 1935. Although Art. 227 is similar to S. 224, Government of India Act, such an interpretation cannot be given to it without first examining the scope of sub-section (1) of S. 224 'vis-a-vis' Cl. (1) of Art. 227. If this has to be done, one has to revert to the very question which has to be answered.

(94) One point of difference is remarkable in this connection, namely that whereas S. 224 provided for superintendence of the High Court over Courts which were subject to its appellate jurisdiction, Art. 227 deals with the Courts or tribunals which are situate within the territories in relation to which the High Court exercises jurisdiction. Such Courts or tribunals cannot be amenable to the High Court's appellate or revisional jurisdiction simply because of their physical location. It, therefore, appears that in the former case, it was necessary to clearly delimit the power of the High Court lest, by virtue of its appellate jurisdiction, it may while purporting to act under the Government of India Act, exercise a power which was not vested in it under the relevant statute.

It is in this context that sub-section (2) of S. 224, Government of India Act has to be read, but for which sub-section (1) was liable to be used in a wider sense. No such extended jurisdiction is indicated in Art. 227, and it is for this reason that no necessity was felt to incorporate in it a provision similar to sub-section (2) of S. 224, Government of India Act. The judicial power, if any exercised by the High Court prior to the Constitution, while superintending a subordinate Court was not therefore referable to S. 224, Government of India Act and was derived solely from its statutory jurisdiction. No such power of intervention can, therefore, be imported in Art. 227 of the Constitution independently of appellate or revisional jurisdiction of the High Court vesting in it in terms of a statute.

(95) As regards — 'Shripad v. Harsiddhbai Divatia (S)' (supra), the matter had arisen before the commencement of the Constitution and was confined to the question whether the Election Commissioner appointed by the Governor under para 4 of Part III of the Order in Council 1936 could be held to constitute a Court, in its extended sense, amenable to the writ jurisdiction of the High Court under S. 45, Specific Relief Act, 1877. That decision can be no guide to the determination of the scope of Art. 227. I, therefore, respectfully concur in the view of my Lord the Chief Justice that the power of the High Court under Art. 227 is confined to administrative matter and does not extend to judicial intervention.

(96) 'Point (2)' — In order to understand the limitation imposed by Art. 329 on the power of the High Courts under Art. 226, it is first necessary to read and interpret the relevant provisions of the Constitution itself. It is only when any doubt or incongruity arises on giving a plain meaning to the words that are used, that the law or practice of foreign countries may prove useful as a guide but not as an authority. In this connection Arts. 105(3), 324(1), 327 and 329(b) are relevant and are reproduced below:

"105(3). In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees at the commencement of this Constitution."

"324(1). The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission)."

"327. Subject to the provisions of this Constitution, Parliament may from time to time by law

make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either house of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses".

"329(b). Notwithstanding anything in this Constitution

* * *

no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

(97) Article 105(3) provides that except in the matters covered by cls. (1) and (2), the powers, privileges and immunities of each House of Parliament, and of the members and committees thereof, shall be such as may be defined by Parliament by law, and until so defined, shall be those of the House of Commons in the United Kingdom, and of its members and committees at the commencement of the Constitution. This Article obviously does not, in terms, apply to the conduct of election, in so far as the powers, privileges and immunities of the House, and its members and committees, come into existence only after the election has taken place and the House is constituted. There is, however, another aspect of the matter.

(98) In England, before the year 1770, controverted elections were tried and determined by the whole House of Commons. Subsequently the House consented to submit the exercise of its privilege to a tribunal constituted by law and composed of its own Members. The principle of selection of these Members was by lot of committees for the trial of election petitions. This practice prevailed until 1868 when the jurisdiction of the House was transferred by statute to the Courts of law. Since 1949 the settlement of these disputes is governed by the Representation of the People Act, 1949, under which the trial of controverted elections is entrusted to judges selected from the judiciary, the judges being selected from a rota to be constituted for the purpose.

Petitions complaining of undue elections and returns or of corrupt or illegal practices are presented in England to the King's Bench Division of the High Court and are tried by two Judges of that court within the county or borough concerned. Similar provision exists for the trial of the petitions in Scotland and Northern Ireland where they are presented respectively to the Court of Session in Scotland and the High Court in Northern Ireland. The House has no cognisance of these proceedings which do not form a proceeding of the House. It comes to know of the determination only after it is certified, in writing, to the Speaker by the judges. The decision, subject to the result of an appeal on a question of law, which can be filed only by special leave of the High Court, becomes final and has then only to be registered by the House.

(99) It will thus be seen that the House of Commons has divested itself completely of its own privileges of deciding controverted elections. This privilege being non-existent at the time of the commencement of the Constitution, cannot vest in either House of Parliament in India under Art. 105(3). It may, however, be contended that in the United Kingdom the power of the judges has been delegated by the House of Commons itself, and, therefore, does not cease to vest ultimately in the House. Such a position may exist in the United Kingdom where the Parliament is supreme.

In India the Parliament derives its power from the Constitution and its legislative function is limited to enumerated items. Unless, therefore, the Constitution itself vests any privilege in the Parliament, either expressly or by necessary implication, it cannot be claimed by either of the Houses. As I read Art. 105(3) of the Constitution, it appears to me that only the powers, privileges and immunities actually exercised or enjoyed by the House of Commons at the commencement of the Constitution are contemplated by it and not those which the House of Commons has abdicated. Even if such of the powers as were given up are subsequently resumed by the House of Commons, they would not vest in the Houses of Parliament in India for they were not existing at the commencement of the Constitution. Nor would they vest in them solely for the reason that they inhered in the House of Commons before the Constitution commenced.

The idea underlying Art. 105(3) in co-relating the matter to the date of the commencement of the Constitution is clearly to take notice of only such of the powers, privileges and immunities as the House of Commons exercised or enjoyed at that date. If the intention was to vest in the Houses of Parliament in India all those powers, privileges and immunities which, at one time or the other, vested in the House of Commons since the dawn of history, nothing was easier than to state so expressly. It would, therefore, appear that the power to decide controverted elections does not vest in the Houses of Parliament in India by virtue of Art. 105(3).

(100) Article 324(1) provides that the superintendence, direction and control of all elections to Parliament shall be vested in a Commission (called the Election Commission). The power of the Commission also includes the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections. It will thus appear that the Commission itself cannot determine controverted elections and its power in regard to election tribunals does not extent beyond appointment of its members. It is the Representation of the People Act, 1951, that makes a provision for the constitution of Election Tribunals. This Act is passed by Parliament in exercise of its power under Art. 327 which is subject to the provisions of the Constitution. Due administration of the Act in the matter of controverted elections is, therefore, subject to the power of the High Court under Art. 226 limited, as it may be, to the extent provided by Art. 329. It would, in my opinion, not be correct to hold that Art. 327 is only subject to the preceding Arts. 325 and 326 and not to other provisions of the Constitution, for that would be reading in the words "Subject to the provisions of this Constitution" a limitation which is not explicit or implicit in the expression.

(101) In this connection it appears to me that an enquiry into the question whether an Election Tribunal is an inferior, or superior or independent, tribunal is not necessary. As already observed, the jurisdiction of the High Court under Art. 226 is not dependent on the inherent status of the tribunal but on its location within its territorial limits. I also think that Art. 226 does not make any distinction between a tribunal of exclusive or of limited jurisdiction. However, in this connection I do not think that the Election

Tribunal is to be deemed to be possessing limited jurisdiction because it is constituted for a limited purpose. Whether or not a Tribunal has a limited or exclusive jurisdiction does not depend upon the limit of the subject-matter allotted to it for adjudication but upon the extent of the jurisdiction conferred on it to decide it.

As was pointed out by their Lordships of the Supreme Court in — 'AIR 1952 SC 64 (A)', the Representation of the People Act, 1951,

> "is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder."

Section 105 of the Act provides that every order of the Tribunal shall be "final and conclusive". Section 107 takes away from the jurisdiction of Civil Courts any action taken or any decision given by the Returning Officer or by any other person appointed under the Act in connection with an election. It is difficult to conceive in these circumstances how the Tribunal can be deemed to be possessed of only limited jurisdiction in the matter of deciding controverted elections.

(102) Even in the case of inferior tribunals the rule to determine whether the jurisdiction conferred by a statute is limited or exclusive has been stated by Lord Esher M. R. in — 'Rex v. Income Tax Special Purposes Commissioner', (1888) 21 Q B D 313 at p. 319 (Z8) thus:

> "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction.
>
> But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none.
>
> In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Even if this test is applied, the Election Tribunal would be found to possess exclusive jurisdiction to decide election disputes. However, it appears to me that even if its jurisdiction be exclusive and may, therefore, be taken out of the purview of Civil Courts of the country, it cannot be so exclusive as to oust the jurisdiction of the High Court under Art. 226 except to the extent provided in Art. 329.

(103) Coming to the question of the superior or independent status of the Election Tribunal, it has to be kept in mind that the Tribunal is a creature of a statute enacted by Parliament in exercise of powers which are subject to the provisions of the Constitution. Such an enactment cannot override the constitutional power of the High Court under Art. 226 except in so far as it is hit by Art. 329. The cases cited in this connection at the Bar are easily distinguishable, and at any rate are not helpful in determining the scope of Art. 226.

(104) In — 'AIR 1945 PC 83 (L)', in which the observations in — '(1883) 11 Q B D 479 (K)' were approved by the Judicial Committee, their Lordships were dealing with the case of an election dispute which was decided under Ceylon (States Council Elections) Order in Council, 1931, by a Judge of the Supreme Court from whose decision there was no appeal. It was held that the cognisance of the election petitions under the Order in Council was an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently the Supreme Court could not grant 'certiorari' to bring up any order made in the exercise of that jurisdiction. The position of the High Court 'vis-a-vis' the Election Tribunal is not of such a character and if it cannot, to any extent, exercise jurisdiction over its order or proceeding, it would be by virtue of the limitation imposed by the Constitution itself under Art. 329 and not because of the status of the Tribunal.

(105) '1876-2 AC 102 (M)' was a case where formerly the decision of controverted elections was vested or was retained in its own hands by the Legislative Assembly of the Province, which was by an Act of the Quebec Legislature of 1872 transferred to judges. That Act was repealed by an Act of Parliament in 1875, which vested the decision in the Supreme Court. The Lord Chancellor delivering the judgment observed:

> "Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character.
>
> They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly and vesting in that Court, that very peculiar jurisdiction which, upto that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised

in a way that should as soon as possible become conclusive, and enable the Constitution of the Legislative Assembly to be distinctly and speedily known."

In India the decision of controverted elections never was vested in the Houses of Parliament and has also not been vested in them by the Constitution. Nor is the decision impugned given by a Tribunal of the status of a Supreme Court of a State. And this makes all the difference.

(106) 'Theberge v. Laudry (M)' (supra) was followed in — 'AIR 1930 PC 227 (N)' in which the question was whether the decision of the Court of Appeal in Malta in a case of election to the Senate was subject to an ordinary incident of an appeal to the Crown. The decision of the Privy Council solely turned on the question whether the Court of Appeal was, in an election case, an ordinary Court or a special tribunal, and their Lordships held that it was a special tribunal under the terms of Art. 33 of the Malta Constitution Letters Patent, 1921, without annexing to it the ordinary incident of an appeal to the Crown. The decision, therefore, turned on a point which does not arise in the instant case. Here there is no question of a right of an appeal as in the case of — 'Strickland v. Grima (N)' (supra) or of special leave to appeal as in — 'AIR 1949 PC 261 (O)'.

(107) Turning to — '1908 AC 443 (P)', the question was whether a petition lay to His Majesty for leave to appeal from a decision of a Native Appellate Court in New Zealand which under S. 93 of New Zealand Act 58 Vict. No. 43, declared that the decisions of the Native Appellate Court established thereby shall be "final and conclusive" but did not expressly exclude His Majesty's prerogative. Lord Robertson delivering the judgment observed:

"Turning to the present case, their Lordships have to deal with rights which are the ordinary legal rights of subjects of the King. The legal rights of this particular people in the matters of land, succession, and probate are subjected to the newly-created tribunal., But for the creation of this Court the Law Courts would have had to determine those rights as best they could, and an appeal would clearly have lain to His Majesty. The exclusion of the right to appeal to His Majesty would therefore be a forfeiture of existing rights on the part of Sovereign and subject."

This decision, therefore, turned upon the view that the exclusion, in the Act, of the right to appeal to His Majesty in a matter of legal right to land, succession and probate, from which an appeal would have ordinarily lain if the lis was tried by the Law Courts amounted to forfeiture of this right on the part of Sovereign and subject. Here there is no forfeiture of a right or power under Art. 226 except to the extent that it is circumscribed by Art. 329.

(108) The decision in — '(1859) 6 C B (NS) 333 (D)' which has been cited with approval in many cases and recently also by their Lordships of the Supreme Court in — 'N. P. Ponnuswami v. Returning Officer, Namakkal (A)' (supra) provides that where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the form of the remedy given by the statute must be adopted and adhered to. This principle has not been violated in the instant case as the petitioner had pursued the remedy provided in the Representation of the People Act, 1951. There is, however, another question to be answered viz., whether Art. 226 of the Constitution, which overrides the limitations imposed by any statute law, provides any further remedy to an aggrieved party. This question is not governed by the decision in — 'Wolverhampton New Water Works Co. v. Hawkesford (D)' (supra).

(109) The real question to determine in the instant case is the extent to which the power of the High Court under Art. 226, otherwise untrammelled, is abridged by Art. 329 (b). What Cl. (b) of Art. 329 excludes from the jurisdiction of the Courts, including the High Court, is the calling into question an election. What follows further in the Article only indicates the forum and the manner for the determination of controverted elections. The governing part of the Article, so far as the power of the High Court under Art. 226 is concerned, is, however, the exclusion from its jurisdiction of all matters which affect the result of an election. If, therefore, a petition under Art. 226 raises any matter of this nature, it would not be within the cognisance of the High Court.

(110) In the case of — 'N. P. Ponnuswami v. Returning Officer, Namakkal (A)' (supra) their Lordships of the Supreme Court were considering two questions, viz., —

(i) Whether rejection or acceptance of a nomination paper was included in the term "election" and

(ii) Whether the matter was justiciable under Art. 226 of the Constitution.

Their Lordships answered the first point in the affirmative. In this connection they observed that the term "election" is used in a wide sense and embraces the entire procedure to be gone through to return a candidate to the legislature, whether or not it be found necessary to take poll. On the second point they held that the law of elections in this country does not contemplate two attacks on matters connected with election proceedings, one while they are in progress and the other after they have been completed by an election petition. The same view was expressed by M. Smith J. in — 'Waygood v. James', (1870) 21 L T 202 at p. 204 (Z9) on a construction of the provisions of 31 & 32 Vict. c. 125, which were similar to those of the Representation of the People Act, 1951.

The question was thus disposed of by their Lordships of the Supreme Court on this short ground and the question "as to what the powers of the High Court under Arts. 226 and 227 of the Constitution may be was left to be decided "on a proper occasion". However, it was held by their Lordships that the question relating to a nomination paper, which is an electoral matter, was liable to be considered by an Election Tribunal under Art. 329 to the exclusion of all Courts including the High Court. It could not have been the intention of the Constitution to make the exclusion effective at one stage and not at another. In my opinion, the plain words of Art. 329 mean nothing else than that the exclusion of the jurisdiction of all Courts, including the High Court, in electoral matters is absolute and complete, and the provision of a machinery for determining them does not indicate that such matters become justiciable after the remedy provided in the Article is exhausted.

(111) In this connection, I would like to stress that the question of jurisdiction is one of substance as was held by the Judicial Committee in —'AIR 1943 PC 164 (V)' and cannot be made to depend upon changing circumstances. In determining jurisdiction, one is not to be guided merely by the words in which the relief is couched but has to penetrate the "cloud of words" — to borrow

with utmost respect the expression used by their Lordships of the Privy Council in — 'AIR 1947 PC 78 at p. 80 (I)' — and ascertain the substance of the action.

(112) In the instant case there can be no doubt that the relief of declaration that the first respondent's election is void and that the petitioner has been duly elected offends against Art. 329(b) and cannot be granted. The question is regarding the relief of writ of 'certiorari'. It was contended that even if the order of the Election Tribunal is vacated, it would not affect the result of election and, therefore, the action is not hit by Art. 329(b). However, it appears to me that wide as the import of the term "election" is as has been held in — 'N. P. Ponnuswami v. Returning Officer, Namakkal (A), (supra)', any interference which has the effect of reopening an enquiry into any electoral dispute would amount to calling into question the election within the meaning of Art. 329(b). In this view it is not necessary to consider the question whether the term "election" extends upto the conclusion of the proceedings before an Election Tribunal.

This question was answered in the affirmative in — 'AIR 1953 Nag 357 (H)', but it does not appear to be necessary to go as far as that for determining the present controversy. Even if it be held that the election ends within the meaning of Representation of the People Act, 1951, with the announcement of the result by the Returning Officer and that the process of the election petition only determines the controverted issues and does not extend the terminal point of the election, it appears to me that if the proceedings once concluded are reopened, it is tantamount to deciding, although indirectly, that the election was not proper. Article 329(b) obviously excludes such an interference by the High Court.

(113) However, giving the fullest amplitude to Art. 329(b) of the Constitution, there may still be cases where the power of the High Court under Art. 226 may not be excluded. Such may, for instance, be jurisdictional or procedural defections, by the Tribunal during the conduct of the proceedings, which may seriously prejudice the course of the trial. Or there may even be a case where the order of the Tribunal is so patently and manifestly subversive of its real intendment that to give effect to its own decision may not amount to interference with the election. Interference in such cases may not violate and may even subserve the purpose of Art. 329(b), and it is possibly such cases that their Lordships had in mind when they expressed themselves in favour of the power of the High Courts, even if limited, to interfere with the proceedings or orders of the Tribunal. See 'Jamnaprasad v. Lachhiram', AIR 1953 Madh B 197 (Z10); — 'Shankar Nanasaheb v. Returning Officer Kolaba (T), (cit. sup.)' and — 'Sivathanu v. Kumara', AIR 1953 Trav-C 274 (Z11). I would, however, leave the consideration of such cases for a suitable occasion.

(114) POINT (3) — The majority of the Tribunal have found that the impugned votes could not be validated by the Election Tribunal. They had power to decide this point, whether rightly or wrongly, and accordingly the majority decision thereon is not liable to challenge in these proceedings. What was contended by the learned counsel for the petitioner was that in so far as the case was one of invalid votes, the Tribunal ought to have rejected them under S. 101, Representation of the People Act, 1951, and not decided the matter with reference to S. 100(2)(v) 'ibid'. It was also contended that the Tribunal's interpretation of the expression "materially affected" in S. 100(2)(c) is manifestly erroneous. For these reasons it was urged that the action of Tribunal in applying S. 100(2)(c) of the Act to the instant case by wrongly interpreting its meaning and import, amounts to usurpation of jurisdiction which did not vest in it under the law.

(115) It appears to me clear that being empowered to decide the dispute, the Tribunal had jurisdiction to adjudicate by what provision of the Representation of the People Act, 1951, the matter in controversy was governed. Its decision on the point may be erroneous, but it would not amount to wrongful assumption or abdication of jurisdiction. Similarly, after deciding that the matter was governed by S. 100(2)(c), it had also jurisdiction to decide what the phrase "materially affected" implied. Its interpretation may again be wrong but as already stated, an erroneous decision with jurisdiction is not open to attack in proceedings under Art. 226 of the Constitution. There has also been no manifest injustice in the case in so far as it was nobody's case that the voters would have voted differently if correct ballot papers were issued. This matter has been dealt with at length by my Lord the Chief Justice in his order and I am in humble agreement with his observations on the point.

(116) POINT (4) — I respectfully agree with my brother Mudholkar J. that so far as the instant case is concerned, the Election Commission is not a necessary party. It had merely registered the decree of the Tribunal as a routine matter and is not obviously interested in the result of the election. Under S. 105, Representation of the People Act, 1951, finality is attached to the Tribunal's order. What S. 107 prescribes is only the date from which the said order becomes effective. No judicial sanctity is, therefore, attached to the publication of the order in the Gazette of India. It is apparent that once the order itself is vacated, the publication in the Gazette of India would be ineffective. As no interference with the publication would be necessary, the Election Commission, which can be trusted to do its duty if the Tribunal's order be quashed, is not a necessary party. For similar reasons the Government of India also is not a necessary party.

(117) However, it should not be understood that in no case would it be necessary to join the Election Commission. In a case where an election Commission proceeds to take steps to hold a fresh election, it may perhaps be necessary to implead the Commission in the proceedings in order to give relief to the petitioner. In such an event, it would be a question if the petition can be entertained, as an authority which is beyond the territorial limits of the High Court's jurisdiction would be involved. My opinion on the point is, therefore, confined to the facts of the instant case.

(118) I would, therefore, dismiss the petition but in the circumstances of the case without costs. The outstanding amount of the security be refunded to the petitioner.

A/D.H.Z. Petition dismissed.

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(FULL BENCH)

SINHA, C. J., R. KAUSHALENDRA RAO AND SEN JJ.

Bali Dhondu, Appellant v. Mst. Soni and others, Respondents.

Second Appeal No. 383 of 1947, D/- 7-1-1953, and 5-1-1954, decided by Full Bench from order of reference made by Mudholkar J., D/- 7-1-1953.

†Debt Laws — C. P. Debt Conciliation Act (2 of 1933), Ss. 12, 12A and 16 — Registered agreement to convey land in favour of mortgagee — Suit to enforce mortgage — Maintainability.

Under an agreement registered under S. 12 (2), C. P. Debt Conciliation Act the mortgagor undertook to convey to the mortgagee two fields in satisfaction of the debts due to the mortgagee and two other creditors of the mortgagor and the mortgagee undertook to pay the two creditors of the mortgagor. Subsequently, the mortgagee brought a suit to enforce the mortgage which was the subject of settlement before the Board even though the mortgagor was willing to act up to the agreement:

Held (i) that the contention that S. 12 contemplates a settlement by way of payment of money only and not by transfer of land could not be accepted. Dictum of Gruer J. in AIR 1939 Nag 224, Not approved. (Para 4)

(ii) that S. 12-A did not enable a mortgagee to fall back on the original cause of action viz., the mortgage and enforce it by a suit ignoring the registered agreement under S. 12 (2). S. A. No. 203 of 1943, D/- 5-1-1947 (Nag), Rel. on. (Paras 3, 4)

(iii) that the settlement was good and binding and the proper way to proceed was by way of execution of the agreement treating it as a decree. Case law referred. (Para 3)

(iv) that the law laid down in AIR 1939 Nag 227 was binding and the suit must fail by reason of the first and the third propositions in that case. (Para 5)

Per Sinha C. J.: The law laid down in AIR 1939 Nag 227 should be followed on the principle of 'stare decisis'. Moreover as the statute has spent itself not many cases will arise in future and, therefore, it is unnecessary to re-examine the legal position. (Paras 8, 9)

D. L. Jayawant and M. W. Puranik, for Appellant; A. L. Halve, for Respondent (No. 4).

CASES REFERRED: Paras

(A) ('39) 1939 Nag LJ 85 3, 10

(B) (V26) AIR 1939 Nag 227: ILR (1939) Nag 503 3, 4, 5, 8, 10

(C) (V27) AIR 1940 Nag 92: 1939 Nag LJ 500 3

(D) ('41) First Appeal No. 366 of 1948, D/- 4-12-1941 (Nag) 3

(E) ('47) Second Appeal No. 203 of 1943, D/- 5-1-1947 (Nag) 3, 4

(F) ('47) Second Appeal No. 126 of 1944, D/- 29-7-1947 (Nag) 3

(G) ('49) Second Appeal No. 712 of 1944, D/- 23-3-1949 (Nag) 3

(H) ('49) Second Appeal No. 63 of 1942, D/- 30-6-1949 (Nag) 3, 4

(I) (V33) AIR 1946 Nag 30: ILR (1945) Nag 975 3

(J) (V26) AIR 1939 Nag 224: ILR (1941) Nag 464 4

R. KAUSHALENDRA RAO J.:

This second appeal comes before the Full Bench on a reference made by Mudholkar J. The appeal is by the plaintiff. The plaintiff instituted the suit for enforcing a claim based upon a mortgage in his favour. The claim on the mortgage was the subject-matter of a settlement before the Debt Conciliation Board. The settlement was recorded as an agreement (Ex. D-3) and registered under S. 12(2) of the Debt Conciliation Act. Under the agreement the debts due by the mortgagor to the appellant as well as to two other creditors were scaled down. In satisfaction of the debts the mortgagor undertook to convey to the appellant two fields. The appellant in turn undertook to pay the two other creditors of the mortgagor.

The defence was that the suit was not maintainable because of S. 16(a)(iii) of the Debt Conciliation Act. The suit failed in both the Courts. According to the learned appeal Judge the mortgagor was all along willing to act up to the agreement. In fact he executed a deed of sale in favour of the appellant and was even willing to get it registered. The learned Judge found that it was the appellant who failed to abide by the agreement. The learned Judge agreed with the trial Judge that the suit was not maintainable on the mortgage because of the agreement under S. 12 which should have been executed as if it were a decree by the Civil Court.

(2) In appeal the learned counsel for the appellant however contends that the settlement of a debt under the Debt Conciliation Act could only be by payment of money and not by an agreement to convey land. Secondly it is contended that as one of the creditors agreed in consideration of conveyance of land to him by the debtor to pay two other creditors there was no direct settlement of debts which only was contemplated by the Act. Thirdly it is contended that because of S. 12A the mortgagee could fall back upon the mortgage and enforce his claim under it by a suit ignoring the agreement registered under S. 12(2).

(3) These contentions are concluded by a long line of rulings beginning from the decision of Gruer J. in — 'Seth Shankardas v. Seth Nandlal', 1939 Nag L J 85 (A) which was approved by Stone C. J. and Bose J. in — 'Shridhar v. Narayan', AIR 1939 Nag 227 (B). In — 'Shridhar's case (B)' also the settlement recorded and registered as an agreement under S. 12 took the form of land being conveyed to one of the creditors in satisfaction of debts due to those creditors as well as another. The Division Bench ruled that the settlement was good and the proper way to proceed was by way of execution of the agreement treating it as a decree.

There are many subsequent rulings to the same effect: by Stone C. J. and Bose J. in — 'Abdul Rashidkhan v. Singhai Bansilal', AIR 1940 Nag 92 (C) and — 'Lakhpat Singh v. Bhakatram', F. A. No. 336 of 1938, D/- 4-12-1941 (Nag) (D), by Grille C. J. and Padhye J. in — 'Lakshmikant v. Ramrao', S. A. No. 203 of 1943, D/- 5-1-1947 (Nag) (E), by Hidayatullah J. in — 'Messrs. U. D. Patel & Co. v. Mohanlal Madan Gopal', S. A. No. 126 of 1944, D/- 29-7-1947 (Nag) (F) and by Sen J. in — 'Atmaram v. Fakirya', S. A. No. 712 of 1944, D/- 23-3-1949 (Nag) (G) and — 'Waman v. Mst. Kesarbai', S. A. No. 63 of 1942, D/- 30-6-1949 (Nag) (H). In — 'Ratan Singh v. Raghuraj Singh', AIR 1946 Nag 30 at pp. 33 & 34 (I), the question before the Court was about the court-fee payable in a suit brought to have the agreement operating as a decree under S. 12(2) made unenforceable. Niyogi and Sen JJ. proceeded to decide the question on the law as stated in the first and the third propositions in — 'Shridhar's case (B)'.

(4) The precedent which is usually referred to as casting a doubt on the first proposition in — 'Shridhar's case (B)' is the decision of Gruer J. in — 'Syed Ahmad v. Ram Gopal', AIR 1939 Nag 224 (J), which was really given prior to the decision in — 'Shridhar's case (B)'. In — 'Syed Ahmed's case (J)', the Court was not concerned with an agreement under S. 12 of the Act. The dictum of Gruer J. that S. 12 contemplates a settlement by way of payment of money and not by transfer of lands did not prevail in — 'Lakshmi Kant v. Ramrao (E)' (supra) & was considered as unsound in — 'Waman v. Mst. Kesarbai (H)' (supra). That S. 12A does not enable a mortgagee

to fall back on the original cause of action and maintain a suit in respect of the mortgage debt if settled by an agreement under S. 12 is the express decision of the Division Bench in — 'Lakshmi Kant v. Ramrao (E)' (supra).

(5) The appellant is unable to show why the view so far prevailing in the Court about the effect of an agreement under S. 12 should be departed from. Nor is there anything in the order of reference to persuade the Full Bench to reconsider the accepted view. The order, if I may say with due respect, does not disclose which of the decisions of the Division Bench require reconsideration and why. That being so, the law laid down in — 'Shridhar's case (B)' is binding on the Court. The suit must fail by reason of the first and the third propositions in that case.

(6) If the true position is that the suit was not maintainable because the agreement itself should have been enforced by way of execution, the appellant does not dispute that there was no default on the part of the mortgagor. The appellant accordingly does not press ground no. 6 for treating the suit as an application for the execution of the agreement as if it were a decree. The decision of the Court below is correct and is affirmed. The appeal is dismissed with costs.

(7) SEN J.: I agree.

SINHA C. J.:

(8) I agree that this appeal should be dismissed with costs, principally for two reasons. Firstly, the decision of the Division Bench in — 'AIR 1939 Nag 227 (B)' was given after a full consideration of the difficulties in giving effect to a literal construction of the different provisions of the statute, viz., the Central Provinces Debt Conciliation Act (II of 1933). That decision has held the field now for over 14 years. Many transactions must have been entered into on the basis of that decision, and if that decision were to be overruled, a large number of transactions entered into on the basis of that decision may be upset. One of the essentials of law is that it should be as certain as human ingenuity can make it. As pointed out by my learned brother, Rao J., that decision has not only stood the test of time but has been followed in a large number of reported and unreported decisions of this Court. Hence, on the principle of 'stare decisis' nothing should be done to unsettle this branch of the law which has stood settled during all the period that this Court has been in existence.

(9) Secondly, the Central Provinces Debt Conciliation Act (II of 1933) itself is no more operative, though there may still be cases involving the consideration of the provisions of that statute. As the statute has spent itself and therefore not many cases will arise in future, it is not necessary to re-examine the legal position.

(10) On these two grounds mainly I would uphold the line of decisions beginning from — '1939 Nag L J 85 (A)' which was approved in — 'AIR 1939 Nag 227 (B)'. I may add that the learned counsel for the appellant was unable to convince us that that line of decisions is erroneous.

A/K.S.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 191 (Vol. 41, C.N. 60)

SINHA C. J. AND BHUTT J.

Maroti Raibhan Patel, Applicant v. Board of Revenue Madhya Pradesh, Nagpur and others, Non-Applicants.

Misc. Petn. No. 128 of 1953, D/-20-8-1953.

(a) Interpretation of Statutes — Retrospective operation — (Civil P. C. (1908), Pre).

Where a substantive right like a right of appeal is involved, the law as it was on the date of commencement of the 'lis' must be applied till the end of that litigation but where an order passed by a member of the Board of Revenue declaring a certain person entitled to the 'patelki' rights is sought to be reviewed it is a matter of procedure and as such the amended rule must have retrospective operation, so that the review petition which was pending in October 1951 would be governed by the rule which came into operation as a result of the latest amendment in October 1951 and not the old rule which was in operation in 1949 or 1950. (Para 4)

Anno: C. P. C., Pre. N. 3.

(b) C. P. and Berar Board of Revenue Act (12 of 1949), S. 9 — Review on ground of error of law.

Section 9 as it stands does not put any limitation on the power of review; nor does it restrict the grounds upon which review may be granted. It cannot therefore be held that review should be granted on grounds analogous to those contained in R. 1 of O. 47, Civil P. C. and that in so far as a member of the Board of Revenue has purported to review the previous order of the board on the ground of a mere error of law it is not valid. (Para 5)

(c) Judicial Precedents — Board of Revenue — (Civil P. C. (1908), Pre) — (Constitution of India, Art. 226).

The High Court cannot take upon itself the burden of directing the Board of Revenue as to what rulings they are bound to follow and what they are not. It is for them to decide for themselves as to what shall be the 'cursus curiae' of that tribunal. Where the board of Revenue has not followed its previous ruling it cannot be said that order impugned had gone beyond the powers conferred on the member, Board of Revenue. (Para 5)

Anno: C. P. C., Pre. N. 15.

Y. V. Jakatdar, for Applicant; N. L. Abhyankar, D. V. Shidore, (for No. 2); T. B. Pendharkar, (for No. 4) and T. P. Naik Additional Govt. Pleader, (for Nos. 1 to 5), for Non-Applicants.

ORDER: This application under Art. 226 of the Constitution impugns the order dated 10-4-1953 passed by Shri S. Rajan, Member, Board of Revenue, Madhya Pradesh, reviewing that of his predecessor, Mr. Dastur, passed on 14-3-1951, whereby the order passed by Shri Dastur on that date was set aside and the order passed by the Deputy Commissioner on 7-10-1949 was restored.

(2) It appears that the petitioner had been declared entitled to the 'patelki' rights which go by rotation. But as a result of the review granted by Shri Rajan, the order under challenge, non-applicant No. 2 was put in charge of that office and non-applicants 3 and 4 were brought into the scheme of rotation.

(3) On behalf of the petitioner two grounds have been urged in support of their claim for issue of a writ, viz., (1) that Shri Rajan was not competent to review the order passed by his predecessor and (2) that the grounds on which the order was reviewed were merely questions of law and that review could have been granted only on grounds analogous to those contained in O. 47, Civil P. C.

(4) In support of the first ground it has been urged that the rule which should govern the present case was a rule which was in operation either in 1949 or in 1950, which required that a review could be granted either by a Bench of members of the Board of Revenue or by a single member

of the Board of Revenue if so authorized by the President, Board of Revenue. It is conceded that if the rule which was brought into existence by the amendment in October 1951 applied to the instant case Shri Rajan would be entitled to review the order as he did. It is contended that as the litigation began earlier than the amendment in question the old rule should be applied and not the amended rule.

It is true that where a substantive right like a right of appeal is involved the law as it was on the date of commencement of the 'lis' must be applied till the end of that litigation; but, this was a matter of procedure and as such the amended rule must have retrospective operation, so that the review petition which was pending in October 1951 would be governed by the rule which came into operation as a result of the latest amendment. In our opinion, therefore, there is no substance in the contention that the old rule should apply and not the amended rule.

(5) The second ground of attack has reference to S. 9 of the Central Provinces and Berar Board of Revenue Act (No. 12 of 1949). Section 9 is in these terms:

"The Board may, either on its own motion or on the application of any party interested, review any order passed by itself and pass such order in reference thereto as it thinks fit:

Provided that —

(i) no order shall be varied or reversed unless notice has been given to the parties interested to appear and be heard in support of such order;

(ii) no order affecting any question of right between private persons shall be reviewed except on the application of a party to the proceedings."

The section as it stands does not put any limitations on the power of review; nor does it restrict the grounds upon which review may be granted. It is therefore conceded that if the section as it stands were to be applied the order impugned in this case would be perfectly valid; but what is contended is that Rulings Nos. 37 and 63 of the Board of Revenue under the Berar Patels and Patwaris Law have laid it down that review should be granted on grounds analogous to those contained in R. 1 of O. 47, Civil P. C. Hence, it is contended that in so far as Shri Rajan has purported to review the previous order of the Board on the ground of a mere error of law it is not valid.

But, in our opinion this Court cannot take upon itself the burden of directing the Board of revenue as to what rulings they are bound to follow and what they are not. It is for them to decide for themselves as to what shall be the 'cursus curiae' of that tribunal. If the order impugned in this case had gone beyond the powers conferred on the Member, Board of Revenue, this Court may have thought fit to interfere; but as it is a domestic matter for that tribunal itself this Court will not take upon itself to lay down rules for the Board to follow.

(6) For the reasons aforesaid it has not been made out to our satisfaction that the case calls for interference, either on the ground that the order passed was beyond the jurisdiction of the Board of Revenue or on the ground that any jurisdiction vested in that Court had not been exercised. The application must therefore stand dismissed with costs to Non-Applicant 2, the successful party; but as no certificate has been filed there will be no hearing fee. The petitioner shall be entitled to a refund of the outstanding amount of his security deposit after paying the costs of the successful party (Non-applicant 2).

A/D.H.Z. Application dismissed.

A.I.R. 1954 NAGPUR 192 (Vol. 41, C.N. 61)

SINHA C. J.

Vithal Diwakar, Applicant v. N. Parshuram Iyer, Non-Applicant.

Civil Revn. No. 841 of 1951, D/- 11-11-1952, against order of 3rd Civil J. Class 2nd, Nagpur, D/- 26-9-1951.

(a) Civil P. C. (1908), Ss. 115, 35-A — Revision in cases of discretionary orders.

Where the trial Court had not refused to go into the matter of awarding costs, on the other hand, it had recorded such evidence as was forthcoming and had come to the conclusion, rightly or wrongly, that it was not a fit case in which compensatory costs should be awarded:

Held, that such a decision did not attract the revisional jurisdiction of the High Court. 18 Nag LJ 309, Disting. (Para 3)

Anno: C. P. C., S. 115, N. 20; S. 35-A, N. 4.

Applicant in person; G. C. Banerjee, for Non-applicant.

CASE REFERRED:

(A) ('35) 18 Nag LJ 309 (Pr 3)

ORDER: This application in revision is directed against the order dated 26-9-1951 passed by the Civil Judge Class II of Nagpur refusing to grant compensatory costs under Section 35-A, Civil P. C. to the petitioner, who is a receiver appointed in the action. The Court below has said in its order that after hearing the evidence of the petitioner it did not find sufficient reasons for awarding compensatory costs.

(2) It is well established that the matter of costs, even compensatory costs, is in the discretion of the Court, and the legislature has not provided for any right of appeal against an order refusing to grant compensatory costs. Hence the matter comes before this Court in its revisional jurisdiction.

(3) The utmost that has been said in this case is that the Court below has erred in law or on facts in refusing to grant compensatory costs. But that does not attract the revisional jurisdiction of this Court. The only case cited before me where the High Court or a Court equivalent to the High Court has interfered in revision is the one decided by the Additional Judicial Commissioner of the then Judicial Commissioner's Court reported in — 'Dhanooji v. Adkooji', 18 Nag LJ 309 (A). That was a case where the Court had failed to exercise its jurisdiction by refusing to give an opportunity to the party to show that he was entitled to compensatory costs. Hence this Court directed the Court below to enquire into the matter and decide judicially. In this case the position is entirely different. The Court has not refused to go into the matter. It has recorded such evidence as was forthcoming and has come to the conclusion, rightly or wrongly, that it was not a fit case in which compensatory costs should be awarded. Such a decision, in my opinion, does not attract the revisional jurisdiction of this Court.

(4) The application is therefore dismissed, but in the circumstances without costs.

B/H.G.P. Application dismissed.

A.I.R. 1954 NAGPUR 193 (Vol. 41, C.N. 62)

SINHA C. J. AND HIDAYATULLAH J.

Shrinarayan Rambilas and others, Plaintiffs-Appellants v. Bhaskar Waman and others, Defendants-Respondents.

First Appeal No. 10 of 1945, D/- 14-2-1952, from decree of 2nd Addl. Dist. J., Amravati, D/- 25-9-1944.

(a) T. P. Act (1882), S. 58 — Distinction between sale and mortgage.

In considering whether a transaction is a sale or mortgage though the matter is one of the intention of the parties, the intention is to be gathered only from the document, though the surrounding circumstances may be looked into to see in what way the language of the document is related to existing facts. 22 All 149 (PC), Foll. (Para 15)

When the question is whether a transaction is a sale or a mortgage, it is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory the Court cannot safely depart from the written evidence of the documents. AIR 1946 PC 178 (179), Foll. (Para 15)

Anno: T. P. Act, S. 58 N. 33.

(b) T. P. Act (1882), S. 58 — Sale or mortgage.

There is no presumption attaching to an ostensible sale-deed but the onus is on the party alleging that an ostensible sale is in fact a mortgage. AIR 1950 Nag 198, Rel. on. (Para 17)

Anno: T. P. Act, S. 58 N. 33.

(c) T. P. Act (1882), S. 58 — Mortgage by conditional sale.

From the proviso to S. 58 (c), it can be inferred that if the condition of reconveyance is not embodied in the document itself, the document cannot be construed as a mortgage. But even if the condition is so incorporated, it is not always conclusive. The intention of the parties must be found out from the terms of the document and the surrounding circumstances are examined if there is any necessity to interpret the meaning of the words used in relation to existing facts. The cardinal test which is to be applied in all such cases is whether the relation of a debtor and creditor is preserved between the vendor and the vendee. If that relationship is found, then the transaction ordinarily amounts to a mortgage, unless there be something to the contrary. (Para 18)

Anno: T. P. Act, S. 58 N. 31.

(d) Evidence Act (1872), S. 92 — Scope.

It is open to a party to prove that a particular transaction was not consented to by him. Section 92 excludes oral evidence to vary the terms of the written contract, but has no reference to the question whether the parties agreed to contract on the terms set forth in the document. AIR 1936 PC 70, Foll. (Para 28)

Anno: Evidence Act, S. 92 N. 1.

(e) T. P. Act (1882), S. 58 (c) — Sale or mortgage — Tests of distinction.

The surrounding circumstances that tend to show that a transaction is a mortgage and not a sale, though in form a sale, are:

(i) whether the vendee has reserved to himself the right to recall the money at a future date thus indicating that the relationship of debtor and creditor is preserved between the vendor and the vendee: AIR 1924 PC 226, Foll. (Para 20)

(ii) whether there was any bargaining between the parties to settle an adequate price and whether the price actually paid is adequate in all the circumstances of the case — a price below the true value of the property indicates a mortgage: AIR 1941 Oudh 582, Rel. on. (Para 27)

(iii) whether there was any agreement to pay interest. (Para 35)

(iv) whether the handing over possession of the property indicates sale; and (Para 36)

(v) whether the fixation of a short period of time for repurchase and making time of the essence of the transaction. (Para 37)

Note: Applying all these tests taken together, particularly the test about the debtor and creditor, it was held in this case that the document was a mortgage and not a sale with condition of repurchase. (Para 38)

Anno: T. P. Act, S. 58 N. 33.

(f) T. P. Act (1882), S. 84 — Tender and notice.

Interest does not cease on the giving of merely a notice unaccompanied by any actual tender of mortgage amount. AIR 1923 PC 26, Rel. on. (Para 40)

Anno: T. P. Act, S. 84 N. 8, 14.

M. R. Bobde and R. G. Siras, for Appellants; W. G. Deo, for Appellants Nos. 2 and 6; A. V. Khare, G. T. Bhide, E. M. Joshi and P. R. Padhye, for Respondents Nos. 1 and 3.

CASES REFERRED:	Paras
(A) (1858) 2 Deg & J 97: 44 ER 924	13, 22
(B) ('90) 12 All 387: 17 Ind App 98 (PC)	13
(C) (1900) 22 All 149: 27 Ind App 58 (PC)	14
(D) (V33) AIR 1946 PC 178: ILR (1947) Kar PC 20	15
(E) (V37) AIR 1950 Nag 198: ILR (1950) Nag 719	17
(F) (V11) AIR 1924 PC 226: 47 Mad 729 (PC)	19, 35
(G) (1813) 2 Bal & B 274	22
(H) (1862) 8 Jur (NS) 1163: 131 RR 810	22
(I) (1860) 13 Moo PC 432: 132 RR 129	22
(J) (V28) AIR 1941 Oudh 582: 17 Luck 198	23
(K) (V16) AIR 1929 PC 34: 53 Bom 230 (PC)	25
(L) ('13) 35 All 48: 40 Ind App 31 (PC)	26
(M) (V23) AIR 1936 PC 70: 59 Mad 446 (PC)	28
(N) ('08) 10 Bom LR 701	32
(O) (V10) AIR 1923 Mad 31: 70 Ind Cas 82	34
(P) (V10) AIR 1923 PC 26: 46 Mad 108 (PC)	40

JUDGMENT: This is an appeal by the plaintiffs whose suit for redemption of an alleged mortgage by conditional sale dated 10-9-1931 has been dismissed by the Court of first instance. The first plaintiff is the father of the other five plaintiffs. The transaction which resulted in the so-called mortgage-bond was entered into by the first three plaintiffs who were the adult members of the joint family then. The alleged mortgage-bond is in favour of Shri Bhaskar Waman Joshi, Advocate, and his brother (since deceased) Dr. Trimbak Waman Joshi. Dr. Joshi is represented in this appeal by his son Pandurang Trimbak Joshi. The fourth defendant in the case was one Surajmal Maheshwari, who was the purchaser of one of the properties from the mortgagees. Surajmal also died, and his son Rambilas represents him. The second defendant in the suit was the wife of Dr. Joshi, but her name was struck off from the array of respondents in this Court on 25-10-1950.

of the Board of Revenue if so authorized by the President, Board of Revenue. It is conceded that if the rule which was brought into existence by the amendment in October 1951 applied to the instant case Shri Rajan would be entitled to review the order as he did. It is contended that as the litigation began earlier than the amendment in question the old rule should be applied and not the amended rule.

It is true that where a substantive right like a right of appeal is involved the law as it was on the date of commencement of the 'lis' must be applied till the end of that litigation; but, this was a matter of procedure and as such the amended rule must have retrospective operation, so that the review petition which was pending in October 1951 would be governed by the rule which came into operation as a result of the latest amendment. In our opinion, therefore, there is no substance in the contention that the old rule should apply and not the amended rule.

(5) The second ground of attack has reference to S. 9 of the Central Provinces and Berar Board of Revenue Act (No. 12 of 1949). Section 9 is in these terms:

"The Board may, either on its own motion or on the application of any party interested, review any order passed by itself and pass such order in reference thereto as it thinks fit:

Provided that —

(i) no order shall be varied or reversed unless notice has been given to the parties interested to appear and be heard in support of such order;

(ii) no order affecting any question of right between private persons shall be reviewed except on the application of a party to the proceedings."

The section as it stands does not put any limitations on the power of review; nor does it restrict the grounds upon which review may be granted. It is therefore conceded that if the section as it stands were to be applied the order impugned in this case would be perfectly valid; but what is contended is that Rulings Nos. 37 and 63 of the Board of Revenue under the Berar Patels and Patwaris Law have laid it down that review should be granted on grounds analogous to those contained in R. 1 of O. 47, Civil P. C. Hence, it is contended that in so far as Shri Rajan has purported to review the previous order of the Board on the ground of a mere error of law it is not valid.

But, in our opinion this Court cannot take upon itself the burden of directing the Board of revenue as to what rulings they are bound to follow and what they are not. It is for them to decide for themselves as to what shall be the 'cursus curiae' of that tribunal. If the order impugned in this case had gone beyond the powers conferred on the Member, Board of Revenue, this Court may have thought fit to interfere; but as it is a domestic matter for that tribunal itself this Court will not take upon itself to lay down rules for the Board to follow.

(6) For the reasons aforesaid it has not been made out to our satisfaction that the case calls for interference, either on the ground that the order passed was beyond the jurisdiction of the Board of Revenue or on the ground that any jurisdiction vested in that Court had not been exercised. The application must therefore stand dismissed with costs to Non-Applicant 2, the successful party; but as no certificate has been filed there will be no hearing fee. The petitioner shall be entitled to a refund of the outstanding amount of his security deposit after paying the costs of the successful party (Non-applicant 2).

A/D.H.Z. Application dismissed.

A.I.R. 1954 NAGPUR 192 (Vol. 41, C.N. 61)

SINHA C. J.

Vithal Diwakar, Applicant v. N. Parshuram Iyer, Non-Applicant.

Civil Revn. No. 841 of 1951, D/- 11-11-1952, against order of 3rd Civil J. Class 2nd, Nagpur, D/- 26-9-1951.

(a) Civil P. C. (1908), Ss. 115, 35-A — Revision in cases of discretionary orders.

Where the trial Court had not refused to go into the matter of awarding costs, on the other hand, it had recorded such evidence as was forthcoming and had come to the conclusion, rightly or wrongly, that it was not a fit case in which compensatory costs should be awarded:

Held, that such a decision did not attract the revisional jurisdiction of the High Court. 18 Nag LJ 309, Disting. (Para 3)

Anno: C. P. C., S. 115, N. 20; S. 35-A, N. 4.

Applicant in person; G. C. Banerjee, for Non-applicant.

CASE REFERRED:

(A) ('35) 18 Nag LJ 309 (Pr 3)

ORDER: This application in revision is directed against the order dated 26-9-1951 passed by the Civil Judge Class II of Nagpur refusing to grant compensatory costs under Section 35-A, Civil P. C. to the petitioner, who is a receiver appointed in the action. The Court below has said in its order that after hearing the evidence of the petitioner it did not find sufficient reasons for awarding compensatory costs.

(2) It is well established that the matter of costs, even compensatory costs, is in the discretion of the Court, and the legislature has not provided for any right of appeal against an order refusing to grant compensatory costs. Hence the matter comes before this Court in its revisional jurisdiction.

(3) The utmost that has been said in this case is that the Court below has erred in law or on facts in refusing to grant compensatory costs. But that does not attract the revisional jurisdiction of this Court. The only case cited before me where the High Court or a Court equivalent to the High Court has interfered in revision is the one decided by the Additional Judicial Commissioner of the then Judicial Commissioner's Court reported in — 'Dhanooji v. Adkooji', 18 Nag LJ 309 (A). That was a case where the Court had failed to exercise its jurisdiction by refusing to give an opportunity to the party to show that he was entitled to compensatory costs. Hence this Court directed the Court below to enquire into the matter and decide judicially. In this case the position is entirely different. The Court has not refused to go into the matter. It has recorded such evidence as was forthcoming and has come to the conclusion, rightly or wrongly, that it was not a fit case in which compensatory costs should be awarded. Such a decision, in my opinion, does not attract the revisional jurisdiction of this Court.

(4) The application is therefore dismissed, but in the circumstances without costs.

B/H.G.P. Application dismissed.

A.I.R. 1954 NAGPUR 193 (Vol. 41, C.N. 62)

SINHA C. J. AND HIDAYATULLAH J.

Shrinarayan Rambilas and others, Plaintiffs-Appellants v. Bhaskar Waman and others, Defendants-Respondents.

First Appeal No. 10 of 1945, D/- 14-2-1952, from decree of 2nd Addl. Dist. J., Amravati, D/- 25-9-1944.

(a) T. P. Act (1882), S. 58 — Distinction between sale and mortgage.

In considering whether a transaction is a sale or mortgage though the matter is one of the intention of the parties, the intention is to be gathered only from the document, though the surrounding circumstances may be looked into to see in what way the language of the document is related to existing facts. 22 All 149 (PC), Foll. (Para 15)

When the question is whether a transaction is a sale or a mortgage, it is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory the Court cannot safely depart from the written evidence of the documents. AIR 1946 PC 178 (179), Foll. (Para 15)

Anno: T. P. Act, S. 58 N. 33.

(b) T. P. Act (1882), S. 58 — Sale or mortgage.

There is no presumption attaching to an ostensible sale-deed but the onus is on the party alleging that an ostensible sale is in fact a mortgage. AIR 1950 Nag 198, Rel. on. (Para 17)

Anno: T. P. Act, S. 58 N. 33.

(c) T. P. Act (1882), S. 58 — Mortgage by conditional sale.

From the proviso to S. 58 (c), it can be inferred that if the condition of reconveyance is not embodied in the document itself, the document cannot be construed as a mortgage. But even if the condition is so incorporated, it is not always conclusive. The intention of the parties must be found out from the terms of the document and the surrounding circumstances are examined if there is any necessity to interpret the meaning of the words used in relation to existing facts. The cardinal test which is to be applied in all such cases is whether the relation of a debtor and creditor is preserved between the vendor and the vendee. If that relationship is found, then the transaction ordinarily amounts to a mortgage, unless there be something to the contrary. (Para 18)

Anno: T. P. Act, S. 58 N. 31.

(d) Evidence Act (1872), S. 92 — Scope.

It is open to a party to prove that a particular transaction was not consented to by him. Section 92 excludes oral evidence to vary the terms of the written contract, but has no reference to the question whether the parties agreed to contract on the terms set forth in the document. AIR 1936 PC 70, Foll. (Para 28)

Anno: Evidence Act, S. 92 N. 1.

(e) T. P. Act (1882), S. 58 (c) — Sale or mortgage — Tests of distinction.

The surrounding circumstances that tend to show that a transaction is a mortgage and not a sale, though in form a sale, are:

(i) whether the vendee has reserved to himself the right to recall the money at a future date thus indicating that the relationship of debtor and creditor is preserved between the vendor and the vendee: AIR 1924 PC 226, Foll. (Para 20)

(ii) whether there was any bargaining between the parties to settle an adequate price and whether the price actually paid is adequate in all the circumstances of the case — a price below the true value of the property indicates a mortgage: AIR 1941 Oudh 582, Rel. on. (Para 27)

(iii) whether there was any agreement to pay interest. (Para 35)

(iv) whether the handing over possession of the property indicates sale; and (Para 36)

(v) whether the fixation of a short period of time for repurchase and making time of the essence of the transaction. (Para 37)

Note: Applying all these tests taken together, particularly the test about the debtor and creditor, it was held in this case that the document was a mortgage and not a sale with condition of repurchase. (Para 38)

Anno: T. P. Act, S. 58 N. 33.

(f) T. P. Act (1882), S. 84 — Tender and notice.

Interest does not cease on the giving of merely a notice unaccompanied by any actual tender of mortgage amount. AIR 1923 PC 26, Rel. on. (Para 40)

Anno: T. P. Act, S. 84 N. 8, 14.

M. R. Bobde and R. G. Siras, for Appellants; W. G. Deo, for Appellants Nos. 2 and 6; A. V. Khare, G. T. Bhide, E. M. Joshi and P. R. Padhye, for Respondents Nos. 1 and 3.

CASES REFERRED:	Paras
(A) (1858) 2 Deg & J 97: 44 ER 924	13, 22
(B) ('90) 12 All 387: 17 Ind App 98 (PC)	13
(C) (1900) 22 All 149: 27 Ind App 58 (PC)	14
(D) (V33) AIR 1946 PC 178: ILR (1947) Kar PC 20	15
(E) (V37) AIR 1950 Nag 198: ILR (1950) Nag 719	17
(F) (V11) AIR 1924 PC 226: 47 Mad 729 (PC)	19, 35
(G) (1813) 2 Bal & B 274	22
(H) (1862) 8 Jur (NS) 1163: 131 RR 810	22
(I) (1860) 13 Moo PC 432: 132 RR 129	22
(J) (V28) AIR 1941 Oudh 582: 17 Luck 198	23
(K) (V16) AIR 1929 PC 34: 53 Bom 230 (PC)	25
(L) ('13) 35 All 48: 40 Ind App 31 (PC)	26
(M) (V23) AIR 1936 PC 70: 59 Mad 446 (PC)	28
(N) ('08) 10 Bom LR 701	32
(O) (V10) AIR 1923 Mad 31: 70 Ind Cas 82	34
(P) (V10) AIR 1923 PC 26: 46 Mad 108 (PC)	40

JUDGMENT: This is an appeal by the plaintiffs whose suit for redemption of an alleged mortgage by conditional sale dated 10-9-1931 has been dismissed by the Court of first instance. The first plaintiff is the father of the other five plaintiffs. The transaction which resulted in the so-called mortgage-bond was entered into by the first three plaintiffs who were the adult members of the joint family then. The alleged mortgage-bond is in favour of Shri Bhaskar Waman Joshi, Advocate, and his brother (since deceased) Dr. Trimbak Waman Joshi. Dr. Joshi is represented in this appeal by his son Pandurang Trimbak Joshi. The fourth defendant in the case was one Surajmal Maheshwari, who was the purchaser of one of the properties from the mortgagees. Surajmal also died, and his son Rambilas represents him. The second defendant in the suit was the wife of Dr. Joshi, but her name was struck off from the array of respondents in this Court on 25-10-1950.

(2) The case of the plaintiffs was that on 10-9-1931 the first three plaintiffs, who were the adult members of the family of Shrinarayan (the first plaintiff) mortgaged three properties in favour of Shri Bhaskar Waman Joshi and his brother Dr. Trimbak Joshi for a sum of Rs. 39,500/-. The consideration of the mortgage was distributed over the three properties as follows:

(i)	One house in Amba Gate	.. Rs. 11,500/
(ii)	One chawl	.. Rs. 26,000/-
(iii)	One house in Dhanraj Lane	.. Rs. 2,000/-
	Total	.. Rs. 39,500/-

Possession of these properties was handed over to the mortgagees the same day. According to the plaintiffs, the value of the property was Rs. 75,000/- and the properties were to be redeemed at the end of five years.

(3) Since the mortgagees insisted on a yield of 9 per cent. per annum on their outlay, a separate document (Ex. D-3) was executed on the same day by which the mortgagors guaranteed interest to the mortgagees at 9 per cent. per annum if the rents and profits did not make up this sum.

(4) In their claim the plaintiffs stated that the mortgagees had constructed several other structures without their permission and they were liable to be treated as part of the mortgaged property. They stated, however, that if they were required to compensate the mortgagees for their expenditure on these new structures, the mortgagors in their turn should also be compensated for those structures which the mortgagees had demolished to enable them to construct the new ones in their place. A list of such structures demolished by the mortgagees was given in the plaint. The plaintiffs claimed to redeem the three houses either separately or together. The plaintiffs further alleged that on 26-8-1943 they sent a notice to the mortgagees (Ex. P-7) by which they offered to redeem the properties but the mortgagees declined their offer, characterising their notice as absurd. They therefore claimed that interest, if awarded, should cease from the date of the receipt of their notice because it amounted to the tender of the mortgage-money and its refusal by the mortgagees. The plaintiffs asked for accounts of the income of the property in the hands of the mortgagees and offered to redeem all the properties or individually for sums found due against each item.

(5) The first three defendants filed a written statement. They denied that there was any relationship of debtor and creditor between the plaintiffs and defendants. They averred that the document evidences three separate transactions of sale for which full price was paid by the so-called mortgagees. They contended that since the vendees wanted to improve the premises and the properties immediately to increase their yield but the vendors wanted to have an option of repurchase, an arrangement was reached by which, though the option of repurchase was given to the vendors, by a separate document the vendees were assured an income of 9 per cent. per annum on their money in case the vendors exercised that option at the end of five years. According to the answering defendants, the document evidenced no more than sale with a clear option to repurchase, exercisable only within five years. According to the answering defendants, time was of the essence of the contract and the condition of repurchase was to be strictly enforced. Since that option was never exercised, the plaintiffs cannot now claim to redeem the property in the suit.

(6) The answering defendants further contended that by their own conduct the plaintiffs had estopped themselves from redeeming the alleged mortgage. According to them, the plaintiffs in the mutation cases of 1940 and further by their conduct in standing by whilst the defendants were spending large sums of money in adding to the structures, had completely barred themselves from denying that the transaction was a sale. They further stated that in 1936 the first plaintiff had assured Dr. Joshi that the option of repurchase was not to be exercised and was cancelled.

(7) The answering defendants denied that any damages were required to be paid on the ground that the old structures were pulled down by them and new ones constructed in their place. Their case was that the old structures were useless and the material derived from those structures was put back into the buildings. They contended that they had spent over Rs. 6.000/- in adding to the property and they held the plaintiffs responsible for this amount in case the Court held that the transaction was one of mortgage and not of sale. The defendants also gave schedules of income derived from the various properties.

(8) The fourth defendant stated that he had purchased from the answering defendants the third property mentioned above. He stated that he had purchased that property from the ostensible owners, for value and in good faith, without notice of the claims of the plaintiffs. He stated, therefore, that he was protected and the plaintiffs could not redeem the property in his possession, though he stated that in case the property was also to be redeemed, he should be paid back the consideration plus whatever he spent on repairs. It may be stated here that the claim against the fourth defendant is no longer pressed by the plaintiffs after they lost their suit in the Court below, and we need not therefore advert to this part of the case.

(9) The trial Court found the transaction to be an out-and-out sale with merely an option of repurchase. Both sides had pleaded the surrounding circumstances and also had led voluminous evidence, both oral and documentary, to show the exact nature of the transaction. The trial Court considered all this evidence and found that the relationship of creditor and debtor did not exist between the parties. It found also that the time fixed for repayment was short and thus denoted a sale rather than a mortgage, that no interest was fixed by the so-called sale-deed and since Ex. D-3, the agreement about interest, was executed before the sale-deed, it could not control the latter. It gave findings on the adequacy of the price, which it held was proved, and it inferred from the immediate delivery of possession that the transaction was in fact a sale. With regard to the option of repurchase, the trial Court held that time was of the essence of the transaction and the option ought to be strictly construed. Since the plaintiffs had not claimed their repurchase within the time allowed to them by the document, they could no longer exercise the option after the expiry of 5 years.

(10) The main point in this case is whether the transaction which is evidenced by Ex. D-1, dated 10-9-1931, though ostensibly a sale, was in point of fact a mortgage. Both sides relied upon the surrounding circumstances and led evidence to prove them and issues thus arising were tried by the Court below. All those issues need not be considered in this appeal, but only those which relate to the inference whether the transaction evidences a mortgage or a sale. The additional

points which thus arise in this appeal are as follows:

(i) Whether the plaintiffs are entitled to redeem the properties (i) and (ii)?

(ii) Is Ex. D-3 admissible in evidence, and whether interest was agreed to be paid at 9 per cent. per annum and the usufruct was to be applied towards this interest?

(iii) Was the letter dated 10-9-1931 only an assurance to the defendants about interest, or was it an agreement to pay interest?

(iv) Did the plaintiff No. 1 in March 1936 request Dr. Joshi to treat the contract of re-purchase as cancelled?

(v) Are the plaintiffs estopped by their conduct?

(vi) Are the defendants entitled to be compensated for the additional structures they have constructed? If so, what is the amount of compensation?

(vii) Did the plaintiffs suffer any loss due to the demolition of old structures and, if so, what should be the damages?

(viii) Did the notice dated 26-8-1943 amount to a tender of the mortgage-money and, if so, must interest under Ex. D-3 cease to run from that date?

(ix) If redemption is to be allowed, are all the plaintiffs entitled to redeem or only one, the first plaintiff, because of a partition between the family?

(x) What is the sum for which redemption, if allowed, can be claimed? and

(xi) Relief.

(11) Before dealing with the principles on which the dispute whether a particular transaction denotes a sale or a mortgage can be resolved, it is necessary to quote the operative portion of the document itself. Leaving out the particulars which go in the beginning, the document reads as follows:

"The immoveable property as above has become of your full ownership from this day and the possession has been delivered to you. It is like this. A list of all the tenants has been prepared and a circular-like notice has been issued to them and they have given you assurance that they would pay you further rent from today. You may get your name mutated in the Committee (records). Our agreement in respect of this sale is as under:

If our heirs or ourselves demand reconveyance of one, two or all the three houses of the above estate at any time within 5 years of this day (this time-limit shall be followed very strictly -- it has been finally settled that we will lose this right if one more day expires), you or your heirs shall reconvey to us at our expense the respective houses for their respective prices mentioned in this deed of sale. With a view that both the sides should have equal rights in respect of this condition, it has been agreed between us that if our heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or anyone of them within four and a half years of this day and if for any reasons you or your heirs do not deem it proper to retain any one or all these houses hereafter, you and your heirs shall have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs expressed such a desire and if we or our heirs fail to comply with it, it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages. It has been (further) agreed between us that in the event of such a reconveyance, our heirs and ourselves will pay full price (as mentioned in this deed of sale) of the estate in the condition in which it may be at that time, that is, in the condition in which it may be on account of heavenly mishap or Government action, on account of any reason whatsoever or on account of fall in prices."

(12) We quote also Ex. D-3, to which a reference would be necessary hereafter:

"To— Dr. Trimbak Waman Joshi,

Compliments of Shreenarayan Rambilasji, Sadangopal and Murlidhar.

The consideration of the sale-deed which you are going to obtain is for the old debt only. Money is due from us to the Imperial Bank and also others. We have taken from you separate cheques for those persons out of the above as it was necessary to make payments to them today only and have assigned the same to them. We have already put you in possession of the houses sold. If you are not prepared to wait for two months for registration, you should not ask for the same at least for 8-15 days. We have to make arrangements for payments of all gradually. In case you effect registration (now), the depositors will necessarily make haste. You want that you should get an income of 9 per cent. per annum from these houses till reconveyance but it is evident that after meeting repairing and insurance charges thereof, there will not remain so much profit in balance. Therefore, we have already agreed before that the agreement of reconveyance mentioned in the deed of sale shall be brought into effect only when ourselves or our heirs pay to you all the expenses incurred by you as found due according to your account books and complete your (nine) per cent. Be it known. Date 10-9-1931.

Sd/- Shreenarayan Rambilas,
in the hand of self.
Sd/- Sadangopal Shreenarayan.
Sd/- Murlidhar Shreenarayan"

(13) The matter falls to be considered under S 58 (c), T. P. Act, which reads as follows:

"Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

In all cases in which the Court is required to determine whether a transaction is one of sale or one of mortgage, certain well accepted principles have to be borne in mind. The distinction which was made in — 'Alderson v. White', (1858) 2 Deg

& J 97 (A), was cited with approval by their Lordships of the Privy Council in — 'Bhagwansahai v. Bhagwan Din', 12 All 387 (PC) (B). Their Lordships observed as follows :

"The rule of law on this subject is one dictated by common sense that 'prima facie' an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase."

(14) There is thus a distinction between a mortgage though it may assume the form of an ostensible sale in the manner mentioned in S. 58 (c) quoted above and a transaction in which the property is in effect sold and the vendor only reserves a right to repurchase it on a future occasion. We need not go into the history of the law which is now circumscribed by the enactment of the proviso in S. 58(c) T. P. Act and the operation of S. 92, Evidence Act. Their Lordships of the Privy Council in — 'Balkishen Das v. W. F. Legge', 22 All 149 (PC) (C), stated the law how far the Court can go in determining whether a transaction is one of sale or of a mortgage. Their Lordships observed as follows :

"Their Lordships do not think that oral evidence of intention was admissible for the purpose of constructing the deeds or ascertaining the intention of the parties. By S. 92, Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

(15) The principles laid down by their Lordships have been applied in numerous cases to which reference was made at the Bar and which will in most part be considered in the sequel. It is clear from what their Lordships have stated that though the matter is one of the intention of the parties, the intention is to be gathered only from the document, though the surrounding circumstances may be looked into to see in what way the language of the document is related to existing facts. In a later case their Lordships laid down a salutary rule of conduct for courts faced with such a difficult question. It is manifest that the dividing line must in some cases be an exceedingly fine one, and it is not easy always to say whether a particular transaction is one of sale or mortgage. Where, however, the document is clear, there is no need to go any further and view the surrounding circumstances. The parties must be taken to have spoken their mind in the document itself. Where the language is uncertain and needs to be explained, then and then only is it permissible to go further and see what the surrounding circumstances were, and even then, the surrounding circumstances are seen with a view to interpreting the document itself. We may conveniently refer at this stage to the pronouncements of their Lordships of the Privy Council in — 'Ramdhandas v. Ramkisondas', AIR 1946 PC 178 at p. 179 (D), where their Lordships observe as follows :

"Upon this apparently simple question oral evidence voluminous and bewildering, has been given and their Lordships find themselves in agreement with Chagla, J., who in the appeal Court said : 'In a case where oral testimony is of such an unreliable and untrustworthy character the safest policy would be to let the documents speak for themselves'. This does not mean that, when the question is whether a transaction is a sale or a mortgage, form is to be preferred to substance. It is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory the Court cannot safely depart from the written evidence of the documents."

(16) Bearing these rules in mind, we shall first attempt to scan the document in an endeavour to discover its true nature and purport. Where, however, there is anything ambiguous in the document and needs to be explained, we shall advert to the oral and documentary evidence in trying to find out the true meaning of the document. We may state here that the tests which are generally applied in such cases are conveniently summarised in one place by Sir Dinshah Mulla in his Transfer of Property Act, 3rd Edition, at p. 356. The learned author states these tests as follows :

"The Courts were therefore practically limited to the document itself, and devised various criteria for determining whether the intention was to mortgage or to sell. A number of these tests based on a passage in Butler's Preface to Coke on Littleton are set out in the undernoted cases. The following tests have been applied : (1) the existence of a debt; (2) the period of repayment, a short period being indicative of a sale and a long period of a mortgage; (3) the continuance of the grantor in possession indicates a mortgage; (4) a stipulation for interests on repayment indicates a mortgage; (5) a price below the true value indicates a mortgage; (6) a contemporaneous deed stipulating for reconveyance indicates a mortgage, but one executed after a lapse of time points to a sale. In applying these tests the Courts put the onus on the party alleging that an ostensible sale deed was a mortgage; and in a case of ambiguity lean to the construction of a mortgage."

The cases cited at the Bar are mostly those mentioned in the foot-notes by Sir Dinshah Mulla. We shall only refer to such of those as may be necessary.

(17) For the application of S. 58(c), T. P. Act it is essential to bear in mind that the transaction would, to all appearance, bear the characteristics of an outright sale only that it would be conditioned by an agreement of repurchase on the part of the vendor. After the amendment of the section, the condition of repurchase has to be incorporated in the same document, before it can be looked into. Whenever their is such a condition and something more, the question falls for consideration whether the transaction should be treated as a sale coupled with a condition of repurchase, or as a mortgage by conditional sale. There is no presumption attaching to such a do-

cument but the onus is on the party alleging that an ostensible sale is in fact a mortgage. The 'onus probandi' was described by Rao, J. in — 'Bhaiyalal v. Kishorilal', AIR 1950 Nag 198 (E), in the following words :

"But it stands to reason that the onus must lie upon the person who wants to construe a document contrary to its tenor to establish the circumstances which go to prove that the sale evidenced by the document is only ostensible and not real. We cannot be oblivious of the fact that it is open to parties to enter into a transaction of sale with a covenant for reconveyance."

(18) From the proviso it can also be inferred that if the condition of reconveyance is not embodied in the document itself, the document cannot be construed as a mortgage. But even if the condition is so incorporated, it is not always conclusive. The intention of the parties must be found out from the terms of the document and the surrounding circumstances are examined if there is any necessity to interpret the meaning of the words used in relation to existing facts. The cardinal test which is to be applied in all such cases is whether the relation of a debtor and creditor is preserved between the vendor and the vendee. If that relationship is found, then the transaction ordinarily amounts to a mortgage, unless there be something to the contrary. We shall first examine the document from this point of view.

(19) Reverting, therefore, to the document in question, it is clear that it was written with great care. The vendees had taken all steps to make the transaction in appearance a sale. That, of course, would be so, because if the document plainly indicated a mortgage, there would be no dispute and no need to interpret it. Their Lordships of the Privy Council have interpreted documents with all the appearance of a sale as mortgages. In — 'Narasingerji v. Parthasaradhi Rayanam Garu', AIR 1924 PC 226 at pp. 229-230 (F), their Lordships observed as follows :

"Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence. But a close examination of the documents discloses their real character."

(20) In the same case their Lordships of the Privy Council adverted to one fact, namely, that the vendee had reserved to himself the right to recall the money at a future date. This, in their Lordships' opinion, indicated that the relationship of a debtor and creditor was preserved between the vendor and the vendee. At p. 230 of the report their Lordships observed as follows :

"Surely that the transaction in which they were engaging was not a sale but a loan. For, notice how that principle is worked out. The Raja has not only an option to repurchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Raja's contract to repurchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid."

Bearing these observations in mind, let us now see what the document we are interpreting provides.

(21) Though it is stated that the immoveable property shown in the document had become the property of the vendees and possession had been delivered to them and that the tenants were asked to attorn to them in future, it was provided that the vendees would have the right to insist on a repurchase after the expiry of 4½ years. This is what the document says :

"With a view that both the sides should have equal rights in respect of this condition it has been agreed between us that if our heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or any one of them within four and a half years of this day and if for any reason you or your heirs do not deem it proper to retain any one or all these house hereafter, you and your heirs shall have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs express such a desire and if we or our heirs fail to comply with it, it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages."

It is clear from this that the vendees had reserved to themselves the right to demand a repurchase. That would show that the vendors were to be treated as debtors, who had to pay the purchase price, if demanded, and had to take back the property. The case is on a par with that decided by their Lordships of the Privy Council and the observations of their Lordships apply equally to this case.

(22) The law on the subject in England is stated in the same terms by Fisher in his Law of Mortgage, p. 12, as follows :

"Although in certain cases conveyances, apparently absolute, may be construed as mortgages, an absolute conveyance with an agreement for repurchase, or that the conveyance shall be void upon payment of a certain sum at a fixed time, will create a mere right of repurchase to be exercised according to the strict terms of the power, and not such a right of redemption as is incidental to a mortgage; unless it is proved that the transaction was in the nature of a mortgage security, and that the grantor and grantee 'were intended to have mutual and reciprocal rights to insist upon reconveyance of the estate and repayment of the consideration'. 'Goodman v. Grierson', (1813) 2 Bal & B 274 (G); — '(1858) 2 Deg & J 97 (A); — 'Tapply v. Sheather', (1862) 8 Jur (NS) 1163 (H); —'Shaw v. Jaffery', (1860) 13 Moo PC 432 (I), (underlined (here into ' ') by us). It is to be noticed that a further condition which binds the vendors was that they were bound to pay the purchase-money if demanded even though the property involved may have been destroyed by "heavenly mishap or Government action, on account of any reason whatsoever or on account of fall in prices". In the Madras case last cited, a similar condition existed by which the vendees had provided against compulsory acquisition of the property by Government, and that circumstance was also taken into account by their Lordships in deciding whether the transaction was one of sale or of a mortgage.

(23) In — 'Shambhu Singh v. Jagdish Bakhsh Singh', AIR 1941 Oudh 582 (J), the learned Judges

adverted to this test as being the most important general test for determining whether the transaction is a sale or a mortgage. Their Lordships stated the law as follows :

"Many authorities have held that the best general test as to the nature of the transaction is the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such repurchase and if there is no such power, there is no mortgage : also that if the amount agreed upon as the price of repurchase was the same as the consideration for the original sale (as in the present case) the deed is a mortgage by conditional sale and not a sale with condition of repurchase."

(24) It is to be noticed that if the parties to the deed intended it to be a sale and not a mortgage, it was the simplest matter to put the condition of retransfer in a separate document; but they did not do so. The document was in favour of a party, one of whom was a leading lawyer; & it stands to reason that he knew that in 1929 the Transfer of Property Act had been amended & it had been made incumbent that the condition of repurchase should be in the same document, if the transaction is to be treated as a mortgage by conditional sale. If only an option to repurchase was reserved to the vendors, the lawyer would have insisted on the execution of a separate document for that right. He must be assumed to know that by incorporating the condition in the same document he was leaving the door open under S. 58 (c), T. P. Act to the allegation that the document denoted a mortgage rather than a sale.

(25) Though one of the defendants who were the transferees under the document is dead, fortunately we have the testimony in the case of the other who is the lawyer. He has attempted to explain why this condition was put in, and we shall refer to his evidence on this point. This is what Bhaskar Waman Joshi, Advocate, states as D. W. 1:

"I protected myself by making the contract bilateral. I reserved my right to sue him for damages if the prices went further down and get the 9 per cent. yield also made up."

On the other hand, Shreenarayan, the first plaintiff, stated the reason as follows:

"It was represented to me by defendant 1 that though the deed was to be styled a sale-deed, it would contain all terms of the mortgage. I do not know when the Karar Kharedy word was entered in it. They represented that it was a mortgage and I agreed to it. He asked me to consult other pleaders also and I told him, defendant 1, that I did not know any better pleader than him."

(26) Of course, the prior negotiations and communings between the parties are not relevant, as laid down by their Lordships of the Privy Council in — 'Bomanji Ardeshir Wadia v. Secy. of State', AIR 1929 PC 34 at p. 36 (K) and — 'Abdulla Khan v. Basharat Husain', 35 All 48 at p. 55 (PC) (L). All the same, it is clear that the explanation which has been given by the plaintiffs is the more reasonable and that given by the first defendant in the case an afterthought. The clear implication of the introduction of the condition for the return of the purchase-money at the option of the vendee is to preserve the relationship of debtor and creditor between the vendor and the vendee. The first test, which is also the most important, is thus answered in favour of the plaintiff-appellants.

(27) We shall now see whether there was any bargaining between the parties to settle an adequate price, and whether the price actually paid was adequate in all the circumstances of the case.

(28) As regards the bargaining, it is obvious that the plaintiffs stood in need of Rs. 30,000/- which they owed to the Imperial Bank, and wanted to raise that sum immediately (vide Shrinarayan, P. W. 2). According to the plaintiffs, they were willing to give a mortgage of their property for this sum. According to the defendants, they were unwilling to take a mortgage of the property at the same figure and therefore insisted on a sale-deed, and as part of the consideration they wanted to utilise the sum of Rs. 7,000/- which the plaintiffs owed them. It appears, however, from the draft which has been prepared (Ex. P-13) that at first the intention was to execute an outright sale-deed, but later it was changed to a conditional sale. This change is explained by both parties. According to the plaintiffs, the change was made because they were unwilling to sell the property for such a low figure and they wanted only to raise the amount which they presently needed. They did not therefore consent to an outright sale and the document as a sale-deed did not have the plaintiffs' consent. It is open to a party to prove that a particular transaction was not consented to by him. Section 92, Evidence Act excludes oral evidence to vary the terms of the written contract, but has no reference to the question whether the parties agreed to contract on the terms set forth in the document: see — 'Tyagaraja Mudaliyar v. Vedathanni', AIR 1936 PC 70 (M). Even if it be held that oral evidence is shut out by S. 92 'ibid', the point still remains whether there was no change from an outright sale to a mortgage. The condition of repurchase, which has been put in with so much attention to detail, would show that the plaintiffs had persuaded the other side to agree to let the property remain as a security for the money. If they repaid the money the property was to return to them. The bargainings of the parties, therefore, show that there was some change from an outright sale to at least a sale with a condition of repurchase. We have shown above that by introducing a clause entitling the vendees to recover their money the relationship of debtor and creditor was preserved. We have now to see whether the bargaining which went on related to the value of the property as such or not.

(29) In dealing with this question, we have to advert to a mass of evidence which has been led. Both sides have cited witnesses to prove the value of the property, and it would appear that the property was considerably more valuable than what the defendants attempt to make out. The defendants have brought several schedules prepared by overseers and engineers to show the value of the property in 1931. On the other side, the plaintiffs have produced a number of sale-deeds to prove the value of houses and sites situated near about the suit houses and sites which were contemporaneously sold. It is said that at the time of the execution of the document in question there were long negotiations and the value of each property was specifically determined. There is, however, no evidence of this. We have to judge only whether the price named in the document represented a fair price, or whether it represented the amount advanced on the security of each of the properties in suit. In the latter case, the price stated would have no relevance except as the amount advanced. In a mortgage the mortgagor puts forward his demand and the

mortgagee only sees whether the security is sufficient or not. If it is, he is not too particular about the value of the property.

(30) Some slight evidence exists, coming mainly from the parties themselves, about the anterior negotiations. According to D. W. 1 himself, the plaintiffs wanted a sum of Rs. 39,500/- but the defendants were unwilling to pay that much amount for the first two properties. Later, the third property was also included, and the inclusion of that property made Rs. 39,500/- a reasonable price. According to the plaintiffs, the amount which they intended borrowing was Rs. 30,000/-, but as the defendants were anxious to recover their own dues which amounted to Rs. 7,000/- and were unwilling to give Rs. 39,500/- on the security of the first two items of property, the third item was also included. The prices were shown separately in the document because the right to redeem was preserved individually in respect of each item.

(31) The evidence of prior negotiations thus is not of very great value because it comes from interested parties. There is, however, one document which militates against the story of the plaintiffs, and that is Ex. D-2. It shows that a sale was at first contemplated. But since the agreement envisaged in that document was materially altered (vide the corrections in Ex. P-13), we cannot go entirely by it. Similarly, Ex. D-3, which is referred to, is not conclusive because it was prior to the registered document, and can only be viewed as evidence of surrounding circumstances. Beyond this there is nothing to show what the bargaining between the parties was, and we are thus driven to determining the approximate value of the properties on the date on which the transaction was gone into.

(32) Here too, the evidence is far from satisfactory; but it appears to us that the entire basis of valuation adopted by the defendants is defective. What the defendants have done is to value the sites separately from the structures built on them. They take the value of the superstructures and add to them the value of the site valued as an open site. This is not the way to value built-up property, as has been indicated in — 'In re Dhanjibhoy Bomanji', 10 Bom LR 701 (N) and other cases. See also A. Ghosh's The Law of Compulsory Acquisition and Compensation (1951) at pp. 240, 241. From a perusal of the evidence contained in the depositions of Dinkar (P. W. 4), Narayan (P. W. 5), Shriram (P. W. 6) and Baburao (P. W. 7) and the sale-deeds produced it is apparent that the price of lands was much more than -/4/- per square foot. There are documents on record in which the price has fluctuated between Re. 1/- and Rs. 2/4/- per square foot; and we feel that even if the price of the land be taken to be -/8/- or -/12/- per square foot, the entire story that a proper price was paid disappears.

(33) Similarly, the depreciation which has been put down at 20 per cent. is not warranted. A property can be said to be depreciated only to the extent to which it has suffered by ravages of time. There is nothing to show that the property was so bad as to require a deduction of 20 per cent. on account of depreciation. If we take the proper value of the sites and do not decrease the amount by as much as 20 per cent., it is clear that the property which was bought for Rs. 39,500/- was really double that amount in value.

(34) The lower Court finds on the basis of a rental of Rs. 245/- per month that the price of the chawl was not more than Rs. 27,000/- and that of the house Rs. 11,500/-. It bases its finding on an investment yield of -/8/- per cent. per month. That would not fix the total value, but how much a person would like to invest if he wanted his money to give a certain yield. The proper way would be to capitalise the sum of Rs. 245/- or Rs. 250/- at twenty years' purchase. On this basis, which is approved in — 'T. Kathissabi v Revenue Divisional Officer, Calicut', AIR 1923 Mad 31 (O), the price comes to nearly Rs. 60,000/-. When we add to this the potential value in the shape of extra and useful land, we reach a much higher figure than this. The second test, therefore, in our opinion, is also in favour of the plaintiffs.

(35) The third is whether there was any agreement to pay interest. Shri Bobde has strenuously argued that Ex. D-3 should be admitted in evidence and that it would show that a 9 per cent. yield as interest on the outlay was guaranteed to the creditors. We put it to the other side whether they challenged Ex. D-3 as inadmissible; but for reasons best known to them, they stated that they did not raise any objection to its admissibility and that it could be read as part of the surrounding circumstances. Since the document is held to be admissible, because no objection was taken to it even in the Court below and no objection has been advanced before us, it is clear that there was some agreement about interest. In the document which we are interpreting the phrasealogy used is indicative of damages rather than interest, but it is apparent that interest was really meant. In the two passages last quoted by us above from the document Ex. D-1, there is a reference to the recovery of the money with damages, and that would clearly show that interest was to be claimed by way of damages in case the document (Ex. D-3) was, for some reason, held inadmissible. The fact that the defendants studiously avoided the use of the word 'interest' would not help them. Such a device was seen through by their Lordships of the Privy Council in — 'AIR 1924 PC 226 at pp. 229-230 (F)' (op. cit. sup.). The third test, therefore, is also answered in favour of the plaintiffs.

(36) We shall now consider whether the handing over of possession to the defendants indicates a sale. It may be pointed out here that according to Ex. D-3, the vendees were to remain in possession and to recover the rents and profits. They were to apply the rents and profits towards a notional sum of 9 per cent. per annum interest on their outlay, and the vendors had guaranteed to make up the sum to 9 per cent. by way of damages. It would show, therefore, that the handing over of possession was in furtherance of an agreement to guarantee interest to the defendants. The handing over of possession, therefore, rather than indicating a sale does exactly the contrary.

(37) We now consider whether the fixation of five years time for repurchase and making time of the essence denotes a sale. The terms short or long period must be treated as relative. In the present case, the period which was fixed for repurchase does not appear to be abnormally short. The parties selling the property were well-to-do but in monetary difficulties due to want of ready cash. They anticipated that they would be able to recover their own outstandings during that period and be able to take a reconveyance. Therefore, nothing much can be made of the fixation of five years as a condition for repurchase. Similarly, making time of the essence does not avail the defendants. By a contrary term they had reserved to themselves the right to demand re-

payment of their money even before the five years had run out. That would show that during the period of grace, namely, five years, during which the vendors were entitled to offer to repurchase the property, the vendees were also entitled to recall their money and to return the property. But for this condition it might have been argued that time was of the essence; but as the relationship of creditor and debtor existed, the document must be taken to evidence a mortgage rather than a sale. The fixation of a fixed period for repurchase cannot alter the character of the document executed, if it is a mortgage.

(38) In our opinion, all the tests taken together (particularly the test about the debtor and creditor) have been completely answered by the plaintiffs in the case, and the document must be interpreted as a mortgage and not a sale with a condition of repurchase.

(39) It remains only to say a few words about certain ancillary matters. Much was made before us of the fact that the property was not shown in the schedules filed before the Debt Conciliation Board and the Debt Relief Court. Nothing turns on this. The property was shown in the insolvency case and the omission from the schedules would falsify the schedules but not destroy the mortgagors' rights. Similarly, merely saying that the right of repurchase was not being exercised would not deprive the mortgagors of their right to seek redemption. Such a right can only be lost by an express transfer of the equity of redemption or by an order of Court or by the law of limitation. None of these events has happened. It may also be stated that no question of estoppel arises, because there can be no estoppel against a statute.

(40) It was argued by the appellants that in view of the notice which they had given (Ex. P-7) interest should cease from 26-8-1943, because there was a complete refusal to allow redemption by the defendants, and therefore there was no need to tender the money. They rely upon — 'Chalikani Venkatarayanim v. Venkata Subadrayamma Jagapathi', AIR 1923 PC 26 (P) in support of this contention. In our judgment, the case cited is against them. It was a question of interpretation of the document and it may be that the defendants wrongly refused the tender because of faulty understanding of the law on the subject. But the circumstances were not such in which the actual tender of money was dispensed with. The plaintiffs ought to have tendered the money to the defendants to save themselves from future interest. They had the option of depositing the amount in Court and asking the defendants to take the money and to return their documents and possession of their property. They did nothing of the kind. Even till today they have not paid a single pie and therefore the case falls within the rule indicated by their Lordships of the Privy Council in the ruling relied upon by the plaintiffs themselves. It is true that the plaintiffs were not aware of how the accounts stood, but they had knowledge of the principal and rate of interest and also of the amount of rent. They could have deposited a larger sum to be on the safe side. In our judgment, interest did not cease on the giving of the notice (Ex. P-7).

(41) We have also to consider what the rate of interest should be. From the document Ex. D-3, to which no exception has been taken by the defendants before us or in the lower Court, it would appear that the interest in contemplation was 9 per cent. per annum simple. It is also clear that the rents and profits from the property were to be utilized towards that sum. In our judgment, that should be accepted as the proper rate of interest on the mortgage-money. Even if it be held that Ex. D-3 is not admissible, we would under the powers granted to Courts under O. 34, Civil P. C., fix 9 per cent. per annum simple as the interest on the sum of Rs. 37,500/-, which represents the two items now being redeemed.

(42) It is clear that the defendants have been in possession of the property. They have been making profits from it by way of rents. An account, therefore, will have to be taken of the interest together with the amounts already realized by the defendants as mortgagees in possession. Such account will now be taken by the Court below with yearly rests up to the date to be fixed for redemption.

(43) This brings us to the question of improvements. Under S. 63A read with S. 51, T. P. Act, it is obvious that the mortgagors must pay that sum. The counsel for the appellants did not raise any objection to this and stated that if his clients were entitled to redeem the property they would pay for all the improvements which have been effected by the defendants. We, therefore, accept the figure given by the defendants representing the improvements which have been effected. They shall be included as part of the price of redemption. The right of redemption shall be only in the first appellant, as found by the lower Court.

(44) The appeal is allowed. The case will now go back to the lower Court for taking accounts of the rents and profits of the mortgagees in possession as also of the interest at 9 per cent. per annum simple and the improvements to which we have referred. The lower Court, whose decree is now discharged, will pass a proper redemption decree in favour of the first plaintiff after the accounts are taken, fixing the usual period for redemption. The respondents shall bear the costs of this appeal and of the Court below.

B/V.S.B. Appeal allowed.

A.I.R. 1954 NAGPUR 200 (Vol. 41, C. N. 63)

CHOUDHURI J.

Amolakchand Mohanlal, Plaintiff-Applicant v. Firm of Sadhuram Tularam and others, Defendants-Respondents.

Civil Revn. No. 679 of 1950, D/- 3-11-1952, from order of Civil J., 1st Class, Wardha, D/- 28-9-1950.

(a) Civil P. C. (1908), O. 6, R. 17 — New case in written statement.

The improbability of the convincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of the written statement by the inclusion of such defence. (Para 7)

Anno: Civil P. C., O. 6, R. 17 N. 4 Pt. 10.

1953 Mulla: O. 6, R. 17 (Topic discussed in N. 4 to O. 6, R. 17 in A.I.R. Com. not independently dealt with in Mulla — See notes generally in Mulla).

(b) Civil P. C. (1908), O. 6, R. 17 — Amendment in written statement — Discretion of Court.

In a suit for redemption of mortgage the defendants in their written statement admitted plaintiff's right for redemption. Later on when notices for inspection of documents were exchanged by the parties, the defendants filed application for amendment of the written statement by which they claimed ownership and exclusive title to the property in suit by denying the plaintiff's right of redemption and

by pleading want of notice and that the transaction in suit was not in the course of money-lending business. The application for amendment was opposed by the plaintiff on the ground that the proposed amendment displaces the admission made by them in their previous written statement, and that it was wholly inconsistent with the previous statement. The trial Court allowed the amendment on payment of costs Rs. 100/-:

Held that though the amendment would change the nature of the defence from admission to the denial of the plaintiff's right to redeem and such an amendment would not be allowed if asked at a late stage, yet if sufficient grounds are shown, the defendant could be allowed to amend his defence for the purpose of withdrawing his admission. Taking into consideration the circumstances and the stage at which the defendants prayed for the amendment no injustice would be done to the plaintiff by the amendment as he would have ample opportunity to meet the defendants' case before the issues were framed. Case law reviewed. (Paras 2, 13, 14)

Anno: Civil P. C., O. 6, R. 17 N. 13.

1953 Mulla: O. 6, R. 17, P. 605 N. "At..... proceedings" (7 Pts. extra in N. 13 to O. 6, R. 17 in A.I.R. Com. — 2 Pts. extra in Mulla).

(c) Civil P. C. (1908), O. 6, R. 17 — Scope and object.

The object of the rule is that the Courts should get at and try the merits of the cases that come before them, and should consequently allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties provided it can be done without causing injustice to the other side. (Para 9)

Anno: Civil P. C., O. 6, R. 17 N. 1 Pt. 4.

1953 Mulla: O. 6, R. 17 (Topic discussed in N. 1 to O. 6, R. 17 in A.I.R. Com., extra — See however, N. "Leave to amend when given" on P. 595 in Mulla).

(d) Civil P. C. (1908), O. 6, R. 17 — New case in written statement.

The principles applicable to the amendments of plaints equally apply to the amendments of the written statements. (Para 10)

Anno: Civil P. C., O. 6, R. 17 N. 4.

1953 Mulla: O. 6, R. 17 (Topic discussed in N. 4 to O. 6, R. 17 in A.I.R. Com., not independently dealt with in Mulla — See notes generally in Mulla).

A. V. Khare with T. B. Pendharkar, for Applicant; G. B. Badkas, for Respondents.

CASES REFERRED: Paras

(A) (V21) AIR 1934 PC 98: 13 Pat 310 (PC) 6
(B) (V33) AIR 1946 PC 50: 222 Ind Cas 534 (PC) 6
(C) (V32) AIR 1945 All 197: ILR (1945) All 109 8, 12
(D) (V9) AIR 1922 PC 249: 48 Cal 832 (PC) 8, 12
(E) (V37) AIR 1950 Mad 46: 1949-2 Mad LJ 422 8, 12
(F) (V25) AIR 1938 Nag 388: ILR (1939) Nag 194 8, 10
(G) (V38) AIR 1951 Cal 262: 85 Cal LJ 213 8, 12
(H) (1892) 3 Ch 226: 67 LT 146 8, 13
(I) (1884) 26 Ch D 700: 53 LJ Ch 891 9
(J) (1880-81) 16 Ch D 440: 50 LJ Ch 260 13

ORDER: This is a revision petition filed by the plaintiff Amolakchand against the order dated 28-9-1950 passed by the Additional District Judge, Wardha, in Civil Suit No. 16-A of 1949, allowing an application filed by the defendants 1 to 3 for leave to amend their written statement.

(2) The plaintiff brought a suit on 19-10-1949 against the defendants for redemption of a mortgage dated 17-9-1936. The defendants were served on 29-11-1949 and filed their written statement on 19-7-1950. In paras. 6 and 15 of their written statement they admitted the plaintiff's right for redemption provided the plaintiff paid to them the sum of Rs. 17238-3-0 as the price of redemption in addition to all costs of the suit.

The defendants filed an application for amendment of their written statement on 7-9-1950 by which they claimed ownership and exclusive title to the property in suit by denying the plaintiff's right of redemption. They also proposed to amend their written statement by pleading want of notice and that the transaction in suit was not in the course of money-lending business. The application for amendment was opposed by the plaintiff on the ground that the proposed amendment displaces the admission made by them in para. No. 15 of their written statement, and that it was wholly inconsistent with the previous statement dated 19-7-1950.

(3) The lower Court, though holding that the proposed amendment displaces the defence of the defendants 1 to 3, allowed the amendment on payment of costs Rs. 100/- to the plaintiff. It is against this order that the plaintiff has come up in revision.

(4) The defendants in their application proposed to make the following amendments as para. 6 (A) after para. 6 of their written statement:

"These defendants deny that they are money-lenders and have money-lending business in this Province. It is also denied that they hold a money-lender's licence. These defendants further deny that they did not maintain accounts. It is submitted that the provisions of the C. P. Money-lenders Act do not at all apply to defendants 1 to 4 and to the transaction in suit for reasons set forth hereinafter."

This prayer of the defendants was not seriously opposed.

(5) The defendants also proposed further amendment by substituting para. 6 of their written statement by the following paragraph:

"The plaintiff has no right of redemption for reasons stated hereinafter. In the alternative, these defendants submit that in case it is held that the mortgage sued upon is really a mortgage and not an out and out conveyance, the plaintiff cannot redeem the same unless and until he pays the full mortgage money with interest and costs as given in the attached schedule A."

In paras. 7 (A), 7 (B) and 7 (C) of their application for amendment, the defendants have stated the circumstances in support of their prayer for amendment. They have also referred to certain letters which were discovered after the filing of the written statement which according to them disclose that the mortgage in suit was executed instead of a regular sale deed at the instance of the plaintiff to avoid payment of consent money to the malguzar.

(6) It was argued on behalf of the applicant that it was not permissible to allow the amendment on the facts disclosed in the application when under S. 92, Evidence Act, evidence was not admissible to vary the terms of the mortgage. Reliance was placed on —'Kamta Singh v. Chatur-

bhuj Singh', AIR 1934 PC 98 (A) and — 'Joseph Darmanin v. Carmel Micallef', AIR 1946 PC 50 (B).

(7) *The improbability of the convincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of the written statement by the inclusion of such defence.* In my opinion, this is not the stage where the question of admissibility of the evidence to show the nature of the transaction should be gone into in considering whether the amendment in the written statement should be allowed or not.

(8) It was next argued by the learned counsel for the applicant that the defendants should not be permitted to amend their written statement as the amendment would convert the defence into another of a different and inconsistent character. Reliance was placed on — 'Nasir Uddin v. Baboo Lal', AIR 1945 All 197 (C); — 'Ma Shwe Mya v. Maung Mo Hnaung', AIR 1922 PC 249 (D) and — 'Narayanappa v. Suryanarayana', AIR 1950 Mad 46 (E). It has been urged by the learned counsel for the non-applicants that the amendment is sought at the earliest stage when the real nature of the transaction was made known to the defendants and that the lower Court has rightly exercised its discretion in allowing the defendants to alter their pleadings even though it amounted to withdrawal of admission. Reliance was placed on the —'Lakhhamansingh v. Mahendralal', AIR 1938 Nag 388 (F); — 'Ahmed Hossein v. Chembelli', AIR 1951 Cal 262 (G) and — 'Hollis v. Burton', (1892) 3 Ch 226 (H).

(9) Amendment of pleadings is permitted under O. 6. R. 17, Civil P. C. It consists of two parts:

"(a) The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just; and

(b) All such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties shall be made."

The present case is under the first part. *The object of the rule is that the Courts should get at and try the merits of the cases that come before them, and should consequently allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties provided it can be done without causing injustice to the other side. Bowen L. J. in — 'Cropper v. Smith', (1884) 26 Ch D 700 at pp. 710, 711 (I), observed as follows:

"It is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights .... I know of no kind of error or mistake which if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. .. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

(10) The principles applicable to the amendments of plaints equally apply to the amendments of the written statements. In — 'Lakhhamansingh v. Mahendralal, (F) (cit. sup.)', though the plaintiff's prayer for amendment was disallowed as it was sought at a very late stage i.e., when the case stood reserved for argument, their Lordships observed as follows:

"Amendments should always be made, in our opinion, with great readiness. In most cases up to issue stage no special burden as to costs is called for and thereafter justice is met by leave being granted conditionally on the payment of costs thrown away. But where one sees an amendment asked for at so late a stage, which introduces a new cause of action one should ask oneself: where would the applicant be if he were to bring a fresh suit at the time he seeks this amendment? If you find that he is out of time and that he has not got the power to bring that fresh suit without finding himself opposed by the defence of limitation, very exceptional circumstances have to be present to justify a Court letting him do in one litigation what he cannot do in another."

(11) In the present case, the application for amendment was filed by the defendants at a very early stage when notices for inspections of documents were exchanged by the parties under O. 11, R. 13, Civil P. C. No injustice would be done to the plaintiff by the amendment as he will have ample opportunity to meet the defendants' case before the issues are framed.

(12) In — 'Ma Shwe Mya v. Maung Mo Hnaung, (D) (cit. sup.)', the amendment sought by the plaintiff was disallowed on the ground that the claim as amended had become barred by limitation. In — 'Nasir Uddin v. Baboo Lal, (C) (cit. sup.)', as well as in — 'Narayanappa v. Suryanarayana (E) (cit. sup.)', the prayer for amendment was disallowed as it was made at a very late stage. It is clear that in these cases amendments were not allowed as they were not only out of time but were made at a very late stage. They are therefore not applicable here. In — 'Ahmed Hossein v. Chembelli, (G) (cit. sup.)', it has been held as follows:

"The making of amendments is not really a matter of power of a Court but its duty, so that substantial justice may be done for which alone Courts exist. As a fundamental principle the law strongly favours an amendment where it is necessary in the ends of justice and it would require the clearest language to alter this very beneficial legal principle."

(13) No doubt the amendment would change the nature of the defence from admission to the denial of the plaintiff's right to redeem; such an amendment would not be allowed if asked at a late stage as was held in — 'Laird v. Brigs', (1880-81) 16 Ch D 440 (J). But if sufficient grounds are shown, the defendant can be allowed to amend his defence for the purpose of withdrawing his admission. See — 'Hollis v. Burton, (H) (cit. sup.)'.

(14) Taking into consideration the circumstances and the stage at which the defendants prayed for the amendment of their written statement, it cannot be said that the lower Court did not

*See A.I.R. Commentary on Civil P. C. Vol. II O. 6 R. 17, N. 4, Pt. 10.

*See A.I.R. Commentary on Civil P. C. 1951 Edn. Vol. II O. 6, R. 17, N. 1, Pp. 1737-1738.

exercise its discretion properly in allowing the amendment.

(15) The revision, therefore, fails and is dismissed with costs. Counsel's fee Rs. 25/- if certified.

B/H.G.P. Revision dismissed.

A.I.R. 1954 NAGPUR 203 (Vol. 41, C.N. 64)

SINHA C. J. AND BHUTT J.

Balaji Gendbaji, Applicant v. Registrar, Co-operative Societies Madhya Pradesh, Nagpur and others, Non-Applicants.

Misc. Petn. No. 103 of 1953, D/- 21-8-1953.

(a) Co-operative Societies Act (1912), S. 12 — Scope — (Co-operative Societies Act (1912), S. 43 — Rules under (M.P.) — R. 14A).

The disqualification under S. 12 attaches not only to non-payment in respect of membership but also to other defaults as may be prescribed by the rules or bye-laws, which may prevent his acquiring an interest as a member. The term "default" is not restricted or qualified in R. 14-A, and is, therefore, wide enough to cover the case of non-payment of the sum due to the society for purchases, provided the period covered by the default exceeds twelve months. (Para 5)

(b) Co-operative Societies Act (1912), S. 43 — Rules under (M.P.) — Rr. 14(4), 14-A — Power of Registrar to prescribe procedure for holding election.

The main purport of the R. 14-A is to prescribe a disqualification to appointment of a member to a committee of the society. How it has to be worked out in a case of election has to be gathered from other provisions. In the matter of holding an election where the committee was dissolved, the relevant rule is R. 14(4). Therefore, the fact that under R. 14-A it is the society which appoints a member to a committee cannot detract from the power of the Registrar or the person or persons appointed by him under R. 14(4). The Registrar or Officer-in-charge of the society has thus the power to lay down a procedure for holding the election, including the power to appoint a person to settle such preliminary points as, if not resolved earlier, were likely to hamper the holding of the election. (Paras 7, 8)

(c) Madhya Pradesh General Clauses Act (1914), S. 9 — Applicability — (Co-operative Societies Act (1912), S. 12) — (General Clauses Act (1897), S. 10).

The matter of payment of a Society's dues is not provided in any Provincial Act as it is an act which has to be voluntarily done by the purchaser. Section 9, Madhya Pradesh General Clauses Act, 1914, has no application to such a case. (Para 8)

Anno: G. C. Act S. 10, N. 3.

(d) Constitution of India, Art. 226 — Interference under.

Procedure prescribed by Registrar under R. 14(4) of the Rules framed under S. 43, Co-operative Societies Act (1912), being with jurisdiction — High Court cannot interfere under Art. 226. (Para 8)

M. R. Rajkarne, for Applicant; T. P. Naik, Addl. Govt. Pleader, for Non-Applicant No. 1.

ORDER : This petition under Art. 226 of the Constitution is directed against the order of the Registrar, Co-operative Societies, Nagpur, by which he upheld the order of the Election Officer rejecting the petitioner's candidature to contest the election to the Board of Directors of the Provincial Weavers' Co-operative Society, Nagpur.

(2) The petitioner is a member of the Provincial Weavers' Co-operative Society, Nagpur, and his name is on the voters' list published by the Society. It appears that the Executive Committee of the Society was dissolved by the Registrar and an Officer-in-Charge was appointed under R. 14(1) of the Rules framed under the Co-operative Societies Act, 1912, to manage the affairs of the Society. After the period of dissolution, the Registrar ordered and authorised the Officer-in-Charge to call a special general meeting of the Society on 31-8-1952 to elect members of the Board of Directors. Accordingly the Officer-in-Charge issued a notice dated 8-8-1952 to convene the special general meeting on the scheduled date for the purpose aforesaid. It was notified by him that 20-8-1952 was the last date for submission of nomination papers, 21-8-1952 was the date for their scrutiny, 23-8-1952 was the date for withdrawal of candidature, and 24-8-1952 was the date for publication of the candidates eligible for election.

(3) In accordance with the abovementioned notice the petitioner offered himself as a candidate for the manufacturing section and submitted his nomination paper on the due date. He had made certain purchases from the Society's shop for which an amount of Rs. 42/10/- was outstanding against him since 26-5-1947. He paid this amount on 21-8-1952, and it is alleged that he could not do so when he submitted the nomination paper, as 20-8-1952 was declared a holiday. On 22-8-1952 one Pundlik Bhanarkar filed an objection in writing to the petitioner's nomination on the ground that he was in default to the Society for a period of over 12 months and was not, therefore, eligible to contest the election. This objection was upheld by the Election Officer appointed by the Registrar who confirmed his order in appeal. Hence the present petition.

(4) Under R. 20 of the rules framed under the Co-operative Societies Act, 1912, the Registrar or any person authorised by him is empowered to summon at any time a special general meeting of the society in such manner and at such time and place as he may direct and to specify the matters that shall be discussed at the meeting. Such a meeting has, under the rule, all the powers of a general meeting called in accordance with the rules or the bye-laws of the society. It was in pursuance of this provision that the Officer-in-Charge, acting under the direction of the Registrar, called the meeting on 31-8-1952 to hold the election. The validity of the notice, so far as the fixation of the date of the election is concerned, is not disputed by the petitioner.

It was, however, contended that as under R. 14-A, it is the society which is empowered to appoint a member to its committee, it was the special general meeting of the society that could accept or reject the nomination papers and not the Election Officer appointed by the Registrar. It was also contended that as the only disqualification attaching to a member under S. 12, Co-operative Societies Act, 1912, is the default in payment to the society in respect of membership, the petitioner could not be disqualified for election for non-payment of the money due on purchases.

(5) Section 12 of the Act is in these terms :

"No member of a registered society shall exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or bye-laws."

The disqualification under this provision attaches not only to non-payment in respect of membership but also to other defaults as may be prescribed by the rules or bye-laws, which may prevent his acquiring an interest as a member. In this connection R. 14-A is pertinent and is reproduced below:

"No society shall appoint any member, who at the time, is in default to the society for a period exceeding twelve months, to its committee or to the committee of another society or to represent the society in another society; and any member of a society who has been appointed to its committee or to the committee of another society or to represent the society in another society, shall cease to hold his appointment as such, if he is in default to the society of which he is a member for a period of twelve months."

This rules does prescribe a disqualification for appointment of a member to a committee of the society. Had the only disqualification laid down in S. 12 of the Act related to the default in payment of the dues of membership, it could be said that the "default" mentioned in R. 14-A could not refer to any other dues. However, as already observed, S. 12 also contemplates other conditions which may be prescribed by the rules or bye-laws in order to acquire an interest in the society, i.e., an interest which may qualify him to exercise the rights of a member, including the right to contest an election to a committee. In this context, the term "default" is not restricted or qualified in R. 14-A, and is, therefore, wide enough to cover the case of non-payment of the sum due to the society for purchases, provided the period covered by the default exceeds twelve months.

(6) It was, however, contended that there was no default in the instant case as there was a sum of Rs. 148/- and odd with the society to the credit of the petitioner. This sum, however, could not be adjusted towards the dues without any direction from the petitioner. This was, therefore, a case of default as the dues were not satisfied by adjustment. So long as the dues existed, the petitioner, even though a member, could not be appointed vide R. 14-A, to the Executive Committee of the society and could not, therefore, take part in the election to the Board of Directors whose constitution was a necessary step to the formation of the Executive Committee. (See bye-laws 13 and 14).

(7) It was, however, urged that this disqualification could be removed at any time before the election took place and as the money was paid by the petitioner on 21-8-1952, i.e., before the election which took place on 31-8-1952, he could not be disqualified to contest the election. In this connection it was contended that the default contemplated by R. 14-A is the one that exists at the time of the actual appointment and as there was no default at the time of the election in the instant case, he could not be treated as a disqualified candidate. Rule 14-A sets out the condition which disqualifies a member to appointment to a committee of the society. It is in this context that it is laid down that if there is default at the time of the appointment, the member concerned cannot be appointed to a committee, or if it has occurred thereafter, he shall cease to hold his appointment.

The main purport, however, of the rule is to prescribe a disqualification to appointment of a member to a committee of the society. How it has to be worked out in a case of election has to be gathered from other provisions.

(8) It is admitted that there is no procedure prescribed under the Co-operative Societies Act, 1912, or the rules or bye-laws framed thereunder, for holding an election. In a case of normal election to the Executive Committee the power to decide how the election shall be conducted will naturally vest in the society, i.e., it will be decided by a general meeting of the society convened for the purpose. Where, however, the committee has been dissolved, the power to arrange for the constitution of a new committee vests under R. 14(4) in the person or persons appointed by the Registrar to manage the affairs of the society during the period of dissolution. This power may also be exercised by the Registrar, if he so desires, as he is the appointing authority. In the matter of holding an election where the committee was dissolved, the relevant rule is R. 14(4). Therefore, the fact that under R. 14-A, it is the society which appoints a member to a committee cannot detract from the power of the Registrar or the person or persons appointed by him under R. 14(4).

The Registrar or Officer-in-Charge of the society had thus the power to lay down a procedure for holding the election, including the power to appoint a person to settle such preliminary points as, if not resolved earlier, were likely to hamper the holding of the election. The procedure that he prescribed, which provided for the different steps leading to the holding of the election, viz.,:

(i) Submission of nomination papers;

(ii) Scrutiny of the nomination papers;

(iii) Withdrawal of candidature; and

(iv) Publication of the candidates eligible for election,

is the same as is followed in all other elections. It was, therefore, a procedure that was not only within his power but was also manifestly reasonable. Had he left these matters to be decided by the general meeting of the society, they might not have been resolved, which would have resulted in the indefinite postponement of the election.

In accordance with this procedure, with which we cannot interfere under Art. 226 of the Constitution as it was prescribed with jurisdiction, it was incumbent on the petitioner to remove his disqualification before he filed his nomination paper. It is no doubt true that the day on which the nomination papers were to be submitted, was declared a holiday, but the conditions laid down for qualifying for an election are to be strictly complied with, and the parties act at their peril if one of the causes of non-compliance is laches or delay on their part. Imposition of any supervening condition in such circumstances, where parties have been initially guilty of negligence, cannot be a ground for interference with the discretion used by competent authorities. Section 9, Madhya Pradesh General Clauses Act, 1914, has no application to the case because the matter of payment of the Society's dues is not provided in any Provincial Act as it is an act which has to be voluntarily done by the purchaser.

(9) The result is that the petition fails and is dismissed with cost. Counsel's fee Rs. 50/-. The

amount of the security outstanding after payment of the respondent no. 1's cost be refunded to the petitioner.

B/D.H.Z. Petition dismissed.

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SINHA C. J. AND BHUTT J.

Mukundrao Martandrao, Applicant v. Addl. Settlement Commr., Madhya Pradesh and another, Non-Applicant.

Misc. Petns. Nos. 47, 48, 56 and 73 of 1953, D/- 14-10-1953, from order of Addl. Settlement Commr., Madhya Pradesh, Nagpur, D/- 29-12-1952.

(a) Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), Ss. 2(g)(3), 4(2) and 68(1) — Scope — Vesting of home-farm land in Berar.

The view that unless a survey number can be said to be the home-farm land of a superior holder in Berar on the first day of October, 1949, it is liable to vest in the State Government, is not correct as it introduces into S. 2(g)(3) the provision of S. 68(1) and ignores the effect of S. 4(2), which is not proper. (Paras 5, 6)

Section 2(g)(3) which defines the term "home-farm" in relation to Berar, is a self-contained provision, and has no relation to any particular date or year. This is in contrast to the definition of the same term in relation to the Central Provinces, which has reference to the year 1948-49. In the absence of any time limit in the case of Berar to determine the character of land, the relevant date is obviously the date of vesting, and, therefore, if the land was not a proprietor's home-farm on 1-10-1949 but if it conformed with the definition of the term under S. 2(g)(3) at any time afterwards up to the date of vesting, S. 4(2) should operate in his case and he would be entitled to retain its possession. (Para 6)

The date, viz. 1-10-1949, prescribed in S. 68(1) of the Act is relevant only for the purpose of deciding the question whether the superior holder is entitled to the rights of an occupant in his home-farm land, but it has still to be decided with reference to S. 4(2) if any land held by him conforms to the definition of the term 'home-farm' under S. 2(g)(3) at any time between 1-10-1949 and the date of vesting, viz. 14-3-1951. If the answer be in the affirmative, the superior holder, or the proprietor, would be entitled to retain possession of the land on such terms as may be agreed between him and the State Government. (Para 11)

(b) Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), S. 13 — Compensation in respect of items exclusively belonging to one co-sharer.

Under S. 13 of the Act if the income relating to any items belongs to a claimant exclusively, the amount of compensation assessed thereon belongs to him alone and cannot be distributed between the co-sharers. (Para 11)

Scheme of assessment of compensation laid down in S. 13 explained. (Paras 8, 9)

(c) Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), S. 8 and Sch. I, Rr. 3 and 4 — Exempted land revenue if can be treated as income for computation of compensation.

The gross and net incomes in Berar, which form the basis of computing the amount of compensation, are, vide S. 8 of the Act, assessed in accordance with Rr. 3 and 4 of the Rules contained in Sch. I. Under R. 4 (1)(a) the amount of land revenue is an item for deduction from the gross income and cannot be included in the items of gross income. Rule 3(c) has obvious reference to other sources from which the superior holder may be deriving income. The amount of the exempted land revenue cannot, therefore, be treated as income for purposes of computing the amount of income. Hence, the amount of the land revenue that is exempted under S. 7 of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948, cannot be treated as income for purposes of computing the amount of compensation. (Paras 10, 11)

(d) Constitution of India, Art. 226 — Other remedy open.

Obiter: Where the remedy of a civil suit, even if available, would not be equally efficacious and expeditious, it cannot serve as a bar to the granting of immediate relief under Art. 226 in appropriate cases. (Para 3)

P. K. Tare and N. L. Abhyankar, for Applicant; T. P. Naik, Addl. Govt. Pleader, for Non-Applicant.

ORDER: This order shall govern the disposal of Miscellaneous Petitions Nos. 48 of 1953, 56 of 1953 and 73 of 1953 as well, as they were heard along with the present petition and common questions arise for decision in all these cases. All these petitions, which are made under Art. 226 of the Constitution, are directed against the orders passed by authorities constituted under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. I of 1951), hereinafter called the Act.

(2) The facts of these cases, briefly, are these: 'Miscellaneous Petition No. 47 of 1953' Petitioner Mukundrao was the Izardar of the alienated village Tiwasa in Taluq Darwha of Yeotmal District. He claims survey Nos. 2, 20, 23, 25, 27-29, 31-34, 36-50, 54, 56, 57, 70, 80, 81, 110, 118, 121, 122, 124-128, 131, 132, 137-139 and 140-142 as his home-farm land which, according to him, has wrongly been held by the Compensation Officer to vest in the State Government. It is, however, admitted that the land was not under actual cultivation on 1-10-1949 but it is contended that it was allowed to lie fallow according to agricultural practice and a certificate under S. 5 of the Cultivation of Fallow Lands Act, 1948, was also obtained in respect thereof. Certain points relating to the assessment of compensation were also raised in the petition but were not pressed in arguments.

'Miscellaneous Petition No. 48 of 1953' This case is similar to Miscellaneous Petition No. 47 of 1953 and relates to survey Nos. 7, 22-35, 41-43, 46, 50, 52-60, 62, 67, 69-71, 74, 82-84, 90-95, 107-116, 118-121, 123, 128, 130-137 and half share of No. 129, situate in the alienated village Bothbodam in Taluq Darwha of Yeotmal District, of which the petitioner Mukundrao was the Izardar.

'Miscellaneous Petition No. 56 of 1953' This case relates to the Izara village Mozar situate in Darwha Taluq of Yeotmal District, in which the petitioner

Pusaram held a fractional share. The petitioner contends that the fields, viz., survey Nos. 171/1 and 109 and 16 acres of survey No. 145, formed his home-farm land and could not vest in the State Government simply for the reason that they were not under cultivation on 1-10-1949. He further alleged that survey Nos. 114, 115, 117 and 158 formed his exclusive fallow land, and consequently the amount of compensation, calculated on the basis of the income of this land and of his share in Parampok and Gaothan land, could not be distributed among his co-sharers. It is admitted by the parties that in calculating the amount of income, there has been an arithmetical mistake, namely that whereas the income should be Rs. 7714/6/9, only Rs. 7414/6/3 have been allowed therefor.

'Miscellaneous Petition No. 73 of 1953' The petitioners and respondents Nos. 4 and 5 were Izardars of village Sai in Pusad Taluq of Yeotmal District. The petitioners claim that survey Nos. 42, 100, 101, 117, 126, 132, 133 and 134 formed their home-farm land which could not vest in the State Government even though they were not under cultivation on 1-10-1949. They also contend that the amount of the land revenue that was exempted during the last 10 years should have been treated as income and compensation allowed for its loss to the co-sharers.

(3) One of the questions that was incidentally mooted before us was whether the Civil Courts have jurisdiction to entertain a suit in matters that are in dispute in these cases. This point was not raised in order to question the power of this Court to interfere with such proceedings, and as the remedy of a civil suit, even if available, would not be equally efficacious and expeditious, it cannot serve as a bar to our granting immediate relief in appropriate cases. We need not, therefore, consider the question of the Civil Courts' jurisdiction to decide the matters in controversy in these proceedings.

(4) The points that arise for decision are the following:

(1) Whether survey numbers in question vest in the State Government solely for the reason that they were not under cultivation on 1-10-1949. (M. P. Nos. 47, 48, 56 and 73 of 1953).

(2) Whether the amount of compensation in respect of the exclusive income of a proprietor can legally be distributed among all the co-sharers of the village. (M. P. No. 56 of 1953).

(3) Whether the amount of exempted land revenue is liable to be treated as income for purposes of computing the amount of compensation. (M. P. No. 73 of 1953).

(5) POINT (1): This question turns mainly on the interpretation of Ss. 2 (g) (3), 4 (2) and 68 (1) of the Act. Section 2 (g) (3) defines the term "home-farm" in relation to Berar in the following terms:

"In relation to Berar, all land included in holdings which is—

(i) under the personal cultivation of the superior holder including land allowed to lie fallow in accordance with the usual agricultural practice;

(ii) held by a lessee from the superior holder; and

(iii) held by a tenant from the superior holder other than a specified tenant."

In this connection it is not necessary to refer to the provision relating to "specified tenant", inasmuch as it is admitted that none of the survey numbers was held by such a tenant. Section 4(2) excludes from the operation of sub-section (1) of the section, home-farm land of a proprietor which he is entitled to retain in his possession. This sub-section is reproduced below:

"Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of his home-stead, home-farm land, and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting."

Section 68 (1) makes the superior holder of his home-farm land an occupant thereof, if it was held by him as such on the first day of October 1949. This section reads:

"The home-farm land held by a superior holder or the land held by a plot-holder on the first day of October 1949 shall on and from the date of vesting be held by him as an occupant and he shall subject to any orders which may be passed under S. 7 of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948, be liable to the payment of land revenue equal to the fair assessment thereon."

The authorities under the Act have, in the instant cases, held the view that unless a survey number can be said to be the home-farm land of a superior holder on the first day of October 1949, it is liable to vest in the State Government.

(6) It appears to us that S. 2 (g) (3) which defines the term "home-farm" in relation to Berar, is a self-contained provision, and has no relation to any particular date or year. This is in contrast to the definition of the same term in relation to the Central Provinces, which has reference to the year 1948-49. (See S. 2 (g) (1)). Even so, S. 4 (2) provides that a proprietor in the Central Provinces shall retain possession of land which he has brought under cultivation after the year 1948-49 but before the date of vesting. That this is not an effete or redundant provision is clear from S. 40 which provides that such land shall be deemed to be settled with the proprietor on such terms and conditions as may be prescribed. The rules framed under this section lay down that such land shall be held in occupancy tenancy right on a rent that may be fixed by the Deputy Commissioner.

There is no similar provision in the Act for Berar, defining the right of a proprietor in the land which was not his home-farm on 1-10-1949 but was held by him as such after that date and before the date of vesting, which, in the instant cases, was 14-3-1951. (See Notification No. 627-XII, dated 27-1-1951, issued under S. 3 of the Act). This does not, however, mean that in the case of Berar, S. 4 (2) is ineffectual. All that S. 68(1) provides is that if the home-farm land is held by a superior holder on the first day of October 1949, he shall get the rights of an "occupant" which term is defined in S. 54 of the Berar Land Revenue Code, 1928. In such a case he is entitled to hold the land on payment of land revenue assessed thereon, subject to any exemption that he may be given under S. 7 of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948. In other cases covered by S. 4 (2), he would obviously be entitled to hold the land without such exemption and subject to such terms and conditions as the State Government may impose. The interpretation put by the authorities under the Act in the instant cases introduces into S. 2

(g) (3) the provision of S. 68 (1) and ignores the effect of S. 4 (2), which is not proper In the absence of any time limit in the case of Berar to determine the character of land, the relevant date is obviously the date of vesting, and, therefore, if the land was not a proprietor's home-farm on 1-10-1949 but if it conformed with the definition of the term under S. 2 (g) (3) at any time afterwards up to the date of vesting, S. 4 (2) should operate in his case and he would be entitled to retain its possession.

(7) In the view that we have taken, it is not necessary to consider the effect of the certificate that the petitioner in Miscellaneous Petition Nos. 47 and 48 of 1953 had obtained under the Cultivation of Fallow Lands Act, 1948. Nor does the scope under Art. 226 of the Constitution extends to our deciding for ourselves whether the survey numbers in question, or any of them, answered the requirements of S. 2 (g) (3) of the Act at any time between 1-10-1949 and the date of vesting. This matter must be left to the authorities competent to deal with it under the Act.

(8) POINT (2): The relevant provisions of the Act on this point are sub-sections (2) and (3) of S. 13, which are reproduced below:

"(2) The Compensation Officer shall assess the amount of compensation payable for the whole estate, mahal or alienated village as one unit and shall then determine the amount due to each claimant in accordance with sub-sections (3), (4) and (5).

(3) Where there are co-sharers, the amount of compensation shall be distributed between them in proportion to the shares held by them."

However, the controlling provision is sub-section (1), under which the Compensation Officer has primarily to decide the amount of compensation payable to the claimant. In doing so, he has, under sub-section (2), to assess the amount of compensation payable for the whole alienated village as one unit and determine the amount payable to him.

(9) After the amount of compensation for the whole village has been assessed, it has, under sub-section (3) to be distributed between the co-sharers, if any, "in proportion to the shares held by them". This obviously presumes that the compensation that is assessed on items jointly held by the co-sharers has to be distributed between them. All the items, however, may not be jointly held, in which case it would be repugnant to the rights of the parties to give a share in the amount of the compensation to persons who have no interest in the items to which it relates. While, therefore, it would be proper to distribute the amount of compensation for joint items between the co-sharers, the amount of compensation in respect of the items, which belong to a particular co-sharer exclusively, cannot be so distributed for the reason that others cannot be deemed to be co-sharers so far as that amount of compensation is concerned.

It would lead to inequitable results if sub-section (3) were construed in a manner that a person who is a co-sharer in the village but has no share in the amount of compensation, should nevertheless partake of it in proportion to his share in the village. The term 'shares' has obvious relationship with the extent of the interest that a co-sharer of the village may have in the items pertaining to the compensation that is assessed. If, therefore, by private treaty or otherwise, any items are held by any one co-sharer exclusively, the amount of compensation that is assessed thereon should belong to him alone.

(10) 'Point (3)' The gross and net incomes in Berar, which form the basis of computing the amount of compensation, are, vide S. 8 of the Act, assessed in accordance with Rr. 3 and 4 of the Rules contained in Schedule I. The relevant clause of R. 3 is reproduced below:

"(c) any other sources from which the superior holder legally derives income in exercise of his right as such."

One of the items which have to be deducted from the gross income, in order to determine the net income, is the amount of land revenue. Clause (a), sub-rule (1) of R. 4 relates to this item and reads thus:

"any sum which was assessed in the agricultural year in which the date of vesting falls on account of the land revenue in respect of lands other than home-farm lands."

Whatever be the meaning of R. 4(1)(a), that is, whether the whole of the land revenue or only the part of the land revenue, that is not exempted, has to be deducted from the gross income, it is clear that the amount of land revenue is an item for deduction from the gross income and cannot be included in the items of gross income. Rule 3(c) has obvious reference to other sources from which the superior holder may be deriving income. The amount of the exempted land revenue cannot, therefore, be treated as income for purposes of computing the amount of income.

(11) Our findings, therefore, are:

(1) that the date, viz., 1-10-1949, prescribed in S. 68(1) of the Act is relevant only for the purpose of deciding the question whether the superior holder is entitled to the rights of an occupant in his home-farm land, but it has still to be decided with reference to S. 4(2) if any land held by him conforms to the definition of the term 'home-farm under S. 2(g)(3) at any time between 1-10-1949 and the date of vesting, viz., 14-3-1951. If the answer be in the affirmative, the superior holder, or the proprietor, would be entitled to retain possession of the land on such terms as may be agreed between him and the State Government, (M. P. Nos. 47, 48, 56 and 73 of 1953);

(2) That if the income relating to any items belongs to a claimant exclusively, the amount of compensation assessed thereon belongs to him alone and cannot be distributed between the co-sharers. M. P. No. 56 of 1953);

(3) That the amount of the land revenue that is exempted under S. 7 of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948, cannot be treated as income for purposes of computing the amount of compensation, (M. P. No. 73 of 1953); and

(4) That the income in Miscellaneous Petition No. 56 of 1953 should be Rs. 7714/6/9 and not Rs. 7414/6/3.

(12) The result is that the orders of the appellate authority in all the cases are set aside and the cases are remitted to him for fresh decision with advertence to our findings stated above. In the circumstances of these cases each party shall bear his own cost. The outstanding amount of the security in each case shall be refunded to the petitioner (s) concerned.

A/K.S.B. Cases remanded.

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MANGALMURTI AND DEO JJ.

Dattatraya Kashinath, Appellant v. Mainabi w/o Raoji and others, Respondents.

Letters Patent Appeal No. 23 of 1947, D/-13-8-1953, from judgment of Sen J. in Misc. F. A. No. 170 of 1943, D/- 23-10-1947.

(a) Debt Laws — C. P. and Berar Relief of Indebtedness Act (14 of 1939), S. 2 (d) — Debt.

It cannot be held that the Debt Relief Court had no jurisdiction to entertain the application for settlement of the debt due to the decree-holder because the liability had ceased to be a debt on the passing of the final decree. AIR 1944 Nag 289 (FB), foll. (Para 3)

(b) Debt Laws — C. P. and Berar Relief of Indebtedness Act (14 of 1939), S. 10(4) — Decree against Hindu father — (Hindu law — Sons — Pious obligation).

On a mortgage executed by one R for payment of his antecedent debts, the plaintiff obtained a preliminary decree for sale against R and his sons. R was then the Karta of the joint Hindu family consisting of himself and his major and minor sons. The decree was made final. R applied to the Debt Relief Court. The Debt Relief Court found that nothing remained due to the debtor and passed an order under S. 10(4) discharging the debt. The decree holder then applied for execution of the decree against the sons.

The contention which was raised was that the decree-holder was entitled to proceed against the sons or against their interest in the mortgaged property because they had not made an application to the Debt Relief Court and their liability, was not determined by that Court. The sons did not appear in the executing Court and R who appeared did not expressly raise the plea that he made the application to the Debt Relief Court as Karta i.e., on behalf of all the judgment-debtors. The plea was not specific. He pleaded that the decree-holder was not entitled to execute the decree against any of the judgment debtors as the debt was wiped off by the order of the Debt Relief Court.

Held, the debt essentially remained the debt of the father and the sons did not become co-debtors. All that was claimed against the sons was the liability of their undivided interest for satisfaction of the debt of the father under the pious obligation rule. Their liability under that rule was conditional on the debt being due by the father. If by operation of some law the debt was deemed to be satisfied, there remained no debt for the recovery of which the interest of the sons could be sold. (Para 8)

Held, further that it must be presumed that R made the application as Karta of the joint Hindu family on behalf of himself & his sons though it was not formally so stated in the application and that the decree-holder was not entitled to execute the decree: Case law discussed. (Paras 8, 11)

B. R. Mandlekar, for Appellant; A. Razzak and S. C. Dube, for Respondents.

CASES REFERRED: Paras

(A) (V31) AIR 1944 Nag 289: ILR (1944) Nag 568 (FB) 3
(B) ('42) 1942 Nag LJ 391 6
(C) (V24) AIR 1937 Mad 610: ILR (1937) Mad 880 (FB) 7, 11
(D) (V35) AIR 1948 Nag 324: ILR (1948) Nag 393 8
(E) (V38) AIR 1951 Nag 307: ILR (1950) Nag 806 8
(F) (V39) AIR 1952 Nag 202: ILR (1949) Nag 526 8
(G) (V4) AIR 1917 Mad 989: 40 Mad 581 9
(H) (V38) AIR 1941 Mad 925: ILR (1942) Mad 251 (FB) 9
(I) (V22) AIR 1935 Bom 287: 159 Ind Cas 911 9

JUDGMENT: This is a decree-holder's appeal under Cl. 10 of the Letters Patent against the order in Miscellaneous First Appeal No. 170 of 1943, affirming the dismissal of his application for execution of the final decree for sale passed against Raoji (since deceased) and his sons, respondents 2 to 5. Respondents 4 and 5 were then minors.

(2) On a mortgage executed by Raoji for payment of his antecedent debts, the plaintiff obtained a preliminary decree for sale on 30-1-1934 against Raoji and his sons. Raoji was then the Karta of the joint Hindu family consisting of himself and his major and minor sons. The decree was made final on 21-9-1934 and the proceedings were sent to the Collector for sale of the mortgaged property. Some property was sold and the sale proceeds were credited towards the decree. Thereafter, Raoji applied to the Debt Relief Court, Sausar, for determination of his debts including the one due on the mortgage decree. On making accounts under S. 10 of the Relief of Indebtedness Act the Debt Relief Court found that nothing remained due to the appellant and passed an order on 27-9-1941 under S. 10(4) of the Act discharging the debt.

(3) On 22-9-1942 the decree-holder applied for execution of the decree on the ground that the Debt Relief Court had no jurisdiction to entertain the application for settlement of the debt due to the decree-holder appellant because the liability had ceased to be a debt on the passing of the final decree. This contention is not now pressed in view of the Full Bench decision in — 'Rukhmabai v. Shamlal', AIR 1944 Nag 289 (A).

(4) The contention which was raised there and is pressed before us is that the appellant is entitled to proceed against the respondents 2 to 4 or against their interest in the mortgaged property because they had not made an application to the Debt Relief Court and their liability was not determined by that Court. This contention was put in issue thus:

Issue no. 2—

"Whether the applicant is entitled to proceed with the execution of the decree as against the non-applicants who did not apply to the Debt Relief Court notwithstanding that an order determining the debt has been passed on an application by the non-applicant no. 1?"

(5) The sons did not appear in the executing Court and Raoji who appeared did not expressly raise the plea that he made the application to the Debt Relief Court as 'karta' i.e. on behalf of all the judgment-debtors. The plea is not specific. He appears to have pleaded that the decree-holder was not entitled to execute the decree against any of the judgment-debtors as the debt was wiped off by the order of the Debt Relief Court.

(6) The executing Court held that the mortgage was indivisible, that the entire joint family property was shown in the application to the Debt Relief Court and that the decree-holder could not proceed against the respondents 2 to 5 even though it were held that Raoji did not make the

application as the 'karta' because there did not remain any debt to be satisfied in view of the order of the Debt Relief Court under S. 10(4) of the Relief of Indebtedness Act. Reliance was placed on — 'Rajeshwar Viswanath v. Madhao Moreshwar', 1952 Nag LJ 391 (B). The learned Judge did not give a finding that Raoji was the 'karta' and had applied as such.

(7) In appeal it was held by the learned Singie Judge that Raoji must be presumed to have made the application as manager of the joint Hindu family on behalf of himself and his sons though it was not so stated in the application. Reliance was placed on — 'Venkatanarayana v. Venkata Somaraju', AIR 1937 Mad 610 (FB) (C). It was therefore held that the sons could take advantage of the order under S. 10(4) of the Relief of Indebtedness Act.

(8) As already stated, the alienation was for payment of antecedent debts incurred by the father & could be enforced against the entire joint family property under the pious-obligation rule. If the suit had been brought only against the father, the decree would have been binding on the sons; and they could not have resisted the suit for possession by the auction-purchaser if the mortgage was proved to have been executed for payment of antecedent debts. They could not impugn the decree merely on the ground that they were not made parties to the suit. — 'Trimbak Raoji v. Lonkaran', AIR 1948 Nag 324 (D), and —'Shankarrao v. Vinayak', AIR 1951 Nag 307 (E); and could not claim redemption without setting aside the auction sale: — 'Gangaram v. Butrusao', AIR 1952 Nag 202 (F). It was in order to obviate a second suit and to enable the sons to save the property by redeeming the mortgage that they were joined as parties under O. 34, R. 1, Civil P. C. Under these circumstances, the debt essentially remains the debt of the father and the sons do not become co-debtors. All that is claimed against the sons is the liability of their undivided interest for satisfaction of the debt of the father under the pious obligation rule. Their liability under that rule is conditional on the debt being due by the father. If by operation of some law, the debt is deemed to be satisfied, there remains no debt for the recovery of which the interest of the sons can be sold.

(9) If, for example, the father had applied to the Debt Relief Court before the institution of the mortgage suit and obtained a discharge under S. 10(4) of the Relief of Indebtedness Act, the mortgagee could not have obtained a decree against the undivided interest of the sons in the joint family property under the pious-obligation rule because there is no pious obligation to pay a debt which cannot be recovered from the father. The fact that the application was made after the final decree for sale was passed ought to make no difference. The liability of the son is derivative and continues so long as the father's liability subsists. The son is not jointly liable with his father nor is his liability joint and several as understood in the English law. — 'Narayanan Chettiar v. Veerappa Chettiar', AIR 1917 Mad 989 (G), — 'Rengaswami v. Sivaprakasam', AIR 1941 Mad 925 (FB) (H), and — 'Mulchand v. Jairamdas', AIR 1935 Bom 287 (I).

(10) The matter can be looked at from another angle. Raoji was undoubtedly the 'karta' at the time of the mortgage suit. The learned counsel for the appellant has drawn our attention to the fact that Raoji did not represent the minor sons in the mortgage suit and in the final decree proceedings. Plaintiff had proposed respondent No. 2 as guardian for the minor respondents 4 and 5; but he having declined to act, the court reader was appointed. The learned Counsel has not offered any explanation for the omission to propose Raoji as guardian ad litem. The plaintiff did not propose Raoji as guardian ad litem evidently because the minor's interests were adverse to those of Raoji so far as the liability of the sons under the pious-obligation rule and the binding character of the mortgage were concerned. No doubt, there is no direct evidence that he was the 'karta' when he made the application to the Debt Relief Court and his plea in the execution proceedings was vague; but his plea that the order of discharge precluded the decree-holder from executing the decree even against the interests of the sons in the mortgaged property can mean either that he was the 'karta' or that it was his own debt.

In the circumstances of the case the decree-holder should have pleaded that there was disruption of the joint family and that Raoji had ceased to represent it. It cannot be presumed that there was separation between the father and the minor sons. The learned Counsel did not say even before us that there was in fact a disruption of the joint family. All that he says is that the decree-holder could have pleaded that there was a disruption. It is noteworthy that Raoji had given in the Debt Relief proceedings all the joint family property excluding that already sold in execution of this mortgage decree. The decree-holder did not there plead that it did not belong to him exclusively or that the application by one co-mortgagor was incompetent. All this indicates that the vague plea did not cause any prejudice to the decree-holder.

(11) It is not disputed that the decree-holder is not entitled to execute the decree if it is held that Raoji made the application as manager. We are in respectful agreement with the learned Single Judge in holding that under the circumstances it must be presumed that Raoji made the application as 'karta' of the joint Hindu family on behalf of himself and his sons though it was not formally so stated in the application. — 'Venkatanarayana v. Somaraju', (C), (cit. sup.).

(12) The appeal therefore fails and is dismissed with costs. Counsel's fee Rs. 100/-.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 NAGPUR 209 (Vol. 41, C.N. 67)

HIDAYATULLAH AND
R. KAUSHALENDRA RAO JJ.

Mohamadali Fakruddin and another, Appellants v. Gokulprasad Lalaram and another, Respondents.

Second Appeal No. 73 of 1953, D/- 10-9-1953, from appellate decree of Dist. Judge, Durg at Rajnandgaon, D/- 10-1-1953.

(a) Houses and Rents — Madhya Pradesh Rent Control Appeals (Validation) Act (28 of 1951), S. 3 (2) — What sub-section cures.

All that sub-section (2) cures is the absence of an order of transfer as required by sub-clause (2) of Cl. 21-A of the Rent Control Order but not the absence of authority under sub-clause (1) of that clause. (Para 7)

(b) Interpretation of Statutes — Preamble — (Civil P. C. (1908), Preamble).

It is true that the preamble of a statute is the key to its interpretation but the intention of the Legislature is not necessarily to be gathered from the preamble taken by itself. In fact the intention of the Legislature can only be gathered from the Act taken as a whole. The preamble is conclusive as to the facts which operated on the mind of the Legislature. It indicates the occasion and the reason for the enactment. But if the enacting part is clear and unequivocal, the preamble can neither restrict nor enlarge the scope of the enacting provision. (Paras 10, 11)

Anno: Civil P. C., Preamble N. 10 Pt. 1.

(c) Houses and Rents — Madhya Pradesh Rent Control Appeals (Validation) Act (28 of 1951), S. 3 (2) — Order passed by officer not authorised under Cl. 21-A (1) of Rent Control Order — Order is not validated. Second Appeal No. 821 of 1951, D/- 10-4-1952 (Nag), Overruled.

The function of the preamble is to clear any ambiguity in the enacting part but not to create it. There is no ambiguity in S. 3 until the preamble is brought into the discussion. The provision must therefore be construed according to its plain meaning without recourse to the preamble. There is therefore no warrant for holding that S. 3 (2) has the effect of validating an order passed by an officer not authorised to pass it under Cl. 21-A of the Rent Control Order. Second Appeal No. 821 of 1951, D/- 10-4-52 (Nag), Overruled. (Paras 12 and 13)

R. S. Dabir, V. M. Kulkarni and Kumari Rama Gupta, for Appellants; V. L. Prabhune and G. S. Padhye, for Respondents.

CASES REFERRED: Paras

(A) Misc. Petn. No. 51 of 1950, D/- 26-2-1951 (Nag) 2

(B) Second Appeal No. 821 of 1951, D/- 10-4-1952 (Nag) 4

(C) (V35) AIR 1948 Nag 199: ILR (1947) Nag 579: 49 Cri LJ 230 10

(D) (1828) 108 ER 863: 7 B & C 643 10

(E) (1827) 31 RR 566 11

(F) (1843) 114 ER 917: 4 QB 314 11

(G) (1806) 103 ER 49: 7 East 128 11

(H) (1873) 42 LJMC 137 11

(I) (1931) 1931 AC 126 12

JUDGMENT: This second appeal is by the plaintiffs in a suit for ejectment of their tenant and for the recovery of arrears of rent at Rs. 38/- per mensem. The first respondent (hereinafter called the respondent) was the tenant of the appellant and the second respondent was the sub-lessee of a part of the premises. The landlords moved the Rent Control Officer, Rajnandgaon, for permission to determine the tenancy and obtained it in rent control case no. 194 of 1948 (Exhibit P-3). Against that order the tenant preferred an appeal before the Sub-Divisional Officer, Rajnandgaon. The Sub-Divisional Officer by his order dated 19-1-1950 reversed the order of the Rent Control Officer (Ex. D-1).

(2) The landlord then invoked the powers of the High Court under Art. 226 of the Constitution for a writ of 'certiorari' for quashing the appellate order of the Sub-Divisional Officer on the ground that he was not empowered to hear the appeal. In — 'Kikabhai v. State of Madhya Pradesh', Misc. Petn. No. 51 of 1950, D/- 26-2-1951 (Nag) (A), one of us (Rao J.) sitting with Deo J. quashed the order of the Sub-Divisional Officer, on the admission that there was no order investing him with the powers of a Deputy Commissioner under Cl. 21-A(1) of the Rent Control Order. In the present appeal, the respondent has not disputed the position that the officer was not empowered under Cl. 21-A(1).

(3) The landlord served the defendant with a notice dated 15-12-1949 determining the tenancy with effect from the end of December 1949. The respondent moved the Deputy Commissioner after the decision of the High Court, but the Deputy Commissioner dismissed the appeal. After the order of the Sub-Divisional Officer was quashed, the appellants gave another notice to quit on 10-4-1951.

(4) The suit out of which the present appeal arises was instituted by the appellants on 3-9-1951. The respondent pleaded that the appellants could not terminate the tenancy because by virtue of the Madhya Pradesh Rent Control Appeals (Validation) Act, 1951, the order of the Sub-Divisional Officer setting aside the order of the Rent Control Officer was validated and therefore there was no proper notice to terminate the tenancy. This plea failed in the first Court but succeeded in the first appellate Court. The learned appellate Judge followed a decision of Choudhuri J. in — 'Champalal v. Fattulal', S. A. No. 821 of 1951, D/- 10-4-1952 (Nag) (B). Choudhuri J. held that S. 3 of the Act validated the appellate decisions in respect of appeals entertained under Cl. 21 of the Rent Control Order retrospectively. The learned Judge was of the view that on the passing of the above Act the order of the Sub-Divisional Officer, Rajnandgaon, permitting the plaintiff in that case to serve a notice to quit became valid.

(5) It is submitted for the appellants that the decision of the learned single Judge requires reconsideration. The contention is that neither sub-section (1) of S. 3 or sub-section (2) thereof has the effect of validating the order of the Sub-Divisional Officer, Rajnandgaon, after it was quashed by the High Court. The further contention is that in any case the Sub-Divisional Officer not having been authorized under sub-clause (1) of Cl. 21-A, sub-section (2) did not validate his order. The learned trial Judge accepted the first contention and his decision raises an important question which would cover a wide ground. But as in our view the second contention is unanswerable and must prevail, there is no need to go into the broader question whether the validating Act has the effect of "quashing the order of the High Court" as the learned counsel for the respondent put it.

(6) Sub-section (1) of S. 3 cures two defects: firstly the absence of a notification under sub-clause (1) of Cl. 21-A of the Rent Control Order authorising the Additional Deputy Commissioners, Nagpur and Jabalpur, to hear appeals under Cl. 21 of the said Order and secondly the absence of an order of transfer as required by sub-clause (2) of Cl. 21-A of the Order. But it is evident that sub-section (1) only applies to the appeals entertained by the Additional Deputy Commissioners, Nagpur and Jabalpur. It has therefore no application to the present case concerning an order of a Sub-Divisional Officer in the Durg district.

(7) Sub-section (2) of S. 3 runs thus:

"Notwithstanding the fact that in certain appeals under the Rent Control Orders entertained before the commencement of this Act by certain officers 'authorised under sub-clause (1) of Cl. 21-A' of the Rent Control Orders no order of transfer as required by sub-clause (2) of the said Cl. 21-A was made by the appropriate Deputy Commissioner, every such appeal entertained by

any such officer shall be and shall always be deemed to have been validly entertained and any decision given in any such appeal shall not be called into question in any Court merely on the ground that there was failure to comply with the said provision." (The underlining (here in ' ') is by us.)

It is clear that the appeal which under the statute is deemed to have been validly entertained is an appeal entertained by officers 'authorized under sub-clause (1)' of Cl. 21-A of the Rent Control Order, though no order of transfer as required by sub-clause (2) of Cl. 21-A might have been made by the appropriate Deputy Commissioner. So all that sub-section (2) cures is the absence of an order of transfer as required by sub-clause (2) of Cl. 21-A but not the absence of authority under sub-clause (1) of that clause. The meaning is clear and there is no equivocation.

(8) The learned counsel for the respondents contends that the intention of the Act is to be gathered from the preamble and a construction must be given to S. 3 to fulfil the object declared in the preamble. The preamble recites:

"Whereas it has been judicially determined that certain appeals disposed of by certain appellate authorities purporting to act under Cls. 21 and 21-A of the Rent Control Orders are void or inoperative for want of jurisdiction;

AND WHEREAS with a view to prevent the hardship to parties involved in such appeals it is expedient to declare that the said decisions shall be and shall always be deemed to have been valid;

It is hereby enacted as follows:"

(9) It would appear from the preamble that the object was to declare that the decisions in appeals disposed of by certain appellate authorities purporting to act under Cls. 21 and 21-A of the Rent Control Orders shall be and shall always be deemed to have been valid. But the enacting part does not reach the result aimed at in the preamble because cases outside Nagpur and Jabalpur are not governed by sub-section (1) and in those cases want of authority under sub-clause (1) of Cl. 21-A is not cured by sub-section (2).

(10) As observed by one of us (Hidayatullah J.) in — 'Om Prakash v. Emperor', AIR 1948 Nag 199 at p. 201 (C):

"It is true that the preamble of a statute is the key to its interpretation but the intention of the Legislature is not necessarily to be gathered from the preamble taken by itself. In fact the intention of the Legislature can only be gathered from the Act taken as a whole."

It was held by the Division Bench that the observations of Lord Tenterden C. J. in — 'Doe v. Brandling', (1828) 108 ER 863 at p. 870 (D) cited therein applied equally to those Acts where the preamble went further than the Act itself.

(11) In the present case the enacting part is not exactly co-extensive with the preamble and cannot be reconciled with it. The question is which is to prevail. The preamble is conclusive as to the facts which operated on the mind of the Legislature. It indicates the occasion and the reason for the enactment. But if the enacting part is clear and unequivocal, the preamble can neither restrict nor enlarge the scope of the enacting provision. 'Dean And Chapter of York v. Middleborough', (1827) 31 R R 566 at p. 581 (E) and — 'Fellowes v. Clay', (1843) 114 E R 917 at p. 930 (F) were cases where on a reading of the enactment a wider intention than that indicated in the preamble was given effect to. On the other hand, — 'Wilson v. Knubley', (1806) 103 E R 49 at p. 51 (G) and — 'Trustees of Market Harborough and Brampton Turnpike Trust v. Kettering Highway Board', (1873) 42 L J M C 137 (H) illustrate the class of cases where the preamble, though found to be more extensive than the enacting part, was held to be ineffective to extend the scope of the latter which was itself free from doubt.

(12) The function of the preamble is to clear any ambiguity in the enacting part but not to create it. We find no ambiguity in S. 3 until the preamble is brought into the discussion. The provision must therefore be construed according to its plain meaning without recourse to the preamble: — 'Ellerman Lines Ltd. v. Murray', 1931 AC 126 at p. 148 (I).

(13) Having regard to the accepted canon of construction there is no warrant for holding that sub-section (2) has the effect of validating the order in question. Stated shortly, the order in question being not that of the Additional Deputy Commissioners, Jabalpur or Nagpur, is outside sub-section (1) of S. 3, and not being of an officer 'authorised' under sub-clause (1) of Cl. 21-A is not within the purview of sub-section (2) either.

(14) The appeal before Choudhuri J. was not contested and the learned Judge did not have the benefit of an argument on the other side which we have had in this case. Having considered the matter fully, we cannot but dissent with due respect from the wide proposition laid down by Choudhuri J. that S. 3 validated the decisions in respect of appeals under Cl. 21 independently of the question whether the officer hearing the appeal was authorized under sub-clause (1) of Cl. 21-A or not. That question is material in a case not governed by sub-section (1) but falling under sub-section (2) and the question was not considered by Choudhuri J.

(15) If the order of the Sub-Divisional Officer was not validated, as we hold it was not, then it is not disputed that a proper notice to terminate the tenancy was given by the appellants. That being the only point decided against the appellants, the appeal must succeed. We accordingly set aside the decision of the learned appellate Judge and restore that of the learned trial Judge. The appeal is allowed. The costs in the trial Court shall be as ordered there. Respondent no. 1 shall bear his own costs and pay those of the appellant in the first appellate Court as well as here.

(16) We cannot conclude this judgment without recording our appreciation of the very lucid and well-reasoned decision of the learned trial Judge. Though we have based our own decision on a much narrower ground than that given by the learned Judge, it is but proper that we should record what is due to him.

A/V.R.B. Appeal allowed.

A.I.R. 1954 NAGPUR 211 (Vol. 41, C.N. 68)

MUDHOLKAR J.

Abdul Rasid Abdul Gaffar and others, Appellants v. Rama Dhin and others, Respondents.

Misc. Second Appeal No. 156 of 1950, D/- 18-11-52, from order of Addl. Dist. J., Kanker, D/- 22-6-1950.

Civil P. C. (1908), O. 1, R. 8 and O. 22, R. 11 — Abatement of appeal instituted in representative capacity.

An appeal instituted in a representative capacity cannot abate merely because some of

the appellants died during its pendency and their legal representatives are not brought on record. (Para 4)

Anno: Civil P. C., O. 1, R. 8 N. 24.

Y. V. Jakatdar, for Appellants; R. M. Hazarnavis, for Respondent No. 1.

ORDER: This is an appeal from a decision of Shri J. P. Jain, Additional District Judge, Kanker, dismissing an appeal on the ground that it had abated.

(2) The appeal before the learned Additional District Judge was from a decree passed by the trial Court in favour of the plaintiff-respondents in their capacity as representatives of the Hindu community of Kanker and against the appellants in their capacity as representatives of the Muslim community of Kanker, directing the latter to deliver possession of a certain site to the former. It would appear that some of the defendant-appellants died during the pendency of the appeal before the learned lower appellate Court and their legal representatives were not brought on record within the time allowed by law. The learned Judge therefore held that the appeal had abated in toto and dismissed it.

(3) The point which is taken before me is that the suit out of which the appeal before the learned Additional District Judge arose was brought against the appellants in a representative capacity, that their appeal itself must be construed as one in a representative capacity and that therefore such an appeal cannot abate merely because some of the appellants died during its pendency and their legal representatives were not brought on record. It is said on behalf of the plaintiff-respondents that the appellants were not permitted to defend the suit in a representative capacity, that the procedure laid down in O. 1, R. 8, Civil P. C. was not followed by them and that therefore it cannot be said that they were sued in a representative capacity.

(4) I have perused the order sheets and the relevant material on record and I am satisfied that the appellants were permitted to defend the suit in a representative capacity, that they followed the procedure which was required by law and that therefore the appeal must be deemed to have been instituted in a representative capacity. Such an appeal cannot obviously abate merely because some of the appellants died during its pendency and their legal representatives are not brought on record. Indeed, when an appeal has been instituted in a representative capacity, the legal representatives of deceased appellant have no right to be brought on record in the appeal at all. In the circumstances, I hold that the dismissal of the appeal was contrary to law. I therefore set it aside and remit the appeal to the lower appellate Court for being heard and decided on merits.

(5) Costs of this appeal will abide the event. Counsel's fee Rs. 20/-.

B/V.R.B. Dismissal set aside.

A.I.R. 1954 NAGPUR 212 (Vol. 41, C.N. 69)

SEN AND BHUTT JJ.

Gajanan Maharaj Sansthan, Shegaon, Plaintiff-Appellant v. Ramrao Kashinath, Defendant-Respondent.

Second Appeal No. 502 of 1946, D/- 14-4-1953, from decree of Dist, J., Akola, D/- 27-2-1946.

(a) Hindu Law — Religious endowments — Religious institutions whether juridical person.

The status of an idol or a 'math' as a juristic entity has been sanctified by Hindu religious usage and has received judicial recognition. The question of religious institutions also depends upon the status that has been given to them by religious usage, and if the conditions which have transformed an idol or a 'math' into a juridical personality are present, there is no reason why the fiction of law applying to an idol or a 'math' should not be extended to their case. For, it is the intensity of the veneration behind a religious teacher that gives to the institution, founded in his name, spiritual animation. In the case of a temple, the building is obviously intended for the abode of a deity, and until the idol is consecrated, it is only a structure of brick and lime, devoid of life and soul; whereas, in the case of a Sansthan, the object associated with the religious teacher and installed in the institution, may itself symbolise the spirit of the sage and impart to it a spiritual existence. The religious instinct of the Hindus has, in this respect, remained untrammelled by the limitations of form and has given to consecrated objects the spirit of the sanctified sages with whom they are associated. It is immaterial whether the faith which sees in the idol of sage the image of God is right or wrong. All that is necessary to give the institution a legal entity is the strength and genuineness of the religious faith:

Held that the sansthan at Shegaon consists of a temple in which the image of Shri Gajanan Maharaj is installed as a divine entity and is being worshipped as such. The Sansthan is on par with a Hindu temple in which an idol is installed and has accordingly the same juristic personality which an idol is recognised to possess. Case law referred. (Paras 8, 9, 11, 12)

(b) Hindu Law — Religious endowments — Religious institutions — Position of a manager.

As in the case of an idol, the plaintiff Sansthan can only act through a person although it has a juristic entity. The position of the Manager of such an institution is analogous to that of the next friend of a minor. A suit brought by him on behalf of the Sansthan is not governed by O. 22, R. 3, Civil P. C. which applies to a case of a plaintiff who is suing in his personal capacity and is not applicable to the case where the plaintiff has a perpetual existence, e.g. an idol. The suit cannot abate on account of his death, and either under O. 22, R. 10 or O. 32, R. 10, Civil P. C. the proper course is to order substitution in place of the deceased person. (Paras 13 and 15)

(c) Limitation Act (1908), Arts. 120, 124 — Suit for possession of an office of Shebait.

Where the defendant has taken possession of the property of the Sansthan in assertion of his claim to be the exclusive manager although the suit was framed as one for possession against a trespasser, the suit was really for possession against a 'de facto' manager for the office of Shebait with appurtenant rights of possession and management and the office not being hereditary, the suit was governed by Art. 120, and not Art. 124. 19 Cal 776; 26 Mad 113; 37 Cal 263, Ref. (Para 23)

Anno: Limitation Act, Art. 120 N. 33 Pts. 2, 3; Art. 124 N. 4.

K. G. Chendke, for Appellant; S. N. Kherdekar, for Respondent.

CASES REFERRED: Paras

(A) (V15) AIR 1928 Lah 375: 9 Lah 588 8
(B) (V21) AIR 1934 Nag 207 (2): 31 Nag LR 15 8
(C) (V29) AIR 1942 Cal 99: ILR (1941) 2 Cal 477 8
(D) (V9) AIR 1922 PC 123: 44 Mad 831 (PC) 10
(E) (V2) AIR 1915 Mad 461: 25 Ind Cas 597 13
(F) (V15) AIR 1928 Pat 168: 106 Ind Cas 540 13
(G) (V20) AIR 1933 Cal 508: 144 Ind Cas 768 13
(H) (V19) AIR 1932 Cal 783: 139 Ind Cas 123 14
(I) (V9) AIR 1922 Mad 402: 45 Mad 703 14
(J) (V13) AIR 1926 Mad 540: 92 Ind Cas 520 14
(K) (V17) AIR 1930 All 348: 123 Ind Cas 376 15
(L) ('92) 19 Cal 776 23
(M) ('03) 26 Mad 113 23
(N) ('10) 37 Cal 263: 23 Ind Cas 419 23

JUDGMENT: This is plaintiff's second appeal arising out of a suit for possession and mesne profits.

(2) The plaintiff is Shree Gajanan Maharaj Sansthan of Shegaon which is a religious institution. The suit was brought by it through Rao Saheb R. K. Patil as manager. There is a similar institution at Mudgaon styled 'Shree Gajanan Maharaj Sansthan of Mudgaon'. Mudgaon Sansthan was initially managed by one Jagannath Makkalal and later by Kashinath Baliram. Defendant is the son of Kashinath Baliram.

(3) Mudgaon Sansthan was established some time in 1910 A.D., Shegaon Sansthan being an older institution. One Zamsingh Rajput dedicated to Mudgaon Sansthan by a registered deed of endowment, Ex. P-5, dated 4-2-1910, certain properties mentioned in Cls. (A), (B), (C), (E) and (F) of para. 3 of the plaint. Later, one Beharilal Onkarlal Kalal dedicated to the Sansthan one field mentioned in Cl. (D) by a deed, Ex. P-6, dated 3-5-1928. These are the properties which form the subject-matter of the suit.

(4) The case of the plaintiff was that Mudgaon Sansthan is a branch of the main Sansthan at Shegaon, and was founded at the request of the people residing in Mudgaon. Jagannath Makkalal was appointed manager of the branch Sansthan by the Deosthan at Shegaon which later appointed Kashinath Baliram as manager in 1921-22. Defendant is said to have taken forcible possession of Mudgaon Sansthan properties after the demise of his father Kashinath Baliram on 20-5-1936. The suit was accordingly filed for possession of the said properties, for recovery of Rs. 900/- as mesne profits for the years 1941-42, 1942-43 and 1943-44, and for future mesne profits. The date of the institution of the suit is 13-9-1944.

(5) The defendant denied that Mudgaon Sansthan is a branch of the Deosthan at Shegaon. According to him, it was founded as an independent institution by Zamsingh Rajput who dedicated certain properties for its upkeep and appointed Jagannath Makkalal as the manager. Kashinath Baliram is said to have been appointed manager by Jagannath Makkalal in the year 1914 A.D., who later appointed the defendant in his place by the 'Vyavastha Patra', Ex. D-10, dated 17-5-1937. Defendant thus denied that he was a trespasser. He also denied that the plaintiff was a juridical entity and had any right of suit or that Rao Saheb R. K. Patil was its duly appointed manager and was entitled to institute the suit on its behalf. He further contended that the suit was barred by limitation.

(6) The trial Court dismissed the suit holding that the Mudgaon Sansthan was not a branch of the Deosthan at Shegaon, and that the plaintiff was not a juridical person and as such was not entitled to maintain the suit. On other points it held that the suit was not barred by limitation, that the defendant's appointment as manager was not valid, and that Rao Saheb R. K. Patil was the manager of the Shegaon Sansthan and was competent to maintain the action on its behalf i.e. if it was a juridical entity. The appeal to the Court of the District Judge, Akola, was dismissed on the short ground that Mudgaon Sansthan was not proved to be founded as a branch of the Deosthan at Shegaon.

(7) During the pendency of the present appeal, Rao Saheb R. K. Patil died on 18-5-1948 and an application was made on 27-7-1931 for substitution of Purushottam Hari Patil in his place. The application is supported by an affidavit which has not been controverted. It is, however, contended on behalf of the respondent that the application is barred by limitation and as such the appeal has abated. On the other hand, it is urged on behalf of the appellant that since the plaintiff is a juridical person, no question of abatement arises, and that as the application has been made before the hearing of the appeal, there is no bar to its acceptance.

(8) We have heard the application and the appeal together since some of the points are common. There is no direct authority for the question whether an institution as Shree Gajanan Maharaj Sansthan of Shegaon is a juridical person. The status of an idol or a 'math' as a juristic entity has been sanctified by Hindu religious usage and has received judicial recognition. In — 'Thakardwara Pheru Mal, Amritsar v. Ishar Das', AIR 1928 Lah 375 (A), it has been observed:

> "While an idol, as well as, a 'math' has a judicial status in the sense of being a juridical person by reason of the judicial recognition of Hindu religion and custom on the point, a temple (Thakardwara), in which the idol is deposited and which is merely a religious building or a building for the performance of religious ceremonies, is not a juridical person."

This ruling, while recognising the status of an idol or a 'math' as a juridical person, has denied it to a temple in which no idol is installed, and accordingly the suit instituted on behalf of the temple was held to be not maintainable. This ruling was cited with approval in — 'Jamboodas v. Chawre Digambar Jain Boarding', AIR 1934 Nag 207 (2) (B) in which a suit filed on a promissory note by the Secretary of the respondent institution, which was founded to help the cause of education, was held to be bad. The peculiar status of a Hindu idol was also recognised in — 'Tarit Bhusan v. Sridhar Salagram', AIR 1942 Cal 99 (C), and it was held that a Shebait of the idol is only its manager in law.

(9) The case of a temple or a secular institution, however, stands on a different footing. They are 'per se' only inanimate objects which, in the eye of law, are incapable of holding property and acting for its protection. In their case, only the body of persons in whom either the ownership or management of the property vests, can act in a Court of Law. The question of religious institutions, however, depends upon the status that has been given to them by religious usage, and if the conditions which have transformed an idol or a 'math' into a juridical personality are present, we see no reason why the fiction of law applying to an idol or a 'math' should not be extended to their case.

(10) Indian genius has evolved several forms of religious institutions which are unknown to other juristic conceptions. Even the principles of Hindu and Mahommedan trusts widely differ from the juridical conceptions on which the English Law is based. It has been observed in Law of Endowments by A. Ghose, 1938 Edition, on p. 41 that "it would be a serious inroad into their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps, where they are absolutely, so to speak, 'in pari materia'. On p. 42, the learned author observes:

"Under the Hindu law the image of a deity is, as has been aptly called, a 'Juristic entity', vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity."

The matter has been authoritatively stated by their Lordships of the Privy Council in — 'Vidya Varuthi v. Balusami Ayyar', AIR 1922 PC 123 at p. 126 (D) thus:

"It is also to be remembered that a 'trust', in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple. (J. G. Ghose: 'Hindu Law', p. 276). Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system to 'Brahmans, Goswamis, sanyasis', etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a 'juristic entity', vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity, and gifts are made to them 'eo nomine'.

In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of mutt were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. 'When the gift is directly to an idol or a temple the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution'." (Underlining (here in ' ') is ours).

(11) It appears from the above that even 'maths' which are in reality only colleges and monasteries have been given a juristic entity, because of their being founded under spiritual teachers of recognised sanctity. It is the intensity of the veneration behind a religious teacher that gives to the institution, founded in his name, spiritual animation. In the case of a temple, the building is obviously intended for the abode of a deity, and until the idol is consecrated, it is only a structure of brick and lime, devoid of life and soul; whereas, in the case of a Sansthan, the object associated with the religious teacher and installed in the institution, may itself symbolise the spirit of the sage and impart to it a spiritual existence. The religious instinct of the Hindus has, in this respect, remained untrammelled by the limitations of form and has given to consecrated objects the spirit of the sanctified sages with whom they are associated.

(12) The Sansthan at Shegaon, is admittedly a religious institution. In the plaintiff's rejoinder dated 5-1-1945 it was noted that the institution consists of a temple in which the image of Shri Gajanan Maharaj is installed. It was also stated that:

"Shri Gajanan Maharaj was a great saint, who had renounced the world and 'whose devotees regarded him as incarnation of God and who was worshipped as such'. After the demise of Shri Gajanan Maharaj his devotees first installed his Padukas and worshipped the same. After a short time a big temple was erected over the 'Padukas' (पादुका) and an image has also been installed there. All the endowments are made to Shri Gajanan Maharaj whose worship is regularly performed according to rules made by the Panchas." (Underlining (here in ' ') is ours).

Rao Saheb R. K. Patil (P. W. 1) has testified to the installation of the 'padukas' and the image of Shri Gajanan Maharaj in the temple in which there is also an idol of Lord Ram in front of which the 'padukas' are kept. Ratansa (P. W. 2) speaks of the installation of the 'padukas' and the image of Shri Gajanan Maharaj, which are worshipped three times a day by the Pujari. This evidence has not been controverted by the defendant. It thus appears that the idol of Shri Gajanan Maharaj has been consecrated as a divine entity and is being worshipped as such. In these circumstances, the Sansthan is on par with a Hindu temple in which an idol is installed and has accordingly the same juristic personality which an idol is recognised to possess. We are obviously not concerned with the question whether the faith which sees in the idol of Shri Gajanan Maharaj the image of God is right or wrong. All that is necessary to give the institution a legal entity is the strength and genuineness of the religious faith. Such a faith obtains in the present case.

(13) As in the case of an idol, the plaintiff Sansthan can only act through a person although it has a juristic entity. Rao Saheb R. K. Patil was the manager of this Sansthan and had brought the action on behalf of the Sansthan. His position was, therefore, analogous to that of the next friend of a minor. Such a suit is not governed by O. 22, R. 3, Civil P. C. The appropriate provision is O. 32, R. 10(1), under which, where the next friend of a minor retires or dies, the Court is required to stay further proceedings until the appointment of a next friend in his place. In — 'Venkateswara v. Ravunni Nair', AIR 1915 Mad 461 (E), it has been observed that on the death of a minor plaintiff's next friend the suit does not abate and if an order of dismissal is passed it is invalid. See also — 'Jagernath v. E. I. Ry. Co.', AIR 1928 Pat 168 (F) and — 'Pulin Chandra v. Aminmiah', AIR 1933 Cal 508 (G). The position of Rao Saheb R. K. Patil being analogous to that of the next friend of a minor, the suit cannot abate on account of his death, and an appointment has to be made in his place.

(14) Coming to the question of O. 22, Civil P. C., it has been observed in — 'Keshab Rai v. Jyoti Prosad', AIR 1932 Cal 783 (H):

"Rules 2, 3 and 4 relate to cases of devolution of interest on the death of a plaintiff or defen-

dant when such plaintiff or defendant was suing or being sued respectively in his personal capacity. These rules do not apply when a suit is brought by or against a person in his representative character, e.g., Mohunt suing for a diety; in such a case R. 10 applies."

Similar view has been expressed in — 'Sunderesan Chettiar v. Visvanadha Pandarasannadhi', AIR 1922 Mad 402 (I), thus :

"Under O. 22, R. 3 a legal representative could only ask for such amendment as the deceased or the person, whose representative he is, could have asked for. But where an institution or a suit is represented at different stages of the suit by different representatives, one not claiming under the other, the rule applicable is R. 10 of O. 22 and not R. 3."

In — 'Thirumalai v. Arunachella', AIR 1926 Mad 540 (J), it was held :

"Where some of the trustees die or retire during the pendency of a suit and new persons are elected to fill their place, it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under O. 22, R. 10, notwithstanding the question of limitation."

The case of trustees who bring an action in their own name is stricter than the case of a person who avowedly acts for an institution or an idol which cannot physically act for themselves. In their case the appropriate provision is O. 32, R. 10; and even if O. 22, R. 10 is applied, no question of abatement of the suit or of the bar of limitation can arise under the law.

(15) Reliance is placed by the respondent on — 'Mt. Moti Bala Debi v. Satyanand', AIR 1930 All 348 (K), for the contention that Purushottam Hari Patil should be deemed to be a legal representative of Rao Saheb R. K. Patil, and accordingly O. 22, R. 3 is applicable. That was a case in which a preliminary decree on a mortgage bond was passed against Kalkanand Swami who was the Mahant of Shrine. On his death an application was made to bring on record Mahant Satyanand as his legal representative. He raised the plea that the mortgage was of an endowed property and as the debt was not supported by legal necessity, the mortgage was infructuous. This contention was upheld by the Courts below and final decree was refused. In second appeal it was contended for the plaintiff that the provisions of O. 34, R. 5 were imperative, and as no payment was made, the Courts were bound to make the decree final. The High Court held that O. 34, R. 5 was subject to O. 22, R. 4(2) and as the legal representative was at liberty to take any defence which might be appropriate to his character as a representative of the deceased defendant, he was entitled to challenge the proceedings for a final decree.

It was observed in that case that either Mahant Satyanand was the legal representative of Kalkanand Swami, in which case he was entitled to contest the validity of the mortgage, or that he was not his legal representative, in which case the application for his substitution would not be maintainable. Thus ruling does not lay down that on the death of a person who was acting on behalf of the institution in an action, one on whom his status devolves and who desires to continue the proceedings, should be deemed to be his legal representative in the sense that if an application is not made for his substitution within the time limited by law for the purpose, the suit shall abate. Obviously O. 22, R. 3 applies to a case of a plaintiff who is suing in his personal capacity and is not applicable to the case where the plaintiff has a perpetual existence, e.g., an idol, but on account of its physical incapacity, an action has to be brought by another on its behalf. In such a case, either under O. 22, R. 10, or O. 32, R. 10, the proper course would be to order substitution in place of the deceased person.

(16) In view of the above, the application of Purushottam Hari Patil is allowed and it is directed that he be substituted in place of Rao Saheb R. K. Patil.

(17) Turning to the merits of the appeal, the main point for consideration is whether Mudgaon Sansthan is a branch of the Deosthan at Shegaon. The following points were raised by the learned counsel for the appellant in support of the contention that Mudgaon Sansthan is a branch institution.

"(i) That the gift dated 4-2-1910 by Zamsingh Rajput was in favour of Shegaon Sansthan.

(ii) That in or about the year 1913 A. D. a question arose regarding the management of Mudgaon Sansthan, when on 21-3-1913 the residents of the village sent the letter, Ex. P-8, to Hari Kukaji Patil President of the Managing Committee of Shegaon Sansthan, requesting him to appoint a manager for Mudgaon Sansthan. Accordingly Hari Kukaji Patil had gone to Mudgaon and appointed Kashinath Baliram as the manager.

(iii) That after the death of Kashinath Baliram, a meeting of the Managing Committee of Shegaon Sansthan was held on 12-5-1937 in which a Committee of 7 persons, including the defendant, was formed for the purpose of management of Mudgaon Sansthan, and that it was only on 30-12-1937 when Rao Saheb R. K. Patil went to Mudgaon to see the management of the institution that the defendant asserted that he would manage the Sansthan singly as was done by his father.

(iv) That the superior proprietary rights of Shegaon Sansthan were acknowledged by Kashinath Baliram and after him by the defendant, by sending annually Rs. 50/- to Shegaon Sansthan on account of the lease money of the fields."

(18) In this connection, the plaintiff's pleading has to be properly appreciated. In the plaint it is nowhere alleged that the property was gifted by Zamsingh Rajput or later by Beharilal Onkarlal, to Shegaon Sansthan. On the other hand, it was admitted in para 2 thereof that the properties were gifted by them to Mudgaon Sansthan. The present contention that the gift-deed, Ex. P-5, dated 4-2-1910 executed by Zamsingh Rajput, really intended that the dedication was made to Shegaon Sansthan and not to Mudgaon Sansthan, is, therefore, contrary to the pleading on the point and cannot be entertained. However, scrutinizing the document itself, we do not find in it anything from which an intention to make the endowment in favour of Shegaon Sansthan can be unequivocally inferred. In the preamble of the document it is no doubt stated that the deed was executed in favour of Shri Gajanan Maharaj Awalia Sansthan Shegaon, but this is qualified by the words "at present new Sansthan, mouza Mudgaon, taluq Akot", indicating thereby that the donee was the new Sansthan which was founded at Mudgaon. Similarly, in the last para the term "Maha-

raja's Sansthan" to whom the property is said to have been gifted refers, in the context, to Mudgaon Sansthan and not to the Sansthan at Shegaon. This also appears from the fact that Shegaon Sansthan is mentioned separately in this para. So far as the deed executed by Beharilal Onkarlal, Ex. P-6, is concerned, it is clear and unambiguous, and shows that the dedication was made to Mudgaon Sansthan. The present contention of the appellant that the gift of the properties in suit was made to Shegaon Sansthan is not, therefore, tenable.

(19) There is no evidence on record that Mudgaon Sansthan was founded by the Deosthan at Shegaon on the request of the residents of the village. Rao Saheb R. K. Patil (P. W. 1) admitted in cross-examination that the Sansthan at Mudgaon was established by Zamsingh Rajput who created an endowment for its upkeep by dedicating his property. That the Sansthan was founded by Zamsingh in his own house where he installed the 'padukas' of Shri Gajanan Maharaj was also admitted by Shankar Rao (P. W. 4). This demolishes the contention of the plaintiff that the Sansthan at Mudgaon was established as a branch institution. In the last para of the deed of endowment, Ex. P-5, it is doubtless mentioned that the main Sansthan of Shri Gajanan Maharaj is at Shegaon, but this does not mean that Mudgaon Sansthan is only its branch. The founder had desired that Mudgaon Sansthan should be run on the lines of the Deosthan at Shegaon and it is in this connection that the latter has been described as the main Sansthan. This description only signifies that the chief Sansthan was at Shegaon, on whose pattern Mudgaon Sansthan was founded and was intended to be managed and maintained.

(20) The first manager was Jagannath Makkalal. Although he is described in the deed of endowment, Ex. P-5, as having been authorised by the people of Shegaon to do the management, Rao Saheb R. K. Patil admitted that he was appointed by Zamsingh Rajput. It is likely that some persons of Shegaon were consulted by Zamsingh before his appointment, but that alone would not mean that Shegaon Sansthan owns the Shrine of Mudgaon and has the right to possess and manage its properties.

(21) It was also contended that Kashinath Baliram was appointed manager by the Sansthan at Shegaon on the letter of request, Ex. P-8, of the residents at Mudgaon, and this indicates that Mudgaon Sansthan is only a branch institution. The letter only described the deplorable state of management of the Sansthan at Mudgaon and requested the good offices of Hari Kukaji, who was President of the Managing Committee of the Sansthan at Shegaon, to make proper arrangements for its orderly management. This again does not indicate that the Sansthan at Mudgaon was founded as a branch institution. However, the evidence to prove that Hari Kukaji had appointed Kashinath Baliram as the manager is too meagre and unreliable. No witness examined by the plaintiff except Shankar Rao (P. W. 4), pretended to know of the appointment of Kashinath Baliram as the manager. Rao Saheb R. K. Patil did not even know whether he began to manage the institution before or after the letter, Ex. P-8, was received at Shegaon.

There is also no record of his appointment in the registers of Shegaon Sansthan. The evidence of Shankar Rao is exaggerated and, therefore, not reliable as he goes to the length of saying that it was Hari Kukaji and nobody from Mudgaon who looked after the Sansthan, which was not even the plaintiff's own case. In this connection, not much can be made of the fact that Kashinath Baliram used to remit Rs. 50/- annually to the Sansthan at Shegaon out of the lease money, and once, on 3-3-1937, this amount was also sent by the defendant for the year 1935-36. (See Ex. P-7). Nothing more can be inferred from this fact than that out of veneration for the Shegaon Shrine, some donation was being made from out of the usufruct of the fields dedicated to Mudgaon Sansthan. It does not lend to the interpretation that any superior rights of Shegaon Sansthan were thereby recognised.

(22) On the death of Kashinath Baliram, the defendant had admittedly assumed charge of the Mudgaon Shrine without reference to the plaintiff. An attempt was made at the stage of evidence to prove that on 12-5-1937 a committee of management was formed by Rao Saheb R. K. Patil, which included the defendant also as one of its members. This was not the pleading on the point. It was, however, admitted that on 30-12-1937, when Rao Saheb R. K. Patil had again been to the village, the defendant had repudiated the authority of the alleged Committee and claimed the right to manage the Shrine singly. Exhibit P-9 is the notice which was circulated on the occasion and bears no specific person's signature. The description of Mudgaon Sansthan in it as a branch of the Sansthan at Shegaon does not, therefore, bind the defendant. The events subsequent to the demise of Kashinath Baliram, also, do not, therefore, lend support to the contention that Mudgaon Sansthan was founded as a branch institution over which the Shegaon Shrine has dominion. We, therefore, confirm the finding of the lower appellate Court on the point.

(23) This disposes of the appeal, and accordingly it is not necessary to decide the question of limitation. We may, however, notice that although the suit was framed as one for possession against a trespasser, it has been found that the defendant was working as Shebait adversely to the plaintiff since some time after the death of his father. The defendant claimed to have assumed management by virtue of the 'Vyavastha Patra', Ex. D-10, dated 17-5-1937, executed in his favour by Jagannath Makkalal. This was doubtless an invalid appointment as Jagannath Makkalal is not proved to have had power to nominate or appoint his successor. However, this means that the defendant had taken possession of the property of the Sansthan in assertion of his claim to be the exclusive manager, and the suit is really for possession against a 'de facto' manager for the office of Shebait with appurtenant rights of possession and management. As the office is not hereditary, the suit is governed by Art. 120, and not Art. 124, of Sch. 2, Limitation Act. (See — 'Jagannath Das v. Birbhadra Das', 19 Cal 776 (L); — 'Kidambi Ragava Chariar v. Tirumalai Asari Nallur Ragavachariar', 26 Mad 113 (M); —'Khajeh Salimullah v. Abul Khayar M. Mustafa', 37 Cal 263 (N)). The same result would follow even if it is held, as stated by Rao Saheb R. K. Patil, that the defendant had taken over management on 30-12-1937, as the suit was filed on 13-9-1944, more than 6 years from that date.

(24) The result is that the appeal fails and is dismissed with costs.

B/H.G.P. Appeal dismissed.

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SINHA C. J. AND BHUTT J.

Mahadeosa Mokamansa, Applicant v. Deputy Commr., Amraoti and others, Non-Applicants.

Misc. Petn. No. 209 of 1953, D/- 11-9-1953.

(a) Municipalities — C. P. and Berar Municipalities Act (2 of 1922), Ss. 10(3) and 18(4) — Right of president to take part in proceedings under S. 10(3).

Section 10(3) which defines the composition of the Committee, contemplates only two main classes of members, viz., (1) elected members; (2) selected members. Neither the president nor the vice-president comes under any of the above categories of members. Section 18(4), therefore, creates a fiction in their favour. This sub-section creates a legal fiction, that is to say, that though neither the president nor the vice-presidents are in truth and in fact members of the committee they should be deemed in all cases 'to be members under this Act.' (Para 6)

But in the provisions of S. 18(4), which have placed the president and the vice-presidents on the same pedestal in so far as they are to be regarded as 'members under the Act', the Legislature did not intend that they should be treated, though actually they are not, as elected members for the purposes of the voting contemplated by S. 10(3) of the Act. If the Legislature had intended that the president and the vice-presidents shall be treated on the same footing and shall be equated with elected members, nothing was easier than to have added the word "elected" before the word 'members' in sub-section (4) of S. 18. (Para 15)

Hence, as S. 18(4) of the Act only gives the president the status of a member and not of an "elected member", he cannot take part in the proceedings under S. 10(3) for selection of members. (Para 11)

(b) Municipalities — C. P. and Berar Municipalities Act (2 of 1922), S. 18(4) — Legal fiction created by S. 18(4) — Duty of Court — (Interpretation of Statutes) — (Legal fiction).

Section 18(4) creates a legal fiction. Where the Legislature has created a fiction the Court has to investigate the question for what purposes the Legislature intended the fiction and to what length it could go. With respect to the law relating to the application of statutory fictions to facts, the Court has got in the first instance to determine what are the limits within which and the purposes for which the Legislature has created the fiction. This may be determined from the actual words used in creating that fiction, and those words must be given their literal and full effect, unless in doing so the purposes of creating the fiction are not achieved. AIR 1940 PC 167; AIR 1930 PC 54, Rel. on. AIR 1953 SC 244 (246), Ref. (Paras 6, 10)

(c) Municipalities — C. P. and Berar Municipalities Act (2 of 1922), S. 10(3) — President is not elected member.

The contention, that as the petitioner in this case is an elected president, elected by all the persons whose names appeared as voters on the electoral rolls of the municipality, he can be said to come within the purview of an elected member, has no force for the reason that the president also may be in certain contingencies a person appointed by the State Government. (Para 12)

(d) Interpretation of Statutes — Rules and provisions of Act.

Anomalies may exist in the Rules framed under an Act. But anomalies cannot control the construction to be placed on the provisions of the statute. (Para 17)

M. N. Phadke, for Applicant; T. P. Naik, Addl. Govt. Pleader (for Nos. 1 and 2) and N. B. Chandurkar and J. N. Chandurkar (for Nos. 4, 5 and 6), for Non-Applicants.

CASES REFERRED: Paras

(A) (V27) AIR 1940 PC 167: ILR (1940) 2 Cal 493 6
(B) (1952) 1952 AC 109 9
(C) (V40) AIR 1953 SC 244: 1953 Cri LJ 1094 (SC) 9
(D) (1881) 17 Ch D 746: 50 LJ Ch 657 9
(E) (V17) AIR 1930 PC 54: 54 Bom 216 (PC) 11

ORDER: This petition under Art. 226 of the Constitution is directed against the order of the Additional Deputy Commissioner, Morsi, respondent No. 2, by which he did not permit the petitioner to take part in the selection of members for constituting the Morsi Municipal Committee.

(2) The petitioner is the elected president of the Committee. In accordance with R. 19-A(1) of the Rules framed under Ss. 10(4), 13, 16(2) and 18(6), (hereinafter called the Rules), of Central Provinces and Berar Municipalities Act, 1922 (2 of 1922), (hereinafter called the Act), a notice, dated 13-6-1953, was sent to him by the Deputy Commissioner, Amravati, respondent No. 1, intimating to him that

"a meeting of all the elected members and elected president of the Morsi Municipal Committee, will be held on 25-6-1953, at 11 A.M. in the Municipal Office at Morsi for selection of 3 members under Cl. (b) of sub-section (3) of S. 10 and one more, if necessary, under sub-section (4) of S. 10 'ibid', to work on the Municipal Committee, Morsi".

Accordingly the petitioner attended the meeting, but when he began to take part in the selection of members, he was not permitted to do so by the Additional Deputy Commissioner, Morsi, who was appointed by the Deputy Commissioner, Amravati, as Chairman of the meeting. The impugned order is to the following effect:

"The President is present in the meeting convened for selection of members to-day under S. 10 (3)(b) of Central Provinces and Berar Municipalities Act, 1922 (2 of 1922). The members are to be selected by the elected members only and not by the President as well. Consequently the President is not entitled to participate in the selection of members and has been disallowed accordingly."

(3) As a result of the selection respondents Nos. 3, 4 and 5 were declared as members under S. 10 (3) (b) and respondent No. 6, under S. 10(4), of the Act. It is contended that the meeting was not validly constituted in so far as the president who entitled to take part in the proceedings was not permitted to do so. It is accordingly prayed that the Deputy Commissioner, Amravati, be directed to call a fresh meeting for the purpose of selection of members.

(4) Section 10, Central Provinces and Berar Municipalties Act, 1922, deals with the constitution of Committees and is reproduced below:

"10(1). There shall be established for each municipality a committee having authority over the municipality.

(2). Each committee shall consist of not less than five members and the total number of members and the number of members of each of the classes specified in sub-section (3) shall be fixed by rules made under this Act.

(3). Each committee shall be composed of
(a) selected members;
(b) selected members, in number not exceeding one-fourth of the total elected members, to be selected by single transferable vote by the elected members of the new committee from amongst persons residing in the municipality.

(4). In case the elected members do not include a Harijan, the total number of members to be selected under Cl. (b) of sub-section (3) shall be increased by such number as may be necessary to include a Harijan and the elected members shall select a Harijan immediately after the selection of the members under Cl. (b) of the said sub-section.

(5). In case the elected members fail to select a Harijan as provided by sub-section (4), the Provincial Government shall nominate a Harijan, as may be required, to be a member of the Committee.

(6). The Provincial Government may make rules under this Act regulating the mode or method of selection by single transferable vote, as the case may be, and time of election and selection of members of Committees."

Section 18(4) of the Act provides:

"The president and the vice-presidents shall 'in all cases' be deemed to be members under this Act." (Underlining (here in ' ' is ours).

The argument of the petitioner is that as he is deemed to be a member under the Act 'in all cases', he should also be deemed to be a member for purposes of Ss. 10(3)(b) and 10(4) of the Act and was, therefore, entitled to participate in the selection of members. As against this, it is contended by the respondents that as S. 18(4) of the Act only gives him the status of a member and not of an "elected member", he cannot take part in the proceedings for selection of members.

(5) The first act contemplated under the Act for the formation of a Committee is the election of members and president. If the voters fail to elect a president, the State Government is empowered to appoint a person who is eligible for election, selection or appointment as a member, to be the president under S. 18(3) of the Act. After the election of members, and the election or nomination, as the case may be, of the president, the results are notified under R. 18-A(1) of the Rules. The next step is for the president under R. 18-A (2) to appoint the vice-presidents within a period of seven days, failing which the State Government is entitled to appoint a vice-president under S. 18(3) of the Act. The result of the appointment of the vice-presidents is to be notified under R. 18-A(2), and thereafter the selection of members takes place under S. 10(3) in the manner prescribed in R. 19-A. If amongst the elected members there is no Harijan, sub-section (4) of S. 10 makes it obligatory to select a Harijan as a member. In case the elected members fail to select a Harijan as a member, the State Government is required under sub-section (5) of S. 10 to nominate a Harijan to be a member of the Committee.

(6) It will be observed from the above that the selection or nomination of a Harijan is an incidental matter and need not be further referred to. Section 10(3) of the Act which defines the composition of the Committee, therefore, contemplates only two main classes of members, viz., (1) Elected members; (2) Selected members. Neither the president nor the vice-presidents come under any of the above categories of members. Section 18(4), therefore, creates a fiction in their favour. This sub-section creates a legal fiction, that is to say, that though neither the president nor the vice-presidents are in truth and in fact members of the committee they shall be deemed in all cases 'to be members under this Act'. It is well settled that where the Legislature has created a fiction like the one in the instant case the Court has to investigate the question for what purposes the Legislature intended the fiction and to what length it could go. To use the language of their Lordships of the Judicial Committee of the Privy Council in — 'Radha Kissen v. Durga Prosad', AIR 1940 PC 167 at p. 170 (A):

"As the analogy only arises by legal fiction, it must be limited to the purposes indicated by the context, and cannot be given a large effect."

In that case their Lordships were considering the provisions of R. 53 of O. 21, Civil P. C. and held that the attaching decree-holder was the representative or agent of the original decree-holder for the limited purpose of executing the decree and that he was not in the position of an assignee of the decree who could be said to have acquired all the rights of the original decree-holder. In other words, their Lordships pointed out in that decision that the legal fiction must be limited to the words used by the Legislature in creating that fiction. To the argument urged before their Lordships that the Legislature intended to clothe the representative with all the rights of the holder of the attached decree their Lordships made the following observations at p. 170:

"It does not say that the attaching decree-holder will be 'deemed to be' the 'holder of the attached decree'. This would certainly have been a simpler way of stating the intention of the Legislature if it was to clothe the attaching decree-holder with all the rights of the holder of the attached decree as if he was his assignee."

(7) Applying the test indicated in their Lordships' observations quoted above, if the Legislature intended in the instant case to clothe the president or the vice-presidents with the rights of an elected member the simplest thing for it to say would have been that they shall be deemed to be elected members under the Act. The Act has made a distinction between members who are elected and those who are not, for certain limited purposes, viz., for the purposes of the selection contemplated by S. 10(3)(b) of the Act.

(8) But it has been argued that the Legislature has used the words 'in all cases' so as to emphasize that the president & the vice-presidents on being elected or appointed, as the case may be, shall enjoy all the privileges and be subject to all the obligations under the Act. We have, therefore, to look into the provisions of the Act to know what are those privileges and obligations.

(9) Before we deal with this aspect of the case it is convenient at this stage to notice the further argument urged on behalf of the petitioner that the Court should not hesitate to go to the farthest length to which the legal fiction may take it. In this connexion reliance was particularly placed on the observations of Lord Asquith of Bishopstone in — 'East End Dwellings Co., Ltd. v. Finsbury Borough Council', 1952 AC 109 at p. 132 (B):

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Those observations have been adopted by Mahajan J. in the recent decision of their Lordships of the Supreme Court in — 'State of Bombay v. Pandurang', AIR 1953 SC 244 at p. 246 (C). His Lordship made the following observations in the course of his judgment relying upon the dictum of Lord Justice James in 'Ex parte Walton; In re Levy', (1881) 17 Ch D 746 at p. 756 (D):

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. If the purpose of the statutory fiction mentioned in S. 15 is kept in view then it follows that the purpose of that fiction would be completely defeated if the notification was construed in the literal manner in which it has been construed by the High Court."

(10) As we understand the law relating to the application of statutory fictions to facts, the Court has got in the first instance to determine what are the limits within which and the purposes for which the Legislature has created the fiction. This may be determined from the actual words used in creating that fiction, and those words must be given their literal and full effect, unless in doing so the purposes of creating the fiction are not achieved.

(11) In — 'Commissioner of Income-tax, Bombay Presidency v. Bombay Trust Corporation, Ltd.', AIR 1930 PC 54 (E) their Lordships of the Judicial Committee of the Privy Council were dealing with the provisions of Ss. 42 and 43, Income-tax Act, 1922, which provided that in certain circumstances the agent of the assessee shall be deemed to be 'for all the purposes of this Act' the assessee. In dealing with those provisions their Lordships have made the following observations at p. 55:

".....when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were."

Applying the force of those words to the provisions of S. 18(4) of the Act in the instant case, the Legislature has provided that though in reality the president and the vice-presidents were not members of the committee they shall be treated as members in all cases in which the Act has made reference to 'members'. It is only to this extent that the Legislature has provided that the president's and the vice-presidents' privileges and obligations shall extend. Under S. 10 it is not every member but only the elected members who are clothed with the privilege of selecting members. If the privilege of membership accorded to the president and the vice-presidents is extended to the right to select the members as contemplated in S. 10(3), in our opinion, we shall be going beyond the legal fiction created by S. 18(4) of the Act.

(12) But it was further contended on behalf of the petitioner that as S. 10 dealing with the constitution of the municipal committee contemplates mainly two classes of members, viz., 'elected members and selected members' the Court must find a category in which the president or the vice-presidents would come. To this contention was added the further contention that as the petitioner in this case was an elected president, elected by all the persons whose names appeared as voters on the electoral rolls of the municipality, he could be said to come within the purview of an elected member. In our opinion this argument has absolutely no force for the reason that the president also may be in certain contingencies a person appointed by the State Government. Therefore in dealing with the question as to how far the fiction may extend we cannot lose sight of the fact that we have to determine the status of persons who may not be elected at all and that the fact that the petitioner in the instant case is an elected president does not add any additional force to the provisions of S. 18(4).

(13) Another reason why, in our opinion, the president has no place in the selection of the second category of members, called the selected members, is that by virtue of S. 18(4), which is the all-important provision on the construction of which the determination of this case depends, the president and the vice-presidents have been placed on exactly the same footing, and under S. 18(2) the vice-presidents have to be appointed by the president 'from amongst the members of the committee, or from other persons residing in the municipality' possessing the qualifications contemplated by the Act. This sub-section, therefore, predicates that members of the committee are something other than the president. This conclusion is reinforced by the terms not only of S. 18 but also of the added S. 18(A), which contemplate the independent existence of the committee apart from the president, and of the president apart from the committee. Upon the passing of a vote of no-confidence against the president he ceases to function, but not necessarily the committee: 'vide' the provisions of S. 18-A(3).

It is only when the committee is dissolved on the application of the outgoing president that a new election has to take place. In this connexion the following words of the statute 'in which case a fresh election of the committee and of the president shall be ordered' have a special significance, viz., that the election of the committee is a thing apart and distinct from the election of the president. The words of S. 18-A(4) also indicate that the president may remain and the committee dissolved and a fresh committee elected thereafter.

(14) The argument that all members enjoy equal privileges and are subject to the same disabilities or obligation under the Act, is to beg the question we have to determine in this case. In our opinion, the more correct way of putting the provisions of the Act would be to say that the elected members stand on a higher footing than the other members because the Legislature has in terms given the power to select the members, only to them and therefore it would be wrong to equate them with all members. Further, it may be pointed out that the term of office of the members of the committee is not the same as that of the president and the vice-presidents. The law contemplates that the vice-presidents shall hold office only so long as the president who appointed them holds his office; but it is conceivable under the provisions of the Act that these may go and the committee may remain. Therefore, the president and the vice-presidents shall be deemed to be members

only so long as they continue to hold their respective offices, and their terms, as already indicated, may be shorter or longer than the term of the committee itself. Hence, it is not correct to say that the president and the vice-presidents are under all circumstances equated with the committee.

(15) It is true that all the members elected, selected or nominated, as the case may be, have equal rights of voting in the meetings of the committee and other consequential privileges, and are subject to the same disabilities and enjoy the same protection afforded to members under the Act. The privileges referred to in Ss. 24, 24-B, 27, 28, 31, 32, 33, 34, and other provisions are instances of the privileges of members and the president. For their disabilities and obligations reference may be made to Ss. 22-B, 34-B, 45, 49 and other provisions. It is, however, only for those purposes that the provisions of S. 18(4) may be appealed to. To give any more extended meaning to S. 18(4) may lead to results not contemplated by the Act and to many anomalies.

If the members of all the categories aforesaid were equated for all purposes then it could be argued with the same plausibility that the vice-presidents would be equally entitled to make the selection of members under the provisions of S. 10(3) of the Act. But it has not been contended that that was a result intended by the Legislature in enacting S. 18(4). It follows, therefore, that in the provisions of S. 18(4), which have placed the president and the vice-presidents on the same pedestal in so far as they are to be regarded as 'members under the Act', the Legislature did not intend that they should be treated, though actually they were not, as elected members for the purposes of the voting contemplated by S. 10(3) of the Act. If the Legislature had intended that the president and the vice-presidents shall be treated on the same footing and shall be equated with elected members, nothing was easier than to have added the word 'elected' before the word 'members' in sub-section (4) of S. 18.

(16) In our opinion, the same result follows from a close examination of the provisions of S. 20 of the Act. The main section provides that a member, the president and a vice-president shall enter on their respective offices from the date of the notification of their election, selection or appointment as the case may be but the proviso to the section makes an exception in the case of members, only for the purpose of selection of members under S. 10, so that even if the membership has not been notified as contemplated by the main section they shall be deemed to have entered on their office from the date of their election or nomination as the case may be. It may be argued that under S. 18(4) the president and the vice-presidents are to be deemed to be members under the Act in all cases, and therefore the proviso would cover not only the case of members only but also of the president and the vice-presidents. If that were the intention of the Legislature there would be no need for the proviso making a distinction between a member on the one hand and a president or a vice-president on the other. As this proviso has reference to a particular object, viz., the selection of members under S. 10 of the Act, and as it excludes in terms a president or a vice-president, the meaning of the Legislature is clear that S. 18(4) did not intend to treat the president and the vice-presidents as elected members.

(17) The Rules framed under the Act are in consonance with the construction which we have sought to place on the provisions of Ss. 10, 18, 18-A and 20 of the Act in so far as they do not confer on the president the right to take part in the proceedings for the selection of members. That is not to say that the Rules have to be construed in order to understand the meaning of the legislature in enacting a particular section of the Act itself; but it is just to point out that the framers of the Rules understood the Act in the proper sense and that there is no substance in the contention raised on behalf of the petitioner that the Rules in so far as they did not accord to the president the position of an elected members are 'ultra virés' of the Act. Our attention was drawn in this connection to Cls. (1) and (2) of R. 19-A of the Rules under which the president is to be given a notice of the meeting and is also to be included in the total number of elected members for determining the quorum.

It may be that there are some anomalies in the Rules in so far as they contemplate giving notice of the meeting to select members under S. 10 of the Act to the president or any other rules treating him as a member of the meeting so held for certain cognate matters; but those anomalies cannot control the construction to be placed on the provisions of the statute. It is true that the elected president is a more representative person than even the members who are elected from the different wards constituting the municipality, because he is elected by all the persons who are entitled to vote and are resident within the municipality. But these are matters for the legislature to consider and to see if it could accord him the position of an elected member within the meaning of S. 10 of the Act. Section 18(4) has reference not only to an elected president but also to one who may not have been elected as also to vice-presidents who are never elected but only appointed by the president, either elected or appointed. Hence those considerations cannot, in our opinion, have any relevance to the question now before us.

(18) In our opinion, the argument raised on behalf of the petitioner that as the legislature has accorded the president and the vice-presidents the position of 'members under the Act' we have got to find them a place in any one of the categories of members contemplated by S. 10 of the Act loses sight of the fact that they are members by fiction only. If they were members in fact and in truth there would be no necessity for the fiction, and only then it may have been necessary to say whether they are included in the category of elected members, selected members or nominated members as contemplated by S. 10. As the president and the vice-presidents do not actually belong to any one of those categories the conclusion is that if at all they are to be placed under any category, they are a class by themselves, viz., a class outside those categories and may be called 'ex-officio' members, because they are to be treated as members only because of their holding the office of president or vice-presidents.

(19) In our opinion, there is no merit in the contentions raised on behalf of the petitioner. We therefore dismiss this application with costs. Hearing fee Rs. 100/-.

(20) Before we part with this case, we may record our protest that the decision of this case has been very much hampered by the way the rules framed under the Act have been kept in their present form. The Act of 1922 has been amended several times, and each amendment has necessitated amendment of the rules also, and all these successive amendments of the rules have been pasted in the book, so that we are left to hunt into a jungle of correction slips, and this hunt has meant a lot of waste

of public time. It is high time that the rules were brought into a readable order, so that any Court which has to pronounce upon those rules may not find itself handicapped, even as we have found ourselves handicapped in finding out the relevant rules governing the instant case.

B/V.S.B. Application dismissed.

A.I.R. 1954 NAGPUR 221 (Vol. 41, C.N. 71)

SEN AND BHUTT JJ.

Haji Mahommad Usman and Sons, Applicant v. Commr. of Income-tax, C. P. & Berar, Non-Applicant.

Misc. Civil Case No. 114 of 1952, D/- 17-4-1953, reference made by Registrar Income-tax Appellate Tribunal, Bombay, in case of R. A. No. 211 of 1949-50.

Income-tax Act (1922), Ss. 4(1) (b) (iii) and 14(2) (c) — Assessment of foreign profits — (Interpretation of Statutes — Fiscal enactments) — (Words and Phrases — "Brought into") — (Civil P. C. (1908), Pre.).

Once money representing income, profits or gains is brought into any part of British India, the department is entitled to assess it to income-tax even though it is not meant for retention or investment at that place, as the object of the Act is clearly not to exclude from taxation income whenever it is found within the taxable territory. AIR 1940 All 154 (FB), Rel. on. (Para 7)

The term, "brought into" denotes only a physical act of shifting a thing from one place to another. The words "brought into" are not qualified or limited under the Act and have, therefore, no reference to the purpose for which the money is brought into British India or to the period for which it is intended to be retained in British India. AIR 1923 Lah 14 (FB); AIR 1923 Mad 574 (FB); AIR 1925 Pat 281; AIR 1931 PC 165 and AIR 1953 SC 140, Distinguished. (Para 7)

To read into them any such qualification or limitation would be to ignore the plain words of the statute, which in fiscal enactments, is not permissible. AIR 1923 Lah 14 (FB), Rel. on. (1869) 4 HL 100, Referred to. (Para 7)

Anno: I. T. Act, S. 4 N. 9; S. 14 N. 7; C. P. C. Pre., N. 7.

R. S. Dabir, for Applicant; M. Adhikari, for Non-Applicant.

CASES REFERRED: Paras

(A) (V10) AIR 1923 Lah 14: 3 Lah 349 (FB) 4, 5, 7

(B) (V10) AIR 1923 Mad 574: 46 Mad 706 (FB) 4, 5

(C) (V12) AIR 1925 Pat 281: 4 Pat 210 4, 5

(D) (V18) AIR 1931 PC 165: 54 Mad 691 (PC) 6

(E) (V40) AIR 1953 SC 140: (Civil Appeal No. 41 of 1952, D/- 16-1-1953, SC) 6

(F) (1869) 4 HL 100: 38 LJ Ex 205 7

(G) (V27) AIR 1940 All 154: 1940-8 ITR 187 (FB) 7

ORDER: In pursuance of the order of the High Court dated 21-8-1950 in Miscellaneous Civil Case No. 210 of 1949, the Income-tax Appellate Tribunal Bombay Bench 'B' has submitted the statement of case under S. 66(2), Income-tax Act, 1922 (hereinafter called the Act), with reference to the following question:

"Whether in the circumstances of the case the amount of Rs. 16,650/- remitted by the Sanawad shop of the assessee to Upleta (both out of British India), by a draft from the Imperial Bank, Khandwa, can be included in the total income of the assessee for the assessment year 1944-45."

(2) The assessee firm Haji Mohammad Usman and sons has its main place of business at Khandwa. It has also a branch at Sanawad and the partners reside in Upleta. Both Sanawad and Upleta were at the relevant time out of British India and formed part of Indian States. In the accounting year 1943-44 the firm made a profit of Rs. 27,760/- in the branch at Sanawad. Out of this amount of profit, a sum of Rs. 16,650/- was brought to Khandwa for being sent to Upleta 'via' Bombay. This amount was remitted to Bombay either by drafts on the Imperial Bank or by 'hundis' between 21-6-1943 to 4-8-1943. In the assessment order, dated 27-11-1946, of the Additional Income-tax Officer, Nagpur, it was stated that the money was sent to Upleta. This was also the assumption during the course of the appellate proceedings both in the office of the Commissioner of Income-tax, Nagpur, and the Income-tax Appellate Tribunal, Bombay, Bench 'B'.

In the statement of the case the Tribunal, however, remarked in para. 5 that "the money never reached Upleta". It has further observed that from Khandwa the money went to Bombay and that "a mere credit entry was passed in Upleta under the instructions of the assessee". Since this was not the stand taken during the assessment proceedings, we assume that the money reached Upleta from Bombay.

(3) This is a case of an assessee resident in British India within the meaning of S. 4B(c) of the Act. The relevant provisions of the Act as amended by Act 7 of 1939, which governs the case, are set out below:

"Section 4(1)(b)(iii): Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which, if such person is resident in British India during such year, having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are 'brought into' or received in British India by him during such year.

And

Section 14(2)(c): The tax shall not be payable by an assessee in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are 'brought into' British India in the previous year by or on behalf of the assessee, or are assessable under S. 42."

(Underlining (here in ' ') is ours).

It is admitted that this is not a case of income etc., 'received' in British India and unless the money can be said to be "brought into" British India, it would not be liable to assessment.

(4) The words "brought into" did not occur in the corresponding S. 3(1), Income-tax Act, 1918, and have not been the subject of any judicial interpretation so long. It is, however, contended that the term "received" has been given a restricted meaning in — 'Sundar Das v. Collector of Gujrat', AIR 1923 Lah 14 (FB) (A), which was followed in — 'Secy., Board of Revenue Madras v. Ripson Press and Sugar Mills Co., Ltd.', AIR 1928 Mad 574 (FB) (B) & —'Ali Imam v. Emperor', AIR 1925 Pat 281 (C) and accordingly the words "brought into" should be given a similar limited

interpretation. It is also contended that the words "brought into" denote an element of permanency, and, therefore, the money which only touches the soil of British India during its onward journey cannot be deemed to be brought into British India for purposes of assessment. Lastly it is contended that since the purpose of the Act is to assess only income, profits or gains, the money which is not brought into British India for this purpose cannot be liable to assessment.

(5) In — 'Sundar Das v. Collector of Gujrat, (A)', (cit. sup.) profits had accrued in British Baluchistan which was exempt from the operation of the income-tax except as to salaries, and were transmitted to the Punjab in British India, where the assessee was residing. In — Secy. Board of Revenue, Madras v. Ripson Press, (B)', (cit sup.) the income had accrued in Raichur in the Nizam's Dominions and was received in Bellari in British India for payment of dividends to share-holders residing there. In — 'Ali Imam v. Emperor (C)' (cit. sup.) the money was transferred by the Hyderabad branch of the Imperial Bank to the account of the assessee in the Patna branch.

In all these cases, it is urged although the money was transmitted to British India for permanent retention, it was not held to be liable to tax. However, this decision was reached on the ground that the money was actually received in a non-taxable territory and since it was already once received it could not be deemed to be further received in British India. It was further observed in — 'Sundar Das v. Collector of Gujrat, (A)', (cit. sup.) at page 15:

> "It seems to me that the word "receive" implies two persons, namely, the person who receives and the person from whom he receives. A person cannot receive a thing from himself."

It will thus be observed that these cases were decided only on the interpretation of the term 'received'" which was held to be referred only to the first act of receipt.

In the present case, however, we are not concerned with the term "received" but with the words "brought into", for whose interpretation these rulings are no guide. All that can be urged on the basis of these rulings is that if the money is deemed to be brought into British India, the relevant place where it would be deemed to be brought would be Khandwa where the first act of bringing it was completed and not any other place in British India where it was taken subsequently in transit. This, however, is not the question in the present case.

(6) In — 'Pondicherry Railway Company, Limited v. Commissioner of Income-tax, Madras', AIR 1931 PC 165 (D) which is also relied on by the learned counsel for the assessee, the facts as summarised in the head note were these:

> "The appellant Company was incorporated in the United Kingdom in 1869 with a registered office in London, and under a convention with the French Colonial Government constructed a railway in the French Colony of Pondicherry making junction at the frontier of British India with the South Indian Railway Company. By the convention, the appellant Company was to pay to the French Colonial Government half its net profits calculated as therein provided. In 1879 the appellant Company entered into a working agreement with the South Indian Railway Company, whereby that Company was to work the Pondicherry Railway as an integral part of its own line, and out of the receipts make certain payments to the appellant Company in India in rupees.
>
> For each of the financial years 1925-26 and 1926-27 the South Indian Company paid sums due under the agreement to their Agent at Trichinopoly, who was also agent for the appellant Company, admittedly, for certain purposes. Under instructions from the appellant Company he calculated and paid to the French Colonial Government the sums due under the convention, and remitted the balance to the appellant Company in London by a bank draft payable there."

On these facts it was held that:

> "The sums paid by the South Indian Railway Company had been "received" in British India (namely, at Trichinopoly) by the appellant Company within S. 4 sub-section 1 of the Indian Income-tax Act, 1922, and constituted the profits and gains of a "business" carried on by them within S. 2(4) and S. 6(iv) of the Act, so as to render them chargeable to tax in respect thereof; further that the appellant Company was not entitled to deduct the payments made under the convention as being expenditure "incurred solely for the purpose of earning such profits or gains' within S. 10 sub-section 2(ix) of the Act."

It was contended on behalf of the appellant Company in that case that their Agent at Trichinopoly, Mr. Rothera, had acted as "a mere channel for communication", and accordingly it is the Company in London which should be deemed to have 'received' payment and not their Agent at Trichinopoly. This contention was rejected by Lord Macmillan, who delivered the judgment, in these terms:

> "The attempt to present Mr. Rothera as an animated post office fails when it is realised that his functions far transcend the mere mechanical act of transmitting a sum to its recipient."

In this view their Lordships were of opinion

> "that the income derived by the Pondicherry Company from the payments made to it by the South Indian Company is, on the facts stated, received in British India, within the meaning of the Act, by the Agent of the Pondicherry Company there on their behalf".

This view was followed by the Supreme Court in — 'Turner Morrison & Co., Ltd. v. Commissioner of Income-tax West Bengal', AIR 1953 SC 140 (E). These rulings, however, deal with the question whether the sums paid to the Agent of the Assessee Company should be deemed to have been 'received' in British India within the meaning of S. 4(1) of the Act. They also, therefore, do not deal with the question of the interpretation of the words "brought into" with which alone we are concerned in the case.

(7) The purpose for which money was brought into British India is not material for purposes of taxation under the Act if it initially accrued or arose as income, profits or gains. It is not disputed in the present case that the money represented profits which accrued to the assessee in Sanawad. This condition being fulfilled, it would become taxable in British India provided that it can be deemed to be brought into British India within the meaning of Ss. 4(1) and 14(2) of the Act. Nor do we think that the words "brought into", 'per se' connote any permanent retention in British India. The term 'bring' has been defined in Chambers 20th Century Dictionary as "to fetch; to carry; to procure; to occasion; to draw or lead". It is similarly defined in other dictionaries also. The term, therefore, denotes only a physical act of shifting a thing from one place to another. The

words "brought into" are not qualified or limited under the Act and have, therefore, no reference to the purpose for which the money is brought into British India or to the period for which it is intended to be retained in British India. To read into them any such qualification or limitation would be to ignore the plain words of the statute, which, in fiscal enactments, is not permissible.

In — 'Sundar Das v. Collector of Gujrat', (A) (cit. sup.) the following rule of interpretation of fiscal statutes, enunciated by Lord Cairns in — 'Partington v. Attorney General'. (1869) 4 H. L. 100 (F), was cited with approval:

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words if there be admissible, in any statute what is called an equitable construction certainly such a construction is not admissible in a taxing statute where you should simply adhere to the words of the statute."

Adverting to the words "from whatever source derived" occurring in S. 4(1) of the Act, it was observed by Iqbal Ahmad, J., in — 'Commr. of Income Tax v. Indra Sen', AIR 1940 All 154 (G), that "taxation under the Act is the rule, and exemption the exception". The test in such cases is whether the case comes within the provision of law, as the object of the Act is clearly not to exclude from taxation income whenever it is found within the taxable territory. We are, therefore, of opinion that once money representing income, profits or gains is brought into any part of British India, the department is entitled to assess it to income-tax even though it is not meant for retention or investment at that place. As the case comes within the letter of the law, it is not within our province to enquire into the intention of the legislature in enacting it or speculate on its underlying spirit. The answer to the reference should, therefore, be in the affirmative.

(8) We hold that ,in the circumstances of the case, the amount of Rs. 16,650/- remitted by the Sanawad shop of the assessee to Upleta by a draft on the Imperial Bank, Khandwa, can be included in the total income of the assessee for the assessment year 1944-45. Costs shall be paid by the assessee. Counsel's fee Rs. 100/-.

B/M.K.S. Reference answered.

A.I.R. 1954 NAGPUR 223 (Vol. 41, C.N. 72)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ.

Shaligram Tatteram Shop by owner Godawaribai w/o Thakurdas, Appellant v. Narayansa and others, Respondents.

Second Appeal No. 511 of 1945, D/- 26-3-1953, from decree of 1st Addl. Dist. Judge, Amravati, D/- 23-4-1945.

(a) Civil P. C. (1908), S. 66(2) — Suits by third person.

A suit by an attaching creditor claiming that the second defendant's share in the property in suit which was purchased at a court auction in the name of the first defendant is liable for attachment and sale under the decree obtained by him against the second defendant is saved by the terms of S. 66(2). (Paras 2 and 3)

Anno: C. P. C., S. 66 N. 11 Pt. 5.

(b) Civil P. C. (1908), Ss. 100 and 101 — Statutory presumption — Rebuttal — Question of fact.

The question whether a statutory presumption is rebutted or not is itself a question of fact. (Para 5)

Anno: C. P. C., S. 100 and 101 N. 32 Pt. 10.

(c) Berar Land Revenue Code (1896), S. 110(b) — Presumption under — Absence of evidence to support presumption.

It is not the law that a party relying on a presumption arising under the statute with respect to an entry in the record-of-right must fail in the absence of independent evidence in support of the entry. (Para 6)

(d) Berar Land Revenue Code (1896), S. 110 (6) — Entries in record-of-rights — Correctness — Burden of proof — (Evidence Act (1872), Ss. 101 to 103).

The burden is on the auction-purchaser to show that the entries in the record-of-rights showing another person as having the shares in the plots purchased by him are erroneous. (Para 6)

Anno: Evidence Act, Ss. 101 to 103 N. 19.

(e) Limitation Act (1908), Arts. 142 and 144 — Adverse possession — Co-owners.

In the absence of ouster, the possession of a co-owner is in law the possession of another co-owner as well. (Para 8)

Anno: Limitation Act, Arts. 142 and 144 N. 35 Pt. 5.

M. R. Bobde, for Appellant; P. S. Pultamkar, for Respondents.

CASES REFERRED: Paras

(A) (V27) AIR 1940 Nag 1: 187 Ind Cas 60 1
(B) (V27) AIR 1940 PC 202 1
(C) ('94) 21 Cal 519 3
(D) ('03) 26 All 82: 1903 All WN 199 (FB) 3
(E) (V17) AIR 1930 PC 91: 11 Lah 199 (PC) 5
(F) (V10) AIR 1923 PC 217: 82 Ind Cas 879 (PC) 6
(G) (V27) AIR 1940 PC 192: ILR (1941) Bom 107 (PC) 6
(H) (1912) 1912 AC 230: 81 LJ PC 151 8
(I) (V5) AIR 1918 PC 1: 64 Pun Re 1918 (PC) 3

JUDGMENT: This appeal is referred to the Division Bench for considering the correctness of — 'Bhudarsao v. Samarathmal', AIR 1940 Nag 1 (A) in view of the decision of their Lordships of the Privy Council in — 'Bishun Dayal v. Kesho Prasad', AIR 1940 PC 202 (B). But the decision of the appeal does not turn on the correctness or otherwise of —'Bhudarsao v. Samarathmal,' (A) (Supra)', which ruled that Section 66, Civil P. C. does not bar a suit by a plaintiff claiming possession of a share in property purchased at a Court auction in the name of an agent of a partnership of which the plaintiff was one of the partners. The ruling can be left alone for the present.

(2) The appellant who was the first defendant to the suit raised for the first time in second appeal the contention that the suit instituted by respondent no. 1 was barred under Section 66, Civil P. C. But the suit which is barred under that section is a suit by a person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. The suit out of which this appeal arises is not such a suit. The suit is

by an attaching creditor claiming that the second defendant's share in the property in suit (1/3 share in plot no. 59 and 1/6 share in plot no. 57) which according to the allegation was purchased at a Court auction in the name of the first defendant is liable for attachment and sale under the decree obtained by him against the second defendant. On the question whether such a suit was barred under the corresponding provision of the old Code, Section 317, there was a conflict of authority.

(3) The Calcutta view was that suits brought by a third party as plaintiff against the certified purchaser as defendant for a declaration that the property, though ostensibly sold to the certified purchaser, is liable to satisfy a claim of such third party against the beneficial owner, were not barred under that section — ('Subha Bibi v. Hara Lal Das', 21 Cal 519 (C). The Allahabad view was to the contrary — ('Ram Narain v. Mohanian', 26 All 82 (FB) (D). In the latter case, Aikman J. observed that Section 317 of the old Code was 'obscurely worded". The Legislature intervened and amended that provision by enacting sub-section (2) of Section 66 in its present form:

> "Nothing in this section shall bar a suit to obtain a declaration that the name of 'any' purchaser 'certified as aforesaid' was inserted in the certificate fraudulently or without the consent of the real purchaser, 'or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.'"

By inserting the words underlined, (here in " ") the Legislature has given approval to the Calcutta view. That being so, the present suit is expressly saved by the terms of sub-section (2).

(4) In the Courts below the first defendant tried to resist the suit on two grounds. Firstly, that though the property was purchased on an agreement to which the second defendant was a party, he did not abide by the terms of the agreement and did not pay his share of the price in full by the time as agreed. Thus the second defendant never became an owner of the share and never acquired any interest in it. The second ground was that even if the second defendant be held to have acquired any interest in the property he lost the same because of adverse possession for over 12 years by the first defendant. Both the Courts concurrently found as a fact that the first defendant paid his share of the consideration money as agreed.

(5) In the record-of-rights there are entries to the effect that the second defendant has a 1/3rd and a 1/6th share in plots Nos. 59 and 57 respectively. The origin of the right is shown to be the purchase at the action sale in civil suit No. 33 of 1861 though the certificate was taken in the name of Godawaribai, wife of Thakurdas. According to the entries possession of the plots was obtained in 1918. Both the Courts held that in view of sub-section (6) of S. 110, Berar Land Revenue Code, the plaintiff was entitled to invoke the presumption of correctness of the entries in the record-of-rights. Both the Courts further held that the first defendant failed to rebut the statutory presumption that the entries are correct. The question whether a statutory presumption is rebutted or not is itself a question of fact. See — 'Wali Muhammad v. Muhammad Bakhsh', AIR 1930 PC 91 at p. 93 (E).

(6) The learned counsel for the appellant however contended that in the absence of any conveyance as required by S. 54, T. P. Act, no title can be presumed to have arisen in favour of the second defendant, merely because of the entries in the record-of-rights. The contention involves a fallacy. It is not the law that a party relying on a presumption arising under the statute with respect to an entry in the record-of-rights must fail in the absence of independent evidence in support of the entry. The entries in the record-of-rights show that the second defendant has the shares in the plots as claimed. The plaintiff had not the burden of showing that the entries were correct. The burden was on the first defendant to show that they were erroneous. See — 'Srinath Ray v. Udai Nath', AIR 1923 PC 217 at pp. 219-220 (F); and — 'Shankarrao Dagadujirao v. Sambhu Nath', AIR 1940 PC 192 at pp. 196-197 (G).

(7) The statutory presumption which the plaintiff invoked in his favour is not weakened by the fact that in 1923 the second defendant joined as a vendor along with the first defendant in executing a deed of sale when a part of the property covered by the sale certificate was sold to one Mst. Ladibai (vide Ex. P-2).

(8) The two Courts negatived the plea of adverse possession also. According to the lower appellate Court, there was no proof of exclusion or ouster of the co-owner which the second defendant was. In the absence of ouster, the possession of the first defendant was in law the possession of the second defendant as well. See — 'Corea v. Appuhamy', 1912 AC 230 (H) and — 'Hardit Singh v. Gurmukh Singh', AIR 1918 PC 1 (I).

(9) If the case set up by the first defendant was rejected and it was further held that he had failed to rebut the presumption arising from the entries in the record-of-rights, then it must follow that the second defendant had the shares in the two plots which are now sought to be attached and sold.

(10) The main points in the appeal are thus concluded by a specific statutory provision and concurrent findings of facts by the two Courts. The appeal is without any merit and is dismissed with costs.

B/V.R.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 224 (Vol. 41, C.N. 73)

SINHA C. J.

Baliram Bhagawanji, Plaintiff-Applicant v. Champat Zamraji, Defendant-Non-Applicant.

Civil Revn. No. 103 of 1952, D/- 30-10-1952, from order of 1st Civil Judge (class II), Amravati, D/- 22-12-1951.

(a) Civil P. C. (1908), S. 149 and O. 7, R. 11 — Whole or any part of the court-fee.

Under S. 149 of the Code even a plaint filed without any court-fee comes within the concession allowed by that section. Of course, it is a matter entirely within the discretion of the Court to be exercised in the circumstances of each particular case Section 149 read with O. 7, R. 11 makes it clear that the court is empowered to grant such time as in its discretion it may think fit to grant in order to enable the plaintiff or the party liable to pay the court-fees to make good the requisite amount. (Para 2)

Anno: C. P. C., S. 149, N. 5.

1953 Mulla: S. 149. P. 473. N. "Scope....section" (8 Pts. extra in N. 5 to S. 149 in AIR Com. — Conflict between Calcutta, Lahore, Patna and

Nagpur on the one hand and Bombay on the other not noticed in Mulla — AIR 1938 Lah 361 (FB) not noticed in Mulla).

C. P. C., S. 149, N. 6.

1953 Mulla: S. 149, (Topic discussed in N. 6 to S. 149 in AIR Com. extra).

C. P. C., O. 7, R. 11, N. 2.

1953 Mulla: O. 7, R. 11, P. 615, N. "Scope..... rule and Chartered High Courts" (5 Pts. extra in N. 2 to O. 7, R. 11 in AIR Com.).

C. P. C., O. 7, R. 11, N. 5.

1953 Mulla: O. 7, R. 11, P. 617, N. "Clause (c).. ....stamped" (3 Pts. extra in N. 5 to O. 7, R. 11 in AIR Com. — Conflict noted in Pts. 9 to 11a in N. 5 to O. 7, R. 11 in AIR Com., not noticed in Mulla — See also N. 7 to S. 149 in AIR Com).

(b) Civil P. C. (1908), Ss. 115 and 149 — Failure to exercise jurisdiction so vested.

Where a court refuses to register an unstamped plaint on the last day of limitation on ground that it has no power to do so, it amounts to refusal to exercise jurisdiction vested in it by law within S. 115. (Para 2)

Anno: C. P. C., S. 115, N. 11.

1953 Mulla: S. 115, P. 419, N. "Failure....jurisdiction" (Allahabad and Oudh views noted in Pts. 6 and 7 in N. 11 to S. 115 in AIR Com., not noticed in Mulla).

C. P. C., S. 149, N. 14, (See also, S. 115, N. 27b, O. 7, R. 11, N. 12).

1953 Mulla: S. 115, P. 429, N. "Court-fee"; S. 149, P. 475, N. "Revision"; O. 7, R. 11, P. 619, N. "Revision" (views of Calcutta, Patna, Lahore and Madras noticed in N. 14 to S. 149 in AIR Com. not noticed in Mulla).

G. R. Mudholkar, for Applicant.

ORDER: This application in revision is directed against the order dated 22-12-1951 passed by the Small Cause Court Judge of Amravati, refusing to register a suit on the ground that the plaint was presented without any court-fee on the last day of limitation. The Court felt helpless in the matter because it observed that if the plaint had been insufficiently stamped, it might have granted time to make good the deficiency, but as it had not been stamped at all there was no power in the Court to grant time to put in the necessary court-fees.

(2) In my opinion, the Court below has taken too narrow a view of the provisions of the Code of Civil Procedure. Under S. 149 of the Code even a plaint filed without any court-fee comes within the concession allowed by that section. Of course, it is a matter entirely within the discretion of the Court to be exercised in the circumstances of each particular case, but the Court is not so powerless as the learned Judge below thought he was.

Section 149 was a new provision introduced for the first time in 1908, because there was a difference of opinion amongst the High Courts in India whether a plaint filed without court-fees or with insufficient court-fees could be allowed to be regularized by payment of full court-fees after the period of limitation had expired. The framers of the Code accepted the views of the Calcutta, Madras and Bombay High Courts in preference to the view expressed by the Allahabad High Court, and laid it down that the Court was empowered at any stage to allow the person by whom the fees were payable to pay the whole or part of the fees, and upon such payment the document shall be deemed to have the same effect as if the fee had been paid in the first instance.

Under R. 11 of O. 7, Civil P. C. the Court is required to fix a time within which the deficiency in the Court-fees shall be made good. But that rule has particular reference to a plaint written on insufficiently stamped paper, but reading that rule along with the provisions of S. 149, Civil P. C. it is clear that the Court is empowered to grant such time as in its discretion it may think fit to grant in order to enable the plaintiff or the party liable to pay the court-fees to make good the requisite amount. In my opinion, therefore, this is a clear case where the Court has refused to exercise jurisdiction vested in it by law.

(3) The order is, therefore, set aside and the Court below is directed to register the plaint as a suit if the petitioner puts in the requisite court-fees on or before 15-11-1952. If the requisite court-fees are not put in within the time allowed, this application shall stand dismissed. There will be no order for costs.

B/K.S.B. Order accordingly.

A. I. R. 1954 NAGPUR 225 (Vol. 41, C. N. 74)

SEN AND DEO JJ. (17-4-1953)

Nemkumar Kesarimal, Applicant v. Board of Revenue, M. P. Nagpur, Non-Applicant.

Misc. Civil Case No. 145 of 1952, from order of Members Board of Revenue, Madhya-Pradesh, Nagpur, D/- 30-6-1952.

(a) Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 23(2) — New question.

Question not raised before the Sales Tax Authorities and the Board of Revenue cannot be canvassed under S. 23(2). (Para 9)

(b) Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), S. 23(2) — Duty of Board to refer question of law.

The Sales Tax Act does require the Board of Revenue to state the case and the question of law arising out of its order. It is not for that authority to decide whether the questions of law are open to debate or not. That authority and the authorities subordinate to it are bound to follow the decision of the High Court. Unless a reference is made to the High Court, the correctness of that view cannot be tested. The Board of Revenue has, therefore, to state a case whenever a question of law arises out of its order unless it is settled by a decision of the Supreme Court. (Para 11)

It is also the duty of the Board of Revenue to refer all questions of law arising out of its order whether they are stated by the applicant in his application under S. 23(1) or not. The provision does not require him to state such questions. He simply points out such questions. The Board of Revenue must consider whether a question of law brought to its notice during the hearing of the case arises or not. No limitation is prescribed for the purpose. (Para 12)

CASE REFERRED : Para

(A) (V39) AIR 1952 Nag 378: 1952 Nag LJ 378 8, 11

S. W. Dhabey, for Applicant; T. P. Naik, Addl. Govt. Pleader, for Non-Applicant.

ORDER : This is an application under S. 23(2), Central Provinces and Berar Sales Tax Act, 1947, requiring the Board of Revenue to state the case and refer it as questions of law are said to arise out of its order, dated 14-12-1951, passed under S 22(5) of the Act arising out of assessment for the period 1-6-1947 to 12-11-1947.

(2) The assessee is a 'bidi' merchant. His head office is situated in Kamptee. 'Bidis' are manufactured at Kodamendi and Khat, both in Ramtek tahsil and at Kamptee. In addition, there are several places where his 'bidis' are manufactured. The 'bidis' are collected and stored either at Kamptee or at the two additional places of business in Ramtek tahsil for despatch outside the State in fulfilment of the orders received at the head office.

The assessee has also a branch shop at Mandsaur in Gwalior State. 'Bidis' which were originally despatched from this State were also distributed by that shop to some of the customers in that area. Orders for the supply of 'bidis' used to be received directly at the head office or at Mandsaur shop. Goods used to be consigned to the customers by railway. The railway receipts and bills were sent to the consignee either through a bank or V. P. P. Sometimes goods were supplied on credit. Some bills were collected through the branch shop against delivery of railway receipts.

(3) The gross turnover of 'bidis' and tobacco amounted to Rs. 6,81,590-7-6 which included a sum of Rs. 1,890-11-6 recovered by the assessee from his labourers on account of tobacco or other materials either retained or not accounted for by them. The assessee in his return had shown a total turnover of Rs. 6,79,699-12-0. The despatches for which particulars were supplied were as under:

METHOD.	VALUE OF GOODS.
(1) Through Bank	Rs. 2,76,997/14/-
(2) By V. P. P.	Rs. 13,967/11/-
(3) By credit system	Rs. 2,07,729/1/-

(4) The contention of the assessee was that he was not liable to pay sales tax on the turnover, as 'bidis' were sold outside the State. The sales in case of goods distributed by the branch shop at Mandsaur should be considered to be complete after the delivery of the railway receipts.

(5) The contention of the assessee was rejected by the Tribunal on the following grounds :

> "It may be emphasised here that the applicant has all along urged that the acceptance of orders received from outside or even through his branch shop at Mandsaur was every time against the stocks in hand which were situated in this province. Thus the provisions of Explanation (II) to the definition of sale in S. 2(g) of the Sales Tax Act are attracted and no matter where the actual transfer of property in the goods may take place, the sale shall be deemed to have taken place in this province."

(6) The alternative stand of the assessee was that the sales amounting to Rs. 97945/10/- should have been excluded from the taxable turnover as orders covering them were received prior to the 1-6-1947 when the Act came into force. The Tribunal held that the contracts of sale were made during the quarter in question when the orders were accepted and goods actually despatched. It upheld the finding of the Sales Tax Commissioner. The item of Rs. 1890-11-6 included in the taxable turnover by the Assistant Commissioner was excluded.

(7) The third contention of the assessee was that the packing charges amounting to Rs. 23,157/6/- and an amount of Rs. 250/- on account of 'dharmada' should not be included in the taxable turnover. The Tribunal held that the packing charges were part of the sale price and could not be excluded from the taxable turnover. On the same ground, the payment on account of 'dharmada' was held to be covered by the definition of sale price.

(8) The assessee submitted an application under S. 23(1) of the Act asking the Tribunal to state the case and refer it to this Court. According to him, three questions of law were involved. He, however, withdrew question no. (1) in view of the decision of this Court in — 'Shriram Gulabdas v. Board of Revenue, Madhya Pradesh', AIR 1952 Nag 378 (A). He proposed a fresh question, but was not allowed as it was raised beyond 60 days.

The remaining questions proposed by the assessee were as follows :

> "(1) Whether on a true construction of Act No. 21 of 1947 it could be held that the sale proceeds amounting to Rs. 97,945/10/- in respect of sales occasioned by the orders received before but executed after coming into force of that Act which was on 1-6-1947 were assessable to tax?
>
> (2) Whether (a) the packing expenses and (b) 'dharmada' charges could be held to form part of sale price such as was assessable to tax?"

Question no. (1) in the opinion of the Tribunal, did not involve any question of law. The sales were effected after the Sales Tax Act had come into force. The question no. (2) was referred and is the subject of Miscellaneous Civil Case No. 105 of 1952. The applicant in his application has raised an additional question which is as follows:

> "Whether the recovery of sales tax is illegal and whether the assessee is entitled to its refund, in view of the decision in — 'AIR 1952 Nag 378 (A)."

(9) This case relates to the assessment for the period ending 12-11-1947. The decision in Miscellaneous Civil Case No. 258 of 1951 does not hold that the sales tax recovered for this period is illegal or is liable to be refunded. The learned Counsel has not advanced any grounds to entitle the applicant to a refund of the tax paid by him. This question was not raised before the Sales Tax authorities and was not raised before the Board of Revenue. We do not think that the question can fairly be canvassed on the order of the Board of Revenue passed in this case.

(10) The important questions of law which appear to arise in this case are:

> "(i) Whether despatches of goods after the Act came into force against orders received prior to the Act are in law sales within S. 2(h) of the Act?
>
> (ii) Whether on the facts and circumstances of the case the goods despatched outside the State can in law be regarded as sales within S. 2(h) of the Act read with Explanation (II)?
>
> (iii) Whether these provisions are 'ultra vires' the State Legislature?"

(11) The learned Counsel for the non-applicant contends that these questions are adequately answered by this Court in — 'AIR 1952 Nag 378 (A)', and can no longer be regarded as debatable questions of law. The Sales Tax Act does require the Board of Revenue to state the case and the question of law arising out of its order. It is not for that authority to decide whether the questions of law are open to debate or not. That

authority and the authorities subordinate to it are bound to follow the decision of this Court. Unless a reference is made to the High Court, the correctness of that view cannot be tested. The Board of Revenue has, therefore, to state a case whenever a question of law arises out of its order unless it is settled by a decision of the Supreme Court.

(12) It is also the duty of the Board of Revenue to refer all questions of law arising out of its order whether they are stated by the applicant in his application under S. 23(1) or not. The provision does not require him to state such questions. He simply points out such questions. The Board of Revenue must consider whether a question of law brought to its notice during the hearing of the case arises or not. No limitation is prescribed for the purpose.

(13) Under these circumstances, we hold that the order of the Board of Revenue rejecting the application under S. 23(1) is not correct, and require the Tribunal to state the case and the question of law arising out of its order dated the 14-12-1951.

(14) The application is allowed with costs. Counsel's fee Rs. 50/- if certified.

B/R.G.D. Application allowed.

A. I. R. 1954 NAGPUR 227 (Vol. 41, C. N. 75)

SEN AND DEO JJ. (17-4-1953)

Nathuram Munnalal, Applicant v. Commissioner of Income-tax C. P. & Berar, Non-Applicant.

Misc. Civil Case No. 187 of 1952.

Income-tax Act (1922), Ss. 13, Proviso and 23(3). — Disclosing of basis and manner of computation.

In a case to which the proviso to S. 13 applies, the Income-tax officer is bound to disclose in his order the basis and the manner of computation of the income, gains or profits, and to disclose the data on which he arrives at the result. Case law Ref.

(Paras 1, 4)

Held on facts that there was material on record to warrant the estimate of the profits at the several rates adopted in the case.

(Para 12)

Anno: Income-Tax Act, S. 13, N. 5, 8, S. 23, N. 3.

CASES REFERRED : Paras

(A) (V32) AIR 1945 Bom 258: 1945-13 ITR 245 4
(B) (V37) AIR 1940 Sind 92: 1940-8 ITR 159 4
(C) (V25) AIR 1938 PC 1: 1938-6 ITR 36 (PC) 4
(D) (V20) AIR 1933 PC 108: 1933-1 ITR 94 (PC) 4
(E) (V24) AIR 1937 PC 133: 1937-5 ITR 170 5
(F) (V13) AIR 1926 Nag 180: 21 Nag LR 175 5

J. M. Thakkar, for Applicant; M. Adhikari, for Non-Applicant.

ORDER : On the dismissal of his applications by the Appellate Tribunal under section 66(1), Income-tax Act, the assessee made two applications under Section 66(2) of the Act, one in respect of the assessment year 1945-46 & the other in respect of the assessment year 1946-47. They are Miscellaneous Civil Cases nos. 201 and 202 of 1949. By an order dated 7-4-1952 this Court required the Appellate Tribunal to state the case on the questions of law indicated in the order. Accordingly the Tribunal has stated the case and referred the said questions of law. They are:

"(1) Whether in a case to which the proviso to section 13 applies, the Income-tax Officer is bound to disclose in his order the basis and the manner of computation of the income, gains or profits, and to disclose the data on which he arrives at the result.

(2) If the answer to this question is in the affirmative, is there any material on record to warrant the estimate of the profits at the several rates adopted in this case?"

These questions arise for both the years.

(2) The assessee, a Hindu undivided family, carrying on business in cloth and yarn, has two shops at Sagar, one at Bada Bazar and the other at Katra locality. According to the Income-tax Officer, the method of accounting employed by the assessee is such that, in his opinion, income, profits and gains cannot be properly deduced therefrom. This finding was not disputed. Proviso to section 13 is therefore applicable. In fact, the profits for the assessment years 1941-42 and onwards were determined under this proviso as stated in the statement of the case.

(3) After reproducing certain extracts from the assessment orders for the years 1941-42 to 1945-46, the statement of the case proceeds :

"The Income-tax Officer did not inform the assessee how he was going to compute the assessee's income from his business. The fact that no such information was given to the assessee by the Income-tax Officer was not one of the grounds before the Appellate Assistant Commissioner or the Appellate Tribunal. The same thing happened in connection with the assessment for the year 1946-47."

In paragraphs 12 to 16 the Appellate Tribunal does not state any facts of the case but indicates the several ways in which the books of account can be manipulated without a proper day-to-day stock account. There is no finding of the Income-tax Officer that the books of the applicant were manipulated or that they were rejected. According to the Tribunal :

"Where the assessee's books of account are rejected the Income-tax Officer has to find out, as best as he can, the income earned by the assessee in the year of account. Sometimes, the Income-tax Officer makes a lump sum addition to the income disclosed; sometimes he disallows a part of the expenses claimed by the assessee; sometimes he applies a percentage rate to the sales as disclosed by the assessee's books; sometimes he applies a rate to the sales as estimated by him. There is no hard and fast rule as to what method he should adopt in a particular case."

* * * *

After all is said and done, an estimate is an estimate. It is a leap in the dark."

The Tribunal further states that when an assessment under section 23(3) read with the proviso to section 13 comes up before the Appellate Tribunal, comparable cases — there are no two truly comparable cases as the Tribunal concedes — are brought to its notice by the Departmental representative and the assessee, and if the assessee fails to prove that the order appealed from is wrong, the assessment is maintained. The Tribunal concludes the statement of the case thus :

"What we want to urge is that once an assessee's books of account are rejected, the best that the Income-tax Officer can do is to make a reasonable estimate, having regard to all the circumstances of the case."

(4) The first question admits of only one answer and that is in the affirmative. The proviso to section 13 does not entitle the Income-tax Officer to have a leap in the dark but requires him to

compute the income "upon such basis and in such manner as the Income-tax Officer may determine". He has therefore to find out "the basis and the manner of computation". The assessment is under section 23(3) after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require on specified points. The Income-tax Officer may use material not placed before him by the assessee; but in such a case natural justice demands that he should give the assessee an opportunity of showing, if he can, that the material is incorrect, though the officer is not bound to disclose the source of his information. It may be that there is an adequate explanation against the information sought to be used against the assessee or that the Income-tax Officer might be misinformed. Although there is no express provision in the Act to require the Income-tax Officer to make such disclosure, it is necessary on the principles of natural justice.

In — 'Sarupchand Hukamchand in re', AIR 1945 Bom 258 (A), Kania Ag. C. J. observed at page 260:

> "In fairness and in law, I think, it is the duty of the authority entrusted with the task of recording its finding, to give every opportunity to the other side to meet the case which the authority thought was in existence. Without giving such opportunity to the assessees it is not proper to rely on any evidence or any fact which he ultimately takes into consideration for arriving at his conclusion."

See also — 'Commr. of Income-tax v. Firm Khemchand Ramdas', AIR 1940 Sind 92 (B).

The order is appealable and must stand scrutiny by an appellate Court. It must therefore be a speaking order. If the basis and manner of computation are not disclosed in the order, the assessee's right of appeal may be illusory unless the appellate authority refers the matter back to the Income-tax Officer to disclose the basis and manner of his computation. If the profits are computed under this proviso upon a basis determined by the Income-tax Officer, profits included in such computation cannot be included again in the assessment for any subsequent year.

The burden is on the assessee to prove that the profits sought to be assessed were included in the assessment for any preceding year. This burden cannot be adequately discharged unless the assessment orders disclose the basis and manner of computation. If after rejecting the method of accounting employed by the assessee, the Income-tax Officer were simply to add a particular amount to the income returned or to disallow a part of the business expenses properly incurred by the assessee and allowable under section 10 of the Act, he would not be acting under the proviso to section 13. The Income-tax Officer would be acting contrary to law if he were to disallow such business expenses or make an addition of a lump sum simply on the ground that the trading profits cannot be properly determined from the books of account. The Income-tax Officer is not entitled to discard the evidence of the books of account altogether merely because the proviso to section 13 is attracted. As their Lordships of the Privy Council stated in — 'Commr. of Income-tax, Bombay v. Sarangpur Cotton Manufacturing Co. Ltd.', AIR 1933 PC 1 at p. 3 (C):

> "But there may well be more complicated cases in which nevertheless, it is possible to deduce the true profit from the accounts and the judgment of the Income-tax Officer under the proviso must be properly exercised. It is misleading to describe the duty of the Income-tax Officer as a discretionary power."

It is certainly not a "leap in the dark". The Income-tax Officer is not entitled to make a guess without evidence. 'Commr. of Income-tax v. Kameshwarsingh', AIR 1933 PC 108 at p. 114 (D).

(5) As appears from the concluding observations in the statement of the case, the Appellate Tribunal does not make a distinction between an assessment under section 23 (3) where the proviso to Section 13 is invoked, and an assessment "to the best of judgment" under Section 23 (4). If the Income-tax Officer has made "best judgment assessments" under Section 23 (3) in the instant case, they are bad in law. Under Section 23 (3) the Income-tax Officer has to determine the income on the evidence before him produced by the assessee or collected by him, while under sub-section (4) he acts in the absence of such evidence because the assessee is in default in supplying information.

As their Lordships of the Judicial Committee stated in — 'Commr. of Income-tax, U. P. and C. P. v. Shop Badridas Ramrai', AIR 1937 PC 133 at p. 138 (E) in an assessment under sub-s. (4):

> "He must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances and his own knowledge of previous returns by and the assessments of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess work in the matter, it must be honest guess work. In that sense too, the assessment must be, to some extent, arbitrary."

As stated in — 'Pandit Pandurang v. Commissioner of Income-tax', AIR 1926 Nag 180 at p. 183 (F), in an assessment under the proviso to S. 13—

> "the taxing authorities must find out the true income of the assessee as, after all, income-tax is leviable on income, profits and gains and not on imaginary sums which do not represent true income."

We therefore answer the first question in the affirmative.

(6) As regards the second question, unfortunately the statement of the case is not satisfactory. This is evidently due to the view of the Appellate Tribunal that the assessment was a leap in the dark. Instead of referring the case back under Section 66 (4) and wasting considerable time, we propose to examine the orders of the Income-tax Officer to see if there is any material on record to warrant the estimate of profits at the several rates adopted by the Income-tax Officer.

(7) The assessee has returned profits by estimate. This is obviously unwarranted. As the trading profits could not be properly deduced from the account books for want of opening and closing stocks, the proviso to Section 13 was attracted; but that did not entitle the Income-tax Officer to reject the books. In fact, the Income-tax Officer has not rejected the books as unreliable. He rejected the method of deducing the gross profits. Under such circumstances, the Income-tax Officer could have ascertained the rate of

profits from the books of account and from outside information of returns and examination of books of local merchants in similar circumstances.

If the assessee fails to satisfy the Income-tax Officer as to the correctness of the percentage of profits returned by him, it is open to the officer to take a higher percentage consistent with the state of trade in the locality or with any special circumstances of the assessee which warrant a higher rate of profits. As already stated, the Income-tax Officer must disclose the basis and manner of computation and make his order a speaking order.

(8) For the Bada Bazar shop the Income-tax Officer has taken the figures of sales from the books of the assessee and estimated the trading profits at 15 per cent. for both the years. This rate was adopted for the preceding assessment year 1944-45 and it was maintained in appeal. The sales are mostly of handloom and other fabrics whose prices were not controlled. Sales were retail to a large extent. The Income-tax Officer has stated that the prices of handloom cloth went higher during the accounting year owing to the control of mill-made cloth. There is no record of quantitative and qualitative particulars. It was therefore impossible to deduce the percentage from the trading account. As the Appellate Assistant Commissioner has stated, he had seen higher margin of profits in some cases. The Appellate Tribunal was satisfied that this was a reasonable percentage of profits.

(9) As regards the cloth business of the Katra Bazar shop, the sales were both of mill-made and handloom cloth and the nature of sales was wholesale and retail. Although the Appellate Assistant Commissioner specifically asked the assessee to give a classification of such sales, the assessee expressed his inability to provide the necessary information in the absence of the necessary details in the books of account. It would therefore be proper for the Income-tax Officer to determine the percentage as if all sales were retail. The Income-tax Officer found great disparity between the figures of purchase and sales which can be due to a large margin of profit or a heavy opening stock.

In the absence of any data to show that there was an excessive opening stock and in the absence of any other check on margin of profit which can be gathered from the books of account, the Income-tax Officer computed the profits at 12½ per cent. on sales as disclosed in the books. This percentage was adopted by the Appellate Assistant Commissioner for the previous year. As stated by him, the account year was better than the preceding year. Consequently, the assessee must have earned higher profits and not lower. This rate was maintained by the Appellate Tribunal.

(10) As regards sales of standard cloth, the assessee was entitled to a profit of 3¼ per cent. on the ex-mill price. In the absence of any details, the Income-tax Officer determined the trading profits at 1.5 per cent. making allowance for the expenses and margin of profits paid to sub-dealers. It was really very easy for the assessee to give proper details of the trading income and expenditure under this head and he has not chosen to do so.

(11) The orders of the Income-tax Officer were scrutinized minutely by the Appellate Assistant Commissioner and he accepted the assessee's contention regarding the trading profits of yarn business.

(12) Under these circumstances we hold that there is material on record to warrant the estimate of the profits at the several rates adopted in this case.

(13) Under the circumstances of the case we make no order as to costs. A copy of this judgment be sent to the Appellate Tribunal under Section 66 (5) of the Act.

B/R.G.D. Order accordingly.

A. I. R. 1954 NAGPUR 229 (Vol. 41, C. N. 76)

SINHA C. J. AND BHUTT J. (23-10-1953)

M. A. Waheed, Officiating Assistant Sub-Inspector of Police Station, Murtizapur, Petitioner v. State of Madhya Pradesh.

Misc. Petn. No. 83 of 1953.

(a) Constitution of India, Arts. 311, 309, 310 and 372 — Scope of these articles — Punishment imposed on civil servant — Necessity of proper departmental enquiry.

The pleasure of the Governor contemplated by Art. 310(1) of the Constitution is restricted to the holding of a post by a civil servant. In so far as this is concerned, he can only hold the post at the Governor's pleasure, i.e., until he is dismissed, discharged, or reduced in rank. If this action is taken it is subject to the safeguard provided in Art. 311(1). In other respects, the conditions of service, which are referable to Art. 309 read with Art. 372(1) of the Constitution, are guaranteed to the civil servant.

Hence, punishment, whatever its kind, cannot be imposed on the civil servant unless a proper departmental enquiry as may be prescribed in appropriate Rules or Regulations has been held and he has been given a reasonable opportunity to defend himself. If, therefore, due to the absence of or defect in any enquiry, prejudice has been caused to the civil servant, it will become a justiciable matter. (Para 10)

(b) Constitution of India, Art. 311 (2) — Guilt of civil servant — Departmental enquiry — Necessity of.

Unless a proper departmental enquiry has been held, there can be no material on which Government can assess the guilt of the civil servant concerned and determine the action to be taken against him, notice whereof may be given under Art. 311(2) of the Constitution. It will be a travesty of justice if without taking the preliminary steps, Government were to determine the punishment simply on the basis of the charges that are framed and then make a formal show of complying with Art. 311(2) of the Constitution. AIR 1948 PC 121, Rel. on. (Para 12)

CASES REFERRED : Paras

(A) (V39) AIR 1952 Nag 288: ILR (1952) Nag 105 7

(B) ('52) Misc. Petn. No. 74 of 1952, D/- 21-8-1952 (Nag) 11

(C) (V40) AIR 1953 Nag 138: ILR (1953) Nag 522 11

(D) ('53) Misc. Petn. No. 312 of 1952, D/- 12-8-1953 (Nag) 11

(E) (V35) AIR 1948 PC 121: 75 Ind App 225 (PC) 12

R. V. S. Mani, for Petitioner; T. P. Naik, Addl. Govt. Pleader, for the State.

ORDER: This is a petition under Art. 226 of the Constitution, questioning the validity of the order

by which the petitioner has been reduced in rank and to a lower stage in a time scale.

(2) The petitioner entered Police service as a Constable in the year 1932. In 1935 he was promoted as Head Constable and was confirmed in that post in 1936. Thereafter he was appointed as a temporary Sergeant Sub-Inspector on 16-6-1942 and was also placed in charge of Special Squad, in which capacity his work was appreciated by his superior officers. Later he was posted as Station Officer, Dabhra, and while working as such was selected to officiate as Sub-Inspector in charge Anti Corruption Branch, Bilaspur. In October 1949 he was posted as Station Officer, Rithi.

(3) While in charge of Police Station, Rithi, the petitioner was served with a notice by the Deputy Inspector-General of Police on 8-4-1951 to show cause why he should not be reverted as Assistant Sub-Inspector for unsatisfactory work. Although a copy of the petitioner's explanation is not included in the paper book, we have perused his personal file with the Additional Government Pleader and find that he had rendered the necessary explanation on 12-5-1951. Without holding a departmental enquiry, an order was passed on 23rd/25th August 1951 reverting the petitioner to the post of Officiating Assistant Sub-Inspector until further orders, and on 19-9-1951 his name was removed from the list of Head Constables and Assistant Sub-Inspectors fit for trial as Sub-Inspectors. His appeal to the Inspector-General of Police was rejected on 28-8-1953 during the pendency of these proceedings.

(4) In his order the Inspector-General of Police has made the following observations:

> "From a perusal of the record before me, I am satisfied that during the period of officiation as S. I., he failed to acquire the prescribed special qualifications and acquit himself well in that post. I, therefore, do not see any reason to interfere with the orders already passed."

(5) The validity of the orders passed against the petitioner is challenged on the following grounds:

(1) That in the absence of a departmental enquiry as prescribed in Regulation 228(a) to (f) of the Police Regulations, the orders passed are illegal.

(2) That in view of Regulation 214(iii) of the Police Regulations the double punishment of reduction in rank and also to a lower stage in the time scale is illegal.

(3) That the punishment actually awarded is in excess of the punishment proposed in the show cause notice and is to that extent invalid.

(4) That a show cause notice without a formal enquiry does not constitute "reasonable opportunity" as contemplated by Art. 311(2) of the Constitution, and accordingly the orders passed are vitiated.

(6) In Government of Madhya Pradesh, General Administration Department, Memorandum No. 599-1665-II/51, dated 2-2-1952, the question of what should be deemed to be reduction in rank within the meaning of Art. 311(2) of the Constitution was considered, and it was explained that—

(i) if a person officiating in a higher post is reverted to his original post in the normal course, i.e. on account of the cessation of the vacancy or the return of the permanent incumbent, or failure to acquire prescribed special qualifications or to pass a prescribed test or departmental examinations, the reversion does not amount to reduction in rank;

(ii) on the other hand, if the officiating person is reverted for unsatisfactory work or as a disciplinary measure, then the reversion amounts to reduction in rank, because such a reversion is likely to stand in the way of future promotions of the Government servant concerned.

(7) The question is whether the case falls under one or the other of the above two clauses. It is no doubt true that the Inspector-General of Police has framed his order in a manner as if he purported to act under clause (i) of the Memorandum. The ostensible grounds of his order are—(i) that the petitioner failed to acquire the prescribed special qualifications & (ii) that he failed to acquit himself well in the post. It is for the first time at this stage that one hears of the petitioner having failed to acquire the prescribed special qualifications. What these special qualifications were have not been disclosed to us, and none were mentioned in the elaborate charge sheet that was drawn up. On the other hand, the second reason is tantamount to a charge of unsatisfactory work, which was mentioned in the charge sheet. It is, therefore, futile to contend that the case is one of ordinary reversion and not of punishment. (See — 'M. V. Vichoray v. The State of Madhya Pradesh', AIR 1952 Nag 288 (A)).

(8) It was, however, contended that even if the action was taken by way of punishment, still as Art. 311(2) was literally complied with in so far as a show cause notice was given as prescribed, the requirement of the Article was satisfied and the petitioner can, therefore, have no justiciable grievance. The argument was developed thus.

(9) The contention is that under Art. 310(1) of the Constitution every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor. This Article overrides Art. 309 which is subject to the provisions of the Constitution and is, therefore, limited by Art. 310(1). In this view it is urged that the procedure prescribed in the Police Regulations for regulating punishment, as ultimately referable to Art. 309 read with Art. 372(1), cannot affect the pleasure of the Governor under Art. 310(1) of the Constitution, and, therefore, failure to hold a departmental enquiry in accordance with the said Regulations cannot be a ground for interference under Art. 226.

(10) It appears to us that the pleasure of the Governor contemplated by Art. 310(1) of the Constitution is restricted to the holding of a post by a civil servant. In so far as this is concerned, he can only hold the post at his pleasure, i.e. until he is dismissed, discharged, or reduced in rank. If this action is taken it is subject to the safeguard provided in Art. 311(1). In other respects, the conditions of service, which are referable to Art. 309 read with Art. 372(1) of the Constitution, are guaranteed to the civil servant. In this view, punishment, whatever its kind, cannot be imposed on the civil servant unless a proper departmental enquiry as may be prescribed in appropriate Rules or Regulations has been held and he has been given a reasonable opportunity to defend himself. If, therefore, due to the absence of or defect in any enquiry, prejudice has been caused to the civil servant, it will, in our opinion, become a justiciable matter.

(11) In — 'Dongarsingh v. The State', Misc. Petn. No. 74 of 1952, D/- 21-8-1952 (Nag) (B), it was held that discharge of the petitioner from the Police Force without a departmental enquiry was not in accordance with law and was, therefore, liable to be set aside. Similarly in — 'Tribhuwan-

nath v. Government, Union of India', AIR 1953 Nag 138 (C) discharge of the petitioner from service was set aside on the ground that the departmental enquiry held against him was not proper. In — 'Rajeram Malik v. The State', Misc. Petn. No. 312 of 1952, D/- 12-8-1953 (Nag) (D), it was held that dismissal of a Sub-Inspector of the Madhya Pradesh Police Force on the basis of the departmental enquiry made by the officials of Hyderabad State, where he was deputed for service, was not legal and was, therefore, liable to be quashed.

In this case the view held in this Court in the past that its jurisdiction is not restricted only to cases where there has been an infraction of the Constitution, but extends also to cases where the Police Act or Regulations have been infringed was cited with approval. For purposes of the present case, it is not necessary to consider whether the departmental enquiry held under Regulations or by officers, other than those of this State, is ineffectual as a basis for imposing punishment. We have cited this decision only for the limited purpose of showing that a full and proper departmental enquiry has consistently been held in this Court as a primary condition for imposing punishment. If, therefore, there has been no departmental enquiry, and thereby prejudice has been caused to the civil servant concerned, the punishment imposed on him cannot be maintained. As at present advised, we are not prepared to depart from this view.

(12) There is another aspect of this question which we would like to stress. In our opinion, unless a proper departmental enquiry has been held, there can be no material on which Government can assess the guilt of the civil servant concerned and determine the action to be taken against him, notice whereof may be given under Art. 311(2) of the Constitution. In — 'High Commissioner for India v. I. M. Lall', AIR 1948 PC 121 (E), where their Lordships of the Privy Council were considering the scope of an analogous provision in S. 240(3), Government of India Act, 1935, it has been held that even where a civil servant had the benefit of a departmental enquiry, it is necessary for Government to come to a definite conclusion on the charges and determine provisionally the actual punishment to be embodied in the show cause notice. Their Lordships also approved of the following observations of the Federal Court, viz.,—

> " x x x it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken."

The decision of their Lordships postulates that a case must first be made out against the civil servant concerned and action determined provisionally on that basis, before a show cause notice is given. This cannot evidently be done unless there is initially a proper departmental enquiry in which full opportunity has been given to the civil servant to defend himself. Article 311(2) comes into play only after this preliminary action has been taken. Another opportunity has then to be given to the civil servant to show cause against the proposed punishment, on the basis of the grounds on which Government have provisionally determined it. It would be a travesty of justice if without taking the preliminary steps, Government were to determine the punishment simply on the basis of the charges that are framed and then make a formal show of complying with Art. 311(2) of the Constitution. This cannot be deemed to be a proper observance of this Article, apart from the question whether the Rules or Regulations dealing with departmental enquiries are obligatory on the Government.

(12A) In the instant case there were contradictory remarks on the petitioner's work as Station Officer, Rithi. Those of the Circle Inspector were favourable, while those of the Sub-Divisional Officer and Additional Deputy Superintendent of Police were adverse. We have perused the explanation of the petitioner to the charges which contained only the latter remarks, and we find that it required proper investigation before the charges could reasonably be held to be proved.

It is surprising that without any enquiry into the correctness of the adverse remarks 'vis-a-vis' the previous state of the Police Station and the difficulties under which the petitioner worked, the remarkably successful career of the officer was suddenly given a set back, probably on the assumption that just because the said remarks were made by superior officers, they must be deemed to be correct. It is regrettable that the lapse that was committed was, at a late stage, sought to be regularised by showing that the action taken was only in the normal course of reversion and did not amount to punishment. We would like to bring to the notice of Government that such procedure is not likely to create confidence in the ranks of Police Officers in the justice of the disciplinary actions and would not, therefore, be conducive to the efficiency of the Service.

(13) The impugned orders are set aside and it is directed that if Government propose to take further action against the petitioner, it should be on the basis that the position that he held before the action was taken was not at any time affected.

(14) The petition is allowed with costs. Counsel's fee Rs. 50/-. The amount of the outstanding security be refunded to the petitioner.

A/V.S.B. Petition allowed.

A. I. R. 1954 NAGPUR 231 (Vol. 41, C. N. 77)

MUDHOLKAR AND CHOUDHURI JJ. (21-8-1953).

State Government, Madhya Pradesh, Appellant v. Vishwanath Nidhanji and others, Accused-Respondents.

Criminal Appeal No 288 of 1952, from Order of First Addl. Sessions J., Amravati, 24-5-1952.

(a) Criminal P. C. (1898), Ss. 422, 512, 540A and 87 — Appeal against acquittal — Non-service of notice on absconding accused — Effect.

Before an appeal against an acquittal can be heard against a respondent, he must be served with a notice under S. 422, Criminal P. C. It may be that a respondent may be absconding, nevertheless that would be no ground for hearing an appeal in his absence. The Court may issue a proclamation against an absconding respondent under S. 87, Cr. P. C. but issue of a proclamation is not equivalent to a substituted service. If an accused person despite proclamation remains absent all that the Court can do is to attach his property. (Para 11)

The Code does not set out the procedure to be adopted where personal service of the notice under S. 422, cannot be effected. S. 512 or

S. 540A, Criminal P. C., does not apply to an appeal. In the absence of such a provision which would enable a Court to proceed with an appeal in the absence of an absconding accused, the Court has no option but to adjourn the case till such time as he is served or he appears before the Court. Cri. App. No. 1 of 1950 D/- 6-10-50 (SC), Rel. on. (Para 11)

Anno: Cr. P. C., S. 422, N. 1.

1949 Mitra: S. 422 (Topic discussed in N. 1 to S. 422 in AIR Com. extra).

Cr. P. C., S. 422, N 3.

1949 Mitra: S. 422, P. 1242, N. "To whom..... given", Paras 3. 4.

Cr. P. C., S. 540, N. 2.

1949 Mitra: S. 540 (Topic discussed in N. 2 to S. 540 in AIR Com. extra).

Cr. P. C., S. 87, N. 2.

1953 Mitra: S. 87, P. 161, N. 163, "conditions.. ....proclamation" (1 Pt. extra in N. 2 to S. 87 in AIR Com.)

(b) Criminal P. C. (1898), Ss. 417, 422 — Appeal by State against acquittal of several accused — Notice under S. 422 not served on one owing to his absconding — Appeal may be split up and heard against accused other than the absconding one. AIR 1944 Cal 234 and Cri. App. No. 253 of 1949, D/- 21-7-1950 (Nag), Relied on. (Paras 5, 6)

Anno: Cr. P. C., S. 422, N. 1.

1949 Mitra: S. 422 (Topic discussed in N. 1 to S. 422 in AIR Com. extra).

CASES REFERRED: Paras

(A) ('50) Cri Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) 5, 6, 11
(B) (V31) AIR 1944 Cal 234: 46 Cri LJ 31 6
(C) ('52) Cri Appeal No. 129 of 1951, D/-14-3-1952 (Nag) 7
(D) ('50) Cri Appeal No. 1 of 1950 D/- 6-10-1950 (SC) 9

W. K. Sheorey, Addl. Govt. Pleader, for the State; S. P. Kotwal, for Respondents.

JUDGMENT: This is an appeal by the State Government under S. 417, Criminal P. C., against the acquittal of the respondents by the First Additional Sessions Judge, Amravati. All the respondents were tried jointly along with three other persons, Balwantsingh, Ramchandra and Chauthmal. The respondents were charged with offences under Ss. 396 and 120-B, I. P. C. whereas the other three persons, were tried for offences under Ss. 399 and 120-B, I. P. C. The respondent Champat was also charged with the offence under S. 302, I. P. C. and tried for the same. The Court of Session acquitted the respondents and other three persons of the offences for which they were tried. The State Government has not appealed from the acquittal of the three persons other than the respondents and has confined its appeal to the acquittal of the respondents of the offence under S. 396, I. P. C.

(2) After the admission of the appeal, this Court ordered issue of notices to the respondents under S. 422, Criminal P. C. Notices were served only on respondents Maroti Dhobi, Gangaram and Champatrao but not on respondent Vishwanath.

(3) On 16-2-1953 an application was made on behalf of the State for issue of a proclamation under S. 87, Criminal P. C., against Vishwanath. On 24-2-1953 this Court passed the following order on the application:

"Shri W. B. Pendharkar for the State and Shri Kotwal for the pauper accused persons are heard. The application for issue of proclamation is supported by an affidavit. As respondent no. 1 Vishwanath was not found, he could not be arrested and the notice under S. 422, Criminal P. C., could not also be served on him. We are satisfied that there is reason to believe that he is either absconding or concealing himself so that the warrant may not be executed. Issue proclamation under S. 87, Criminal P. C., and it be published in the manner laid down in sub-sec. (2) of S. 87."

(4) The proclamation was reported to have been duly published and therefore the case was set down for hearing before Hemeon J. and one of us (Choudhuri J.) on 30-6-1953 when the following order was passed:

". . . The Additional Government Pleader requests one month's time to receive instructions on the point whether the appeal be proceeded with except against the absconding accused — Vishwanath — who is absent though a proclamation was published under S. 87, Criminal P. C., for his appearance in this Court today.

One month's time granted."

(5) Thereafter the appeal came up before us on 4-8-1953. On that date we ordered that we would hear the appeal in respect of the respondents other than Vishwanath as was done in — 'Provincial Govt. C. P. & Berar v. Shyamlal', Cri. Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) (A) and deferred our order regarding Vishwanath till the conclusion of the hearing of the appeal against Maroti Dhobi, Gangaram and Champatrao. On 12-8-1953, the arguments in the appeal were concluded and we ordered that the appeal with regard to Vishwanath shall remain pending 'sine die' and that we would give reasons for this direction in our judgment.

(6) The course which we followed of splitting up the appeal was, as we have already mentioned, followed by this Court in one case in the past — 'Cri. Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) (A), in which the Division Bench consisting of Hidayatullah J. and one of us (Mudholkar J.) observed as follows:

"Section 422, Criminal P. C., makes it obligatory on the Court to cause notice of appeal under S. 417, Criminal P. C., to be served on the accused person whose acquittal is challenged. The Criminal P. C. does not set out the procedure to be adopted where personal service of the notice cannot be effected on the accused person. What course should be followed in case personal service cannot be effected because the correct address of an accused person is not known, is not a matter which we are required to deal with at the moment. It may be that in such a case the provisions of S. 87, Criminal P. C., could be used by analogy. But even then, it is necessary to show that the accused person has either "absconded" or is "concealing himself" with a view to avoiding service of notice on him. That being the position, the appeal cannot go on in so far as Shyamlal and Champa are concerned. It would, however, be most undesirable to adjourn the whole appeal because such a course will not be fair to the remaining twelve respondents who have already had to appear in this Court a number of times and against whom the appeal has been pending for seven or eight months. We think that the appropriate course to be followed should be the one adopted by a Division Bench of the Calcutta High Court

in the case reported in — 'Supdt. and Legal Remembrancer v. Golok Tikadar', AIR 1944 Cal 234 (B). In that case, notices were served only on 40 out of 58 accused persons, and it was argued that as only one appeal had been presented, it could not be heard until all the accused persons named in the memo of appeal had been served. The learned Judges, however, held that there had been in effect 58 appeals against 58 different accused persons and that there would be no legal bar to the separate hearing of the appeal against each separate accused person. They also observed that it was convenient to consolidate the appeals against the appearing respondents though it was not legally necessary so to do. They therefore proceeded to hear the appeal against those of the accused persons who had been served and left over the appeal in so far as those who had not been served were concerned. Accordingly, we proceed with the appeal in so far as respondents other than Shyamlal and Champa are concerned and separate the appeal as against each of these two latter persons."

Here too, it would not be fair to the respondents who are served and represented before us to be kept in suspense regarding their fate till such time as Vishwanath could be found or served with the notice of appeal.

(7) Having heard the appeal against the respondents other than Vishwanath we decided to adjourn the appeal 'sine die' in so far as Vishwanath is concerned. The course which we have taken in this case is different from that taken by this Court in — 'The State v. Hanumat', Cri. Appeal No. 129 of 1951, D/- 14-3-1952 (Nag) (C). That was also an appeal by the State Government against the acquittal of the respondent. There was however only one respondent to that appeal. The respondent was not served with a notice of appeal and therefore a proclamation under S. 87, Criminal P. C., was issued by this Court. Evidence was also recorded by this Court that the respondent was absconding. The respondent was represented in this Court by a counsel appointed by the State Government for defending him. This was regarded by the Division Bench consistng of Hemeon and Sen JJ. to be sufficient compliance with the requirements of the law and the appeal was heard and decided by this Court. In the concluding paragraph of the judgment the learned Judges observed as follows :

"We may point out that the respondent could not be personally served under S. 422, Criminal P. C., and the warrant of arrest could not be executed as he has absconded. Proclamation was issued under S. 87, Criminal P. C. He has not been arrested so far and has not put in appearance in this Court. Shri Samiullah Khan, an advocate of this Court, was engaged by the State Government as a counsel on his behalf. He argued the case and supported the judgment of acquittal. Steps will be taken by the District Magistrate to arrest him and send him to prison for carrying out the sentence."

(8) The respondent then went up in appeal against the decision of this Court to the Supreme Court. Their Lordships set aside the decision of this Court and in the course of the judgment observed :

"It is contended on behalf of the appellant that no notice, under S. 422, Criminal P. C., was served on him of the appeal filed by the State Government in the High Court. It is clear from the record that though a notice was issued, it was not served on the appellant as he was not traceable. We are, therefore, of the opinion that the order of the High Court converting his acquittal into a conviction without serving a notice on him, as provided in S. 422, Criminal P. C. is bad and must be set aside. An opportunity must be afforded to the appellant to contest the appeal preferred by the State Government in the High Court. In the result, therefore, we set aside the order of the High Court convicting him on the charge made against him and remand the appeal to that Court for rehearing in accordance with the provisions of law."

(9) After the remand of the appeal by the Supreme Court the respondent was actually served, arrested and produced in Court. Thereafter the appeal was heard and decided on merits.

(10) There is yet another decision of the Supreme Court in a case which was taken up in appeal from the decision of this Court. That appeal is — 'Dwarkaprasad v. The State', Criminal Appeal No. 1 of 1950, D/- 6-10-1950 (SC) (D). In that case also the acquittal was set aside by this Court even though notice under S. 422, Criminal P. C., was not served on the respondent. Dealing with the matter their Lordships observed :

"One thing, however, is clear, that although it was an appeal from a judgment of acquittal, no notice was served upon the accused as is required under S. 422, Criminal P. C. The provision of the section, as its language shows, is mandatory and a compliance with it an essential preliminary to the hearing of the appeal. The arrest of the accused under a non-bailable warrant cannot be the substitute of a notice of appeal as is required under law. Neither the warrant, nor any return in token of its being executed is in the record and obviously the warrant could not contain the particulars which should be contained in a notice under S. 422, Criminal P. C."

Shri Singhai had appeared in this Court as counsel for the respondent Dwarkaprasad having been engaged by the father of Dwarkaprasad. According to their Lordships this was not sufficient and that the respondent could not be deemed to have been duly represented in the appeal.

(11) These decisions of their Lordships leave no doubt whatsoever that before an appeal against an acquittal can be heard against a respondent, he must be served with a notice under S. 422, Criminal P. C. It may be that a respondent may be absconding nevertheless that would be no ground for hearing an appeal in his absence. Where a person accused of an offence is absconding, S. 87, Criminal P. C. empowers the Court to issue a proclamation against him. Issue of a proclamation however is not equivalent to a substituted service. Indeed, as was pointed out in — 'Cri. Appeal No. 253 of 1949, D/- 21-7-1950 (Nag) (A)', the Criminal P. C. does not set out the procedure to be adopted where personal service of the notice under S. 422, Criminal P. C., cannot be effected on the accused person. If an accused person despite proclamation remains absent all that the Court can do is to attach his property. If an accused person was wanted for a trial before a Magistrate or the Court of Session and was absconding, all that could be done would be to record evidence in his absence under S. 512, Criminal P. C. Where the person is not the sole accused but is tried along with one or more accused persons and is absconding then under S. 540A, Criminal P. C., the Judge or Magistrate has discretion either to adjourn such inquiry or trial, before him,

or order that the case of the absconding accused be taken up or tried separately. Of course, neither S. 512 nor section 540A, Criminal P. C., applies to an appeal. We have referred to them only to show the importance which is attached by the Court to the presence of an accused person in Court or to his representation before it. In our judgment in the absence of a provision which would enable a Court to proceed with an appeal in the absence of an absconding accused we nave no option but to adjourn the case in so far as Vishwanath is concerned till such time as he is served or he appears before this Court.

* * * *

(22) Accordingly we allow the appeal, set aside the acquittal of each of the three respondents, convict each of them under S. 396, I. P. C. and sentence them to suffer rigorous imprisonment for seven years.

B/D.R.R. Order accordingly.

A.I.R. 1954 NAGPUR 234 (Vol. 41, C.N. 78)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (17-3-1952).

Uttamchand Motilal, Judgment-debtor, Appellant v. Sheolal Hiralal, Assignee of Decree-holder, Respondent.

Misc. Second Appeal No. 128 of 1950, from an order of Dist. J., Akola, D/- 10-8-1950.

(a) **Civil P. C. (1908), S. 11 — Execution proceedings.**

The judgment-debtor raised an objection about the executability of the decree. Held that there being no decision on the objection the dismissal of the application for default of the decree-holder could not be held to conclude the question about the maintainability of the application. AIR 1941 Nag 152; AIR 1937 Mad 289; AIR 1929 Bom 217, Rel. on. (Para 6)

Anno: C. P. C., S. 11, N. 23, 'fifthly'.

(b) **Civil P. C. (1908), S. 145, O. 21, R. 16, Second proviso — Surety for judgment-debtor becoming assignee of the decree.**

For the operation of the second proviso to R. 16, there must first be a decree for the payment of money against two or more persons. Even if the decree be against two persons, the proviso cannot be invoked unless the decree is one against them jointly. The proviso has equally no application where the decree is transferred to one of the defendants in the suit against whom no decree was passed or to his benamidar. Where the decree was only against A and in the course of the execution proceedings B became a surety to the judgment-debtor the second proviso to R. 16 of O. 21 is not applicable to the surety who seeks to execute the decree on its assignment to him by the decree-holder. The surety is not liable because of the decree being against him but because of his own undertaking. So when the decree is transferred to the surety, there is no merger of any right given by the decree with any liability imposed by it. As the surety acquires rights in the decree, his own liability as a surety is extinguished. But the liability of the person against whom there is the decree remains. Case law rel. on. (Paras 9, 11, 12)

Anno: C. P. C., S. 145, N. 3; O. 21, R. 16, N. 16; O. 21, R. 16, N. 17.

(c) **Civil P. C. (1908), O. 21, R. 16 — Inadequacy or absence of consideration.**

The judgment-debtor cannot prevent the assignee from executing the decree on the ground of inadequacy or absence of consideration. AIR 1919 Mad 123; AIR 1932 Mad 327, Rel. on. (Para 12)

Anno: C. P. C., O. 21, R. 16, N. 11.

CASES REFERRED: Paras

(A) (V28) AIR 1941 Nag 152: 194 Ind Cas 641 6
(B) (V24) AIR 1937 Mad 289: 166 Ind Cas 72 6
(C) (V16) AIR 1929 Bom 217: 118 Ind Cas 700 6
(D) (V12) AIR 1925 All 117: 47 All 86 7
(E) (V19) AIR 1932 Pat 168: 11 Pat 94 7
(F) ('49) S. A. No. 478 of 1945, D/- 14-12-1949 (Nag) 7
(G) (V20) AIR 1933 Cal 919: 60 Cal 1181 7
(H) (V23) AIR 1936 PC 258: 164 Ind Cas 17 (PC) 7
(I) ('08) 32 Bom 195: 10 Bom LR 89 9
(J) (V29) AIR 1942 Sind 83: ILR (1942) Kar 168 9
(K) ('11) 38 Cal 754: 9 Ind Cas 862 10
(L) (V27) AIR 1940 PC 167: ILR (1940) 2 Cal 493 (PC) 10
(M) (V6) AIR 1919 Mad 123: 49 Ind Cas 141 12
(N) (V19) AIR 1932 Mad 327: 137 Ind Cas 715 12

M. N. Phadke, for Appellant; S. N. Kherdekar, for Respondent.

JUDGMENT: This appeal is by the judgment-debtor. A decree was passed against the judgment-debtor by the High Court of Judicature at Bombay in Summary suit no. 1529 of 1936, on 9-2-1937, for Rs. 2,126/7 and costs. The decree was in favour of the Aero and Motor Company. It was transferred for execution to the District Judge, Akola. Two certificates were forwarded by the Bombay High Court to the District Judge, Akola one for costs and the other for the principal amount.

(2) On 31-8-1937 the decree-holder took out execution against the judgment-debtor for recovery of the decretal amount. One Bajranglal stood surety for the judgment-debtor on 7-9-1937. The execution for the recovery of costs was dismissed as fully satisfied on 19-11-1943. The decree was assigned in favour of the respondent Sheolal on 25-11-1943. On an application made by the assignee in the Bombay High Court his name was substituted in place of the original decree-holder. The assignee thereafter made an application for execution at Akola on 13-10-1948.

(3) Both the Courts found that Bajranglal adopted the course of purchasing the decree benami in the name of Sheolal to get him discharged from the decree. While the original decree-holder was trying to realise the decretal amount from the surety Bajranglal, the latter desired that the amount shoud be realised from the judgment-debtor Uttamchand.

(4) The contention of the surety was that his liability would arise only on the decree-holder's failure to realise from Uttamchand. The matter was taken up to the High Court, but the contention failed. So the case must now be considered on the footing that Bajranglal purchased the decree benami in the name of Sheolal.

(5) The main ground of objection by the judgment-debtor was that the assignee Sheolal was merely a benamidar for the surety Bajranglal and therefore the decree was inexecutable because of the second proviso to R. 16 of O. 21, C.P.C., as well as the principle of merger.

(6) It is also contended that because the decree-holder allowed the last execution application to be dismissed for default on 26-4-1948 on the judgment-debtor's raising an objection about the executability of the decree, the Court must be deemed to have decided the question against the decree-holder. According to the judgment-debtor, the question of executability must be considered 'res judicata'. It will be convenient to dispose of this latter contention. There was no decision on the objection and the dismissal of the application for default of the decree-holder cannot be held to conclude the question about the maintainability of the application. See — 'Nathmal v. Balkrishna', AIR 1941 Nag 152 (A); '(Firm) Lachiram Santhokchand Ameechand v. (Firm) Tarachand Jayapupji', AIR 1937 Mad 289 (B), and — 'Lashmibai v. Ravji', AIR 1929 Bom 217 (C).

(7) To the objection of the judgment-debtor that the decree is inexecutable because of the second proviso to R. 16 of O. 21, Civil P. C., the decree-holder answers that the question whether the assignee could execute the decree or not is 'res judicata' because the point ought to have been raised by the judgment-debtor in the Bombay High Court. According to the respondent, the judgment-debtor not having raised the point at that stage was precluded from agitating the question in the Akola Court when the former applied for execution of the decree. Reliance is placed upon — 'Dwarka Das v. Muhammad Ashfaqullah', AIR 1925 All 117 (D), and — 'Prithvi Chand v. Satya Kinkar Das', AIR 1932 Pat 168 (E). To this the judgment-debtor replies relying on — 'Baburao v. B. R. Vyankatchalam', S.A. No. 478 of 1945 D/- 14-12-1949 (Nag) (F), and — 'Gopendraprasad v. Ramkishore', AIR 1933 Cal 919 (G), that an objection to the executability of the decree can be taken not when the question of substitution of the assignee of the decree was being determined but when the assignee moves for execution of the decree.

Further, the judgment-debtor argues that the question of 'res judicata' was not pleaded in the executing Court. It is urged that without raising a specific plea or having an issue framed on the question of 'res judicata', the decree-holder cannot plead the order of the Bombay High Court substituting Sheolal in place of the original decree-holder as concluding the question whether the respondent can execute the decree. In support of this, the judgment-debtor invites our attention to — 'Jagadish Chandra Deo Dhabul Deb v. Gour Hari', AIR 1936 P.C. 258 (H). If the main argument of the judgment-debtor that because of the proviso to R. 16 of O. 21 or the principle of merger the respondent cannot execute the decree fails on its merits, it is, in our opinion, not necessary to decide the question of 'res judicata' based upon the omission of the judgment-debtor to raise the objection about the executability of the decree in the Bombay High Court or the omission of the decree-holder to plead 'res judicata' in the executing Court. Accordingly we propose to examine the main contention in the case.

(8) The second proviso to rule 16 runs:

> "Where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

The contention of the judgment-debtor is that the decree was against himself as well as Bajranglal, the surety, and on the finding that the assignee is but a benamidar for the surety, the decree becomes inexecutable against the appellant, the remaining judgment-debtor. The appellant refers to section 145 of the Code of Civil Procedure to show that the surety must be considered as a person against whom there is a decree.

(9) For the operation of the second proviso to rule 16, there must first be a decree for the payment of money against two or more persons. Even if the decree be against two persons, the proviso cannot be invoked unless the decree is one against them 'jointly'. See — 'Anant Vinayak v. Nagappa Subraya', 32 Bom 195 (I). The proviso has equally no application where the decree is transferred to one of the defendants in the suit against whom no decree was passed or to his benamidar. See — 'Isso v. Rattanchand', AIR 1942 Sind 83 (J). In the present case, the decree was only against the appellant. It is in the course of the execution proceedings that Bajranglal became a surety to the judgment-debtor.

It is true that the surety made himself liable to the decree-holder for the default of the judgment-debtor. Because under S. 145 a decree may be executed against a person who becomes liable as surety for the performance of the decree, it does not follow that the decree itself must be considered as one against two persons. The liability of the surety is not primarily under the decree. His liability is an accessary or a secondary one. He is a person who has taken upon himself the liability of another i.e. the liability of the party against whom the decree was originally passed.

(10) Section 145 does not say that a person who has become liable as surety shall be deemed to be a judgment-debtor under the decree. The very fact that it is expressly provided in the section that for the purposes of appeal the surety shall be deemed a party within the meaning of S. 47 Civil P. C., makes it clear that the true position is that he cannot be regarded as a person against whom there is a decree for the payment of money. He is fictionally so regarded for the purpose specified under that section. The fiction must therefore be limited to the purpose indicated by the context and cannot be given a larger effect. See — 'Srinibash Prasad v. Kesho Prasad Singh', 38 Cal 754 at p. 776 (K) and — 'Radha Kissen v. Durga Prosad', AIR 1940 PC 167 at p. 170 (L).

(11) We agree with the decision of the Court below that the second proviso to R. 16 of O. 21, is not applicable to a surety who seeks to execute the decree on its assignment to him by the decree-holder.

(12) The argument that the decree on its transfer to the surety becomes inexecutable on the principle of merger is also without force. The surety is not liable because of the decree being against him but because of his own undertaking. So when the decree is transferred to the surety, there is no merger of any right given by the decree with any liability imposed by it. As the surety acquires rights in the decree, his own liability as a surety is extinguished. But the liability of the person against whom there is the decree remains. In the present case fraud is not alleged. The question of consideration for the assignment is really immaterial. The judgment-debtor cannot prevent the assignee from executing the decree on the ground of inadequacy or absence of consideration. See — 'Thimma Reddi v. Subba Reddiar', AIR 1919 Mad 123 (M) and — 'Venkataramanujamma v. Chinna Venkata Reddi', AIR 1932 Mad 327 (N).

(13) The matters covered by grounds nos. 9 and 10 of the memorandum of appeal were not pressed

at the hearing and need not therefore be considered.

(14) The appeal is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A. I. R. 1954 NAGPUR 236 (Vol. 41, C. N. 79)

MANGALMURTI AND DEO JJ. (28-8-1953)

Firm Shriram Haracharandas Khamgaon, Appellant v. The President, The Cotton Seed Forward Delivery Managing Association Ltd., Khamgaon, and others Respondents.

Misc. First Appeal No. 30 of 1950, from order of Addl. Dist. J., Khamgaon, D/- 23-12-1949.

(a) Arbitration Act (1940), Ss. 14 (2) and 30 — Award not filed — Application for setting aside award — Maintainability.

Under S. 14 (2), Arbitration Act, either the original award or a copy signed by the arbitrators has to be filed in Court. If an award or its copy is in fact filed in Court by a party, it is not a valid filing under S. 14 (2) unless the party has the authority of the arbitrators or umpire. This authority of the arbitrators or umpire has to be specifically alleged and proved. AIR 1953 S. C. 313 Rel. on. (Para 6)

An application for setting aside an award on the grounds stated in S. 30 of the Arbitration Act cannot be made unless the award is filed under S. 14 (2). (Para 7)

Anno: Arbn. Act, S. 14, N. 2. S. 30, N. 2.

(b) Arbitration Act (1940), S. 1 — Arbitration agreement — Construction — Cotton-seed Forward Delivery Managing Association, Arts. 7 (c), 15 and 17 — Construction — (Arbitration Act (1940) Sch. 1, Cl. 2) — Arbitration agreement — Construction).

Article 7 (c) regarding the quorum of the Appeal Committee is not only applicable to its administrative functions stated in Arts. 10, 13 (A) and 22, but also to its judicial functions. No doubt, Art. 15 provides for decision by a majority and there cannot be a decision by majority if the appeal is heard by two members and they disagree. Whenever rules are silent and do not provide for any particular contingency, the Arbitration Act will govern such arbitration. If a dispute is referred for arbitration by two arbitrators, they have to appoint an umpire in accordance with Cl. 2 of the First Schedule of the Arbitration Act, unless the arbitration agreement provides otherwise. If there are only two persons available to sit on the Appeal Committee, it can reasonably be expected that they will follow the Arbitration Act and appoint an umpire in accordance with law. (Para 11)

To constitute an Appeal Committee for the decision of a dispute it is not necessary that all the five members including the President must be present. The provision in Art. 17 regarding the payment of fee along with the appeal does not lead to this conclusion. The presence of the President is not indispensable. Where the Appeal Committee consists of two members with the Vice-President acting as President under Art. 5, there is no defect in the constitution of the Appeal Committee. (Para 12-13)

(c) Evidence Act (1872), S. 114 Illus. (g) — Account books and their non-production.

Where the question is whether a particular person was at a particular place where he was alleged to have made a certain statement and the account books of that person are relevant only to show that he was at that place, then a failure on the part of such person to produce them may entitle the Court to draw an adverse inference that he was at that place when the statement was alleged to have been made by him, but it would not justify an inference that he made the statement attributed to him. That must be proved by other evidence. (Para 18)

Anno: Evi. Act S. 114, N. 9.

(d) Arbitration Act (1940), S. 30 — Legal misconduct.

Where the arbitrator has to decide whether a particular heap of cotton-seed is of the required quality it is no legal misconduct on the part of the arbitrator to decide that half of the heap is of the required quality especially when the arbitrator is expert in the commodity. It is always possible to separate good seed from bad from a heap. (Para 20)

Anno: Arbitration Act S. 30 N. 12.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 313: 1953 SCR 878 6

(B) (V29) AIR 1942 Bom 101: ILR (1942) Bom 452 7

(C) (V31) AIR 1944 Cal 304: ILR (1943) 2 Cal 392 7

(D) (V34) AIR 1947 Cal 106:ILR (1946) 1 Cal 611 7

(E) (V38) AIR 1951 Nag 198: ILR (1950) Nag 983 7

(F) (V38) AIR 1951 Cal 78: 55 Cal WN 147 8, 21

R. S. Dabir, G. S. Thombre, V. M. Kulkarni and Kumari Rama Gupta, for Appellant; M. K. Chande, for Respondents.

JUDGMENT: The appellant and the respondents were members of the Cotton-seed Forward Delivery Managing Association, Limited, Khamgaon, hereinafter referred to as the Association. In 1947-48, to which year the dispute relates, the appellant had to take delivery of 400 khandis of cotton-seed from respondent No. 5 Shri Factory, Limited under agreements to purchase with condition of delivery in Fagun Sammat 2004 (March 1948). The seller had issued delivery orders tendering delivery in different lots stated therein. On the allegations that the goods were not of the quality prescribed by Article 11 of the Association, the appellant made an application to the Association for survey of those goods. The two surveyors appointed by the parties inspected four heaps; one heap of 50 khandis was passed as being of the required quality and the other three heaps were held to be of inferior quality and were rejected.

Against this decision an appeal was taken by Shri Factory to the Appeal Committee. The application is also signed by the appellant. The decision of the Appeal Committee was given by Kantilal, Ramkuwar and Jaideo, representing respondents 2, 3 and 4. The representative of Shri Factory, though a member of the Appeal Committee and though present, did not take part in the Committee's deliberations and decision. The unanimous decision of the Appeal Committee was that 150 khandis of cotton-seed on the platform were of the required quality and out of 150 khandis from the tin godown, excluding about one 'khana' (compartment) on the northern side, the remaining cotton-seed was held to be of the required quality. The third heap of

50 khandis was also unanimously rejected. This decision was delivered on 20-3-1948 in the evening in the presence of both parties who have signed the decision.

(2) The appellant's pleader sent the following telegraphic notices to respondents 1 to 5 :

"Appeal Committee decision rejecting part of same heap of cotton seed opposed to justice and is misconduct of Appeal Committee members rectify within 24 hours else client proceeding legally at your costs."

Exhibit A-3 is one such notice.

(3) On 27-3-1948 the appellant filed an application in the lower Court, purporting to be one under S. 33 of the Arbitration Act, for setting aside the decision of the Appeal Committee on the ground that the members of the Appeal Committee misconducted themselves and the proceedings. The particulars were—

(a) That the respondents 2 to 4 being sellers in the market were interested in the respondent No. 5 and were hostile to the appellant and were incompetent to act as arbitrators.

(b) That even prior to the surveyors' decision respondents 2 to 4 gave out that they would compel the appellant to accept even worst quality of cotton-seed that might be tendered.

(c) That the goods in dispute did not answer the description of tenderable cotton-seed given in Article 11.

(d) The decision is perverse in that the Committee decided that half the cotton-seed in one heap was of the required quality and the other half was not.

(e) The decision is quite opposed to justice and amounts to misconduct on the part of the members. It was therefore alleged that the award was liable to be set aside. Respondent No. 1 who is president of the Association was joined on the ground that he was a necessary party in a proceeding to set aside the award.

(4) The lower Court held against the appellant on all these points and dismissed the application. It was held that the respondents 2 to 4 were not in any way interested in the subject-matter of the reference, that they did not give out that they would compel the appellant to accept cotton-seed of bad quality, that there was no mechanical or scientific test prescribed by the Articles of Association, that the decision depended on the individual judgment of the arbitrators who were selected by the general body of the members for their business experience and skill, that if the goods did not answer the requirements of Article 11 the decision was at the most due to an error of judgment. The Court was also not satisfied with the evidence as to the inferior quality of the goods passed by the Appeal Committee. The appellant's agent who was examined as A. W. 3 has himself admitted in evidence that there was no conspiracy.

(5) This award of the Appeal Committee was not filed in Court under S. 14(2) of the Arbitration Act and is not yet made a rule of the Court. The respondents submit that an application to set aside an award is not tenable unless the award is filed under S. 14(2). The learned Counsel for the appellant on the other hand contends that it is not necessary to have the award filed for challenging it. Alternatively it is submitted that the award (Exhibit A-2) is before the Court and the requirements of S. 14(2) are satisfied.

(6) Section 14, sub-section (2), material for our purpose runs thus :

"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court ..... cause the award or a signed copy of it ..... to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

If this section is applicable, it must be held that it is not complied with. Exhibit A-2 is not a signed copy of the award. It is only a certified copy issued by the Association. Either the original award or a copy signed by the arbitrators has to be filed in Court. It was filed by the appellant. If an award or its copy is in fact filed in Court by a party, it is not a valid filing under S. 14(2) unless the party has the authority of the arbitrators or umpire. This authority of the arbitrators or umpire has to be specifically alleged and proved. — 'Kumbha Mawji v. Dominion of India', AIR 1953 SC 313 (A). There is no such allegation or proof. In fact, it is conceded that Ex. A-2 was not filed with the authority of the arbitrators.

(7) It is settled law that an application for setting aside an award on the grounds stated in S. 30, Arbitration Act cannot be made unless the award is filed under section 14(2). — 'Ratanji Virpal & Co. v. Dhirajlal Manilal', AIR 1942 Bom 101 (B); — 'Bengal Jute Mills v. Jewraj Heeralal', AIR 1944 Cal 304 (C); — 'Bengal Silk Mills Co. v. Aisha Ariff', AIR 1947 Cal 106 (D) and — 'Janardhanprasad v. Chandrasekhar', AIR 1951 Nag 198 (E). In the case before the Supreme Court a copy of the award signed by the arbitrators was obtained by a party from them and was filed, but there was no authority to file that award in Court. It was therefore held that a decree could not be passed on an award which was not properly filed. The contention advanced by the learned Counsel for the appellant was examined in detail in — 'Bengal Silk Mills Co. v. Aisha Ariff (D)', (cit. sup.) and was negatived. We, therefore, hold that the application to set aside the award on grounds which can be raised under S. 30 of the Act is not maintainable unless the award is filed under S. 14(2).

(8) The learned Counsel for the appellant, however, submits that his application is "to challenge the validity or the existence of the award and to have the effect of the same determined by the Court." Beyond reproducing the words of S. 33 the appellant has not stated any facts to support the allegation. The appellant has stated more than once that the Appeal Committee made the award. Its copy is Exhibit A-1. In fact, this award is the foundation of the application. If there is no award in existence, there is nothing to set aside. There is also no dispute about the effect of the award. Both parties have construed the award in the same way, that is, the appellant had to take delivery of the goods passed by the Appeal Committee.

Now remains the question of the validity of the award. In the application the appellant has not disputed the validity of the award. The learned Counsel however submits that he has stated facts which are not disputed, and they render the award invalid. His contention is that the Appeal Committee which consists of five persons — The President, the Vice-President, and three members, must act collectively. A lesser number cannot hear the appeal. Alternatively, it is contended that the President and the Vice-President must always be members of the Committee, and that an Appeal Committee without the President was incompetent to make an award.

Since the arbitrators have thus acted without jurisdiction, it is contended, the application to set aside the award is maintainable under S. 33 of the Act and that proceedings under S. 30 would be inappropriate. Reliance was placed on — 'Bajranglal Laduram v. Ganesh Commercial Co. Ltd.', AIR 1951 Cal 78 (F).

(9) According to the respondents, this ground of attack should not be allowed to be raised at this stage as it is not mentioned in the application and further an application under S. 30 is the appropriate remedy because the contention is covered by the expression "otherwise invalid" in clause (c) of S. 30. It is therefore contended that the application is incompetent even for this relief unless the award is duly filed. We do not propose to examine this contention as in our opinion the appellant cannot succeed even if his application is tenable for this limited purpose.

(10) The Managing Committee is elected at a general meeting and consists of five persons — The President and the Vice-President elected under Article 5, and three members elected by the General Body. This Managing Committee also functions as Appeal Committee (Art. 6). The quorum for the Managing Committee even when functioning as Appeal Committee consists of two members (Art. 7(C)). If this quorum is not present, the meeting shall be deemed to have been cancelled (Art. 7(D)). The Appeal Committee has to fix the rate for settlement for each 'waida' as on the 7th. Payments of differences have to be made on that basis. Delivery of all outstanding contracts has to be given and taken at the rates so fixed (Arts. 10 and 13(A)). The Appeal Committee has to ascertain and declare rates for everyday after the 7th till the 15th (Art. 22).

Article 11 provides for the quality of cotton-seed tenderable for delivery. If there is a dispute regarding quality, it is to be decided by two surveyors, one nominated by each party from the panel elected at an annual general meeting (Art. 9). A party aggrieved by the decision of the surveyors has a right of appeal and the Appeal Committee has to give a decision by majority. Such decision is final and binding on the parties (Art. 15). The party who prefers an appeal has to pay Rs. 5/- as fees along with the appeal. This fee has to be divided and paid equally among the members present in the Appeal Committee (Art. 17), and the President has to make arrangements to pronounce the decision of the Appeal Committee within 24 hours from the receipt of the appeal (Art. 19).

(11) The appellant having raised the dispute about the quality of the goods, it was referred to the surveyors selected according to the Articles of Association. The surveyors having decided in favour of the appellant, the respondent No. 5 appealed. The request for the decision of the Appeal Committee was signed by both the parties (Ex. A-1). The appeal was decided by respondents 2 to 4 who were members of the Appeal Committee. The other two members were the President and respondent No. 5. The former was absent from the station and the latter took no part as he was a party. We cannot accept the contention of the learned Counsel for the appellant that the Article regarding the quorum of the Appeal Committee is applicable only to its administrative functions stated in Articles 10, 13(A) and 22, and not to its judicial functions. No such distinction is made in Article 7(C). No doubt, Article 15 provides for decision by a majority and there cannot be a decision by majority if the appeal is heard by two members and they disagree. Whenever rules are silent and do not provide for any particular contingency, the Arbitration Act will govern such arbitration. If a dispute is referred for arbitration by two arbitrators, they have to appoint an umpire in accordance with clause 2 of the First Schedule of the Arbitration Act, unless the arbitration agreement provides otherwise. If there are only two persons available to sit on the Appeal Committee, it can reasonably be expected that they will follow the Arbitration Act and appoint an umpire in accordance with law.

(12-13) The learned Counsel further submits that as Article 17 requires payment of Rs. 5/- along with the petition of appeal as fees for the members of the Appeal Committee, it is evident that the intention of the Association was that to constitute the Appeal Commitee all the five members must be present. This argument is unacceptable in view of the subsequent provision in that Article that the appeal fees will be divided equally among the members present in the Appeal Committee. The learned Counsel next contended that the presence of the President on the Appeal Committee was indispensable. There is no basis for this contention either. Moreover, in the instant case the Vice-President was on the Committee. Article 5 provides that the Vice-President shall act as President in the absence of the President. So even if the interpretation of the learned Counsel is accepted, there was no defect in the constitution of the Appeal Committee.

(14) In order to decide the case completely we propose to examine the objections regarding misconduct on merits. With the knowledge that the respondents 2 to 4 were sellers in the market, that they had given out that they would pass bad cotton-seed and that they were the only persons available to decide the appeal, the appellant submitted to the arbitration without any protest. Not only that; he has even signed the appeal Exhibit A-1 along with respondent No. 5. Even after the adverse decision, the appellant did not complain of any misconduct of the arbitrators now set up till the petition was filed in Court. He complained only of the decision on merits as stated in the telegram Exhibit A-3 reproduced in paragraph 2 above. The appellant's managing partner Phulchand (A. W. 3) was unable to assign any reason for his failure to protest either before or after the award.

(15) The appellant alleged that the sellers conspired to compel him to accept goods which were not tenderable in Fagun delivery and that a few days prior to 17-3-1948 respondents 2, 4 and 5 openly gave out that they would compel the appellant to accept such goods. There is no evidence of any conspiracy. Respondents 2 and 4 denied it. (After discussion of evidence the judgment proceeds) : In our view, the lower Court has rightly come to the conclusion that the respondents 2 and 4 did not make any statement attributed to them.

(16) A. W. 3 admitted that he did not know if any contracts of respondents 2 to 4 were outstanding for delivery in Fagun 'waida'. He did not make any enquiry whatsoever on this point. Kantilal has stated that he had no dealings with the appellant and that there were no outstanding contracts with him. There is no cross-examination on this point. On the contrary, A. W. 3 has admitted that he had no outstanding contract with the members of the Appeal Committee. Kantilal further stated that he had an outstanding contract of 150 khandis of cotton-seed which was delivered from the godown of Holkar-

mal Kanhaiyalal. There is no evidence that this witness had any other outstanding contracts of sale. The learned Counsel drew our attention to the statement of A. W. 6 Mahadeo that the contracts of Kantilal, Jaideo, Dwarkadas and the President respondent No. 1, were outstanding. This evidence is inadmissible, being hearsay, as admitted by the witness in cross-examination. His source of information was A. W. 3 Phulchand. As already stated, Phulchand had no knowledge. Whether the respondents 2 to 4 were sellers or not for Fagun delivery is really immaterial. What is material is whether they had any outstanding contracts of sale against which they had not sufficient goods to tender and whether the quality of goods they had was disputed by their buyers. If they were in such a predicament, it is likely that they would pass bad cotton-seed and thereby compel their buyers to settle the outstanding contracts on terms favourable to them. There is no such plea and there is no evidence.

(17) A. W. 3 says that he received delivery order for 15000 to 16000 khandis from respondent 5. The dispute was however regarding 400 khandis. It is unlikely that a seller who delivers 15000 khandis would deliberately tender 400 khandis of bad quality. As a matter of fact, 50 khandis were passed by the surveyors and the appellant did not appeal. The appellant does not admit that he raised a false dispute, regarding these 50 khandis. Under these circumstances we are inclined to hold that there must have been an honest difference of opinion between the parties regarding the quality of the goods.

(18) The learned Counsel for the appellant laid very great stress on the failure of Kantilal to produce his books of account which he had undertaken to produce while giving evidence. It is no doubt true that the witness has deliberately withheld his books of account. His explanation that the books were lying in the Income-tax office in Bombay for 1½ years cannot be true. He was examined on 9-12-1949. According to him he had sent the books for the year 1947-48 to Bombay in or about June 1948 and allowed these current books to remain in the Income-tax office since then. There is no evidence that the witness carries on business in Bombay and is assessed there. For the assessment year 1948-49 the books for the year 1947-48 are not required except for verifying whether the balances from the previous year have been correctly brought forward. Such examination cannot take more than a day or two. A business man requires his current book for his day-to-day business. It is therefore unlikely that the witness allowed his current books to lie with the Income-tax Officer for over a year and a half. If he had really sent the books to Bombay, he did not make any attempt to get those books for this case though he had undertaken more than six months earlier to produce them.

The learned Counsel contends that an adverse inference should be drawn against this witness for this deliberate withholding of account books. The witness alleged that he was not present at Khamgaon for over a fortnight till 18-3-1948 and could not have made the statement attributed to him by the appellant's witnesses. If the books had been produced, it would have been possible to prove that the witness was at Khamgaon during this period. Jaideo has no doubt stated that the witness was away from Khamgaon for about a fortnight and returned on the 18th. Failure to produce account books may entitle the Court to draw an inference that Kantilal was in Khamgaon when the statements are alleged to have been made by him; but it would not justify an inference that he made the statement attributed to him. That must be proved by other evidence. The learned Counsel further contends that the account books would have disclosed that Kantilal was a seller and had outstanding contracts for March delivery for which he had not sufficient deliverable goods to deliver. This is not even the appellant's case in the pleadings. All that he says is that he was a seller and was interested in delivering the award against the appellant. The inference required by the appellant's Counsel cannot therefore be drawn against this witness.

(19) The lower Court was not impressed with the evidence adduced by the appellant that the goods passed by the Appeal Committee were of inferior quality. There is no mechanical or scientific test for survey prescribed by the Articles of Association. It is left to the individual judgment of the surveyors and the members of the Appeal Committee who are elected at the general meeting for their skill and wide business experience in this commodity. As the learned Judge has put it, it may at the most be an error of judgment. It is admitted by A. W. 6 that there was no old cotton-seed and the cotton-seed tendered was of the current season. According to the appellant's witnesses it contained 'zoda'. Tendering of 'zoda' quality is not excluded by Article 11 of the Articles of Association. 'Zoda' cotton-seed is extracted from a subsequent picking of cotton and is of inferior quality to the first or second picking. According to Ratansi (A. W. 8), who was the surveyor nominated by the appellant, the goods contained a mixture of old cotton-seed. This is not the appellant's case. On further questioning in examination-in-chief he stated that by old cotton-seed he meant 'pichala' i.e. of last picking. In cross-examination he admitted that the last picking was in Fagun or Baisakh. Then he stated that in March picking there can be all varieties of cotton-seed. Cotton picked in Fagun could not be available for tender on 18-3-1948. To bring that cotton to the market and to extract cotton-seed from it would naturally take some time. It is not possible to have uniform quality of cotton-seed during the whole season; and there can be honest difference of opinion whether a particular sample answers the description given in Article 11. Ramkuwar, against whom nothing has been said by the appellant or his witnesses, passed this cotton-seed. It cannot therefore be said that respondents 2 and 4 passed the cotton-seed with any dishonest motive.

(20) There is no substance in the contention that there is legal misconduct because half the heap of cotton-seed of one godown was passed by the Appeal Committee rejecting the rest. As the evidence goes, this was not uncommon at Khamgaon. It is always possible to separate good seed from bad from a heap as was done by the Committee.

(21) The learned Counsel next contended that there was no enquiry by the Appeal Committee. It is not so. Samples were taken out both by the appellant and respondent No. 5 and by the members of the Appeal Committee. On an examination of all those samples the Appeal Committee reached its decision. The Appeal Committee had to decide this dispute as experts in trade. Being a matter within their expert knowledge, they could do so without evidence by a visual examination of the cotton-seed. AIR 1951 Cal 78 (F). There is therefore nothing to show that

the Appeal Committee misconducted the proceedings.

(22) We are satisfied that the appellant has failed to prove any ground for setting aside the award or to show anything against its validity.

(23) The appeal must therefore fail and is dismissed with costs. Counsel's fee Rs. 300/- if certified.

B/K.S.B. Appeal dismissed.

A. I. R. 1954 NAGPUR 249 (Vol. 41, C. N. 80)

SINHA C. J. (30-10-1952)

Kisan Dinaji, Applicant v. Deorao Nathuji and another, Non-Applicants.

Civil Revn. No. 156 of 1952, to revise order of Addl. Dist. J., Achalpur, D/- 1-3-1952.

(a) Civil P. C. (1908), Order 21, R. 90, Second proviso (Nagpur) — Scope.

The grounds contemplated by the added proviso are grounds which would be available to the judgment-debtor or the person whose property has been put up for sale before the sale had been held. But the ground that the sale was held before the expiration of 30 days from the date of the publication of the sale proclamation would come into existence only after the sale and therefore this could not be a ground which could be said to be available to the judgment-debtor before the commencement of the sale. It is obvious, therefore, that the proviso in question does not attract cases of this kind. (Para 4)

Anno: C. P. C., O. 21 R. 90 (Nagpur) Note 1.

1953 Mulla: O. 21 R. 90 (High Court Amendments not given in Mulla).

(b) Civil P. C. (1908), S. 115 — Failure to exercise jurisdiction.

Where in a case the courts below have refused to entertain the petitioner's application on the ground that it is barred by the provisions of the proviso to R. 90 of O. 21, whereas on a proper construction of the statute there is no such bar it is a case where the court vested with jurisdiction to entertain the case has wrongly refused to entertain it. It is clearly a case which attracts the revisional jurisdiction of the High Court under S. 115. It is not a case where while deciding a matter on merits the Court with jurisdiction has come to a conclusion on facts or in law which may be erroneous or unsound. AIR 1949 PC 156, Distinguished. (Para 5)

Anno: C. P. C., S. 115 N. 11.

1953 Mulla: S. 115 P. 419 N. "Failure ..... Jurisdiction" (Allahabad and Oudh views noted in Pts. 6 and 7 in N. 11 to S. 115 in AIR Com. not noticed in Mulla).

C. P. C., S. 115 N. 13.

1953 Mulla: S. 115 (Topic discussed in N. 13 to S. 115 in AIR Com. scattered in various notes in Mulla).

(c) Civil P. C. (1908), O. 21 Rr. 68, 90 — Sale held before expiration of 30 days.

The terms of R. 68 are imperative, inasmuch as the rule prohibits a sale taking place before the expiration of at least 30 days from the date of the publication of the sale proclamation, unless certain conditions are fulfilled. The sale held before the expiration of 30 days is vitiated. 7 All 289; AIR 1918 Nag 213, Rel. on. (Para 6)

Anno: C. P. C., O. 21 R. 68 N. 1.

1953 Mulla: O. 21 R. 68 (Topic discussed in N. 1 to O. 21 R. 68 in AIR Com. extra).

C. P. C., O. 21 R. 90 N. 23.

1953 Mulla: O. 21 R. 90, P. 900 N. "Material .... sale", Item 5, and O. 21 R. 68, P. 873 N. "Non-compliance ..... rule".

CASES REFERRED: Paras

(A) (V36) AIR 1949 PC 156: ILR (1950) Mad 1 (PC) 5
(B) ('85) 7 All 289: 1885 All WN 42 6
(C) (V5) AIR 1918 Nag 213: 48 Ind Cas 611 6

C. P. Kalele, for Applicant; Dr. D. W. Kathalay, for Non-Applicant No. 2.

ORDER: This application in revision is directed against the concurrent orders of the Courts below dismissing the petitioner's application under O. 21, R. 90, Civil P. C. for setting aside the sale of immovable property.

(2) The Courts below have dismissed the application on the ground that the proviso specially added by this Court to R. 90, O. 21, of the Civil P. C. comes into operation. The proviso is in these words:

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

(3) One of the grounds raised by the petitioner attacking the sale was that it had been held in complete disregard of the provisions of R. 68 of O. 21 of Civil P. C. in so far as it was held before the expiration of 30 days from the date that the sale proclamation was published. The lower appellate Court has found that this ground is well founded, but in its view this was a ground which should have been taken before the sale was held. The Court, however, felt bound to decide the application against the petitioner on the ground that this objection should have been raised before the commencement of the sale in terms of the added proviso quoted above.

(4) In my opinion, the Courts below have completely misdirected themselves in coming to that conclusion. The grounds contemplated by the added proviso are grounds which would be available to the judgment-debtor or the person whose property has been put up for sale even before the sale had been held, for example grounds to the effect that the notice under R. 22, O. 21 had not been served or that the processes of attachment & sale had not been published as required by law. But the ground that the sale was held before the expiration of 30 days from the date of the publication of the sale proclamation would come into existence only after the sale and therefore this could not be a ground which could be said to be available to the judgment-debtor before the commencement of the sale. It is obvious, therefore, that the proviso in question does not attract cases of this kind.

(5) But it has been argued by the learned counsel for the petitioner that the Courts below have come to that conclusion on a question of law, and that that conclusion may be right or wrong but the decision does not attract the revisional jurisdiction of this Court. In my opinion, there is no substance in this contention. It was tried to be supported by reference to the decision of their Lordships of the Judicial Committee in—'Venkatagiri v. H. R. E. Board, Madras', AIR 1949 PC 156 (A).

In the instant case the Courts below have refused to entertain the petitioner's application on the ground that it is barred by the provisions of the proviso to R. 90 of O. 21 of Civil P. C., whereas on a proper construction of the statute there is no such bar. This is therefore a case where the Court vested with jurisdiction to entertain the case has wrongly refused to entertain it. It is clearly a case which attracts the revisional jurisdiction of this Court under S. 115, Civil P. C. It is not a case where while deciding a matter on merits the Court with jurisdiction has come to a conclusion on facts or in law which may be erroneous or unsound. It is a case where the Court has refused to exercise jurisdiction vested in it by law on an erroneous interpretation of the statute giving the Court that jurisdiction. In that view of the matter the decision of their Lordships of the Judicial Committee is out of the way of the petitioner.

(6) It has not been contended that the infringement of R. 68 of O. 21, Civil P. C. does not entitle the petitioner to have the sale set aside. The terms of that rule are imperative, inasmuch as the rule prohibits a sale taking place before the expiration of at least 30 days from the date of the publication of the sale proclamation, unless certain conditions are fulfilled, viz., the consent in writing of the judgment-debtor which is not the case of either party. It has been clearly laid down in the case of — 'Bakhshi Nand Kishore v. Malak Chand', 7 All 289 (B), that a sale held in such circumstances was entirely vitiated. The decision of the Judicial Commissioner's Court in — 'Laxminarayan v. Mst. Purnabai', AIR 1918 Nag 213 (C) also lends support to the petitioners' contention that the sale held before the expiration of 30 days is vitiated.

(7) It is manifest, therefore, that on the finding arrived at by the lower appellate Court that the sale was held before the expiration of 30 days from the date of publication of the sale proclamation the sale should have been unconditionally set aside. The application is therefore allowed with costs. Hearing fee Rs. 50/-.

B/D.H.Z. Application allowed.

A.I.R. 1954 NAGPUR 241 (Vol. 41, C.N. 81)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (27-3-1953).

Tikaram Khupchand, Plaintiff-Appellant v. Hansraj Hazarimal and another, Defendants-Respondents.

Misc. First Appeal No. 73 of 1949, from Order, of Addl. Dist. J., Narsimhapur, D/- 7-5-1949.

(a) Arbitration Act (1940), Sch. I, Cl. 2 — Effect of non-compliance — (Interpretation of Statutes — Mandatory enactments) — (Civil P. C. (1908), Pre.).

No universal rule can be laid down for the construction of the statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. When the command of the Legislature is disregarded, nullification may be the usual consequence. But the mere presence of the word "shall" does not necessarily mean that proceedings in disregard of the requirement of the statute are null and void and the question whether it is so is in the main governed by considerations of convenience and justice. An intention that the disregard of the provision should be followed by a nullification of the proceedings must not be attributed to the legislature when that result would involve general inconvenience or injustice to innocent persons or advantage to those guilty of the neglect, without promoting the real aim and object of the Act. Case Law rel. on. (Paras 14, 15, 16)

The Arbitration Act does not say that when the reference is to an even number of arbitrators the failure to appoint an umpire vitiates the award. The intention of Sch. I, Cl. 2, appears to be that the umpire whose function it is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. Whatever may be the result in a case of a disagreement between the arbitrators, where no disagreement arises between the arbitrators and there is no need for an umpire, to regard the omission to appoint him as fatal to the validity of all the proceedings would only result in general inconvenience without promoting any object considered essential by the statute. The statute in such case could be complied with by the arbitrators appointing an umpire just before delivering their award. But such a compliance, though punctilious, is purposeless. When the objector cannot point to any prejudice because of the omission to appoint an umpire the omission does not vitiate the award. AIR 1940 Sind 37, Rel. on. (Paras 19, 20)

Anno: Arbn. Act, Sch. 1, R. 2 N. 1; C. P. C., Pre. N. 7.

(b) Civil P. C. (1908), S. 54 and O. 20, R. 18 — Scope.

Merely because the claim includes revenue paying estate, the Court or the arbitrators are not precluded from dealing with the case. Section 54 read with Order 20, R. 18, Civil P. C. does not preclude a Civil Court from making a partition of land of a revenue paying estate where no separate allotment of the revenue is asked for. Where an award did not even divide any of the revenue paying properties but only allotted different items intact to the different parties a decree passed in terms of that award would not be one for "partition of an undivided estate assessed to the payment of revenue to the Government", or "for the separate possession of a share of such an estate" as would attract S. 54, Civil P. C. read with Sub-r. (1) of R. 18 of Order 20, thereof. Case law referred to. (Paras 22, 24)

Anno: C. P. C., S. 54, N. 2; C. P. C., O. 20, R. 18, N. 1.

(c) C. P. Land Revenue Act (2 of 1917), S. 220(4)(n) — Applicability — (Civil P. C. (1908), S. 9).

Clause (n) comes into play only when the jurisdiction of the Civil Court is invoked over "the partition or union of Mahals or patties". In a suit for partition, where the civil Court is not asked to partition a mahal or a patti, merely because revenue paying property is included as an item, jurisdiction of the Civil Court is not barred. The civil Court can decide rights with respect to a mahal or a patti which under the Act are not left to the determination, decision or disposal by the State Government or a Revenue Officer. (Para 25)

Anno: C. P. C., S. 9, N. 51.

(d) Arbitration Act (1940), S. 30 — Acts amounting to misconduct.

Because under the terms of the arbitration agreement it is open to the arbitrators to decide the case without examining any person, it does not follow that when they consider it necessary to take the statements of parties or witnesses for the disposal of the case, they are free to take such statements in the absence of any of the parties.

Therefore where the arbitrators informed a party that his presence before them was unnecessary and that they would take his evidence on the following day after recording the statements of the other parties and on the following day after taking those statements and evidence of witnesses behind his back they refused to see that party holding that no more evidence was necessary on his behalf:

Held that the opinion of the arbitrators was induced by a grave defect in procedure which prejudiced the party in so far as the witnesses and the other parties had made statements which he had no opportunity to controvert or explain and that the arbitrators misconducted themselves by refusing to see him and by taking statements or evidence behind his back. (Paras 31, 32, 33)

Anno: Arbn. Act, S. 30, N. 10.

(e) Arbitration Act (1940), S. 30 — Acts not amounting to misconduct — Wrong decisions.

Normally the Court is not concerned with the merits of the decision given by the arbitrators. (1861) 5 LT 507, Rel. on. (Para 34)

Where in the arbitration in a suit for partition the story of the plaintiff and one of the defendants was that there was only a partial partition before and that the property in dispute remained a joint family property but the other defendant claimed that there had been a complete partition already and that the property was his self-acquired one and there was nothing to show that the arbitrators had any personal knowledge of the matter and even if they had the arbitration agreement did not authorise them to make an award on their personal knowledge.

Held that it was open to them on considering the evidence before them to accept either story and their award was not liable to be set aside on the ground of the award being perverse. (Para 35)

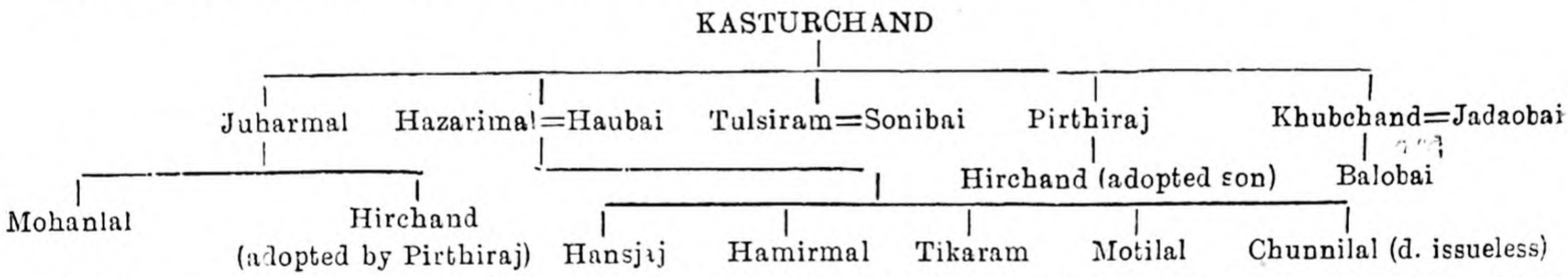
Anno: Arbn. Act, S. 30, N. 12.

CASES REFERRED : Paras

(A) (1827) 108 ER 627: 7 B & C 7 14
(B) (1857) 26 LJ MC 175: 8 El & Bl 321 14
(C) (1865) 1 QB 433: 35 LJ QB 145 14
(D) (1860) 45 ER 715: 2 De G F & J 502 15
(E) (1877) 2 P. D. 203 15
(F) (1819) 106 ER 661: 3 B & Ald 266 17
(G) (V4) AIR 1917 PC 142: 1917 AC 170 (PC) 18
(H) (V27) AIR 1940 Sind 37: 187 Ind Cas 262 20
(I) ('97) 24 Cal 725: 1 Cal WN 375 (FB) 23
(J) (V32) AR 1945 Cal 28: 48 Cal WN 223 23
(K) (V21) AIR 1934 Pat 365: 13 Pat 637 23
(L) (1922) 1922-1 KB 640: 91 LJ KB 432 31
(M) (V17) AIR 1930 Mad 646: 126 Ind Cas 735 31
(N) (1844) 49 ER 1141: 7 Beav 455 33
(O) (1861) 5 LT 507: 31 LJ Ch 420 34

D. T. Mangalmurti and P. S. Pultamkar, for Appellant; M. R. Bobde, K. G. Chendke and A. S. Bobde, for Respondent No. 1.

JUDGMENT : This appeal is by the plaintiff. The appeal is against the decision of the Additional District Judge, Narsingpur, setting aside an award made by the arbitrators in civil suit No. 35-A of 1943. The following genealogy from the written statement of defendant no. 2 will be helpful in understanding the case:



(2) The plaintiff instituted the suit for partition of the joint family property and business as the adopted son of one Khubchand, the brother of the father of the two defendants. The immovable property to be partitioned included three items of property paying land revenue.

The defendants resisted the suit and pleaded that on the death of Kasturchand in 'samvat' 1850 (1893-94) all his five sons including the father of the defendants and the father of the plaintiff separated. Tulsiram had his residence and business separate from the other brothers from that time. The remaining four brothers remained joint until about 'samvat' 1859 (1902-03) when there was a partition by metes and bounds of the property among the four brothers. Since then they began to live, mess and do business separately. The share of Khubchand which was converted into cash remained in deposit with Hazarimal. Khubchand had no male issue. He was indifferent to worldly affairs. He did no business and maintained himself from the money deposited with Hazarimal. Khubchand died a few months after the partition. The defendants asserted that the plaintiff in his alleged capacity as the adopted son of Khubchand has thus no legal claim against Hazarimal and his other sons.

(3) Issues were framed on 31-3-1948 and two witnesses for the plaintiff were examined on commission. On 13-9-1948 the parties applied for referring the case to arbitration.

(4) The arbitrators delivered their award on 21-9-1948.

According to the award the appellant is the adopted son of Khubchand, that all the three brothers Tikaram, Hamirmal and Hansraj separated in the year 1935, and began doing their business separately, and that ten items of immovable property remained yet to be partitioned including 'mauza' Bakori and a house at Bhusawal. The arbitrators found that Tikaram was entitled to a half share. Accordingly the award gave to the plaintiff the entire -/16/- in 'mauza' Bakori and Rs. 4,000 in cash to be paid by Seth Hansraj who was to retain the house at Bhusawal.

Hamirmal was allotted other items of property including Rs. 4,000 to be paid by Seth Hansraj.

(5) It may be noted that not a single item of the revenue paying properties was itself divided.

(6) The award was objected to by both the defendants and the plaintiff. Defendant no. 2 and the plaintiff objected on the merits the decision of the arbitrators on some of the points in con-

troversy. Defendant no. 1 contended that the award was vitiated because the arbitrators failed to appoint an umpire before they entered upon their duties. Defendant no. 1 further contended that the arbitrators misconducted themselves because they had recorded a false claim by Seth Motilal to a half share in the house at Bhusawal; exclude the defendant during the examination of Motilal, Lalsingh and the plaintiff and finally refused to look into his accounts and documents as desired by him. The award was thus said to be perverse and liable to be set aside.

(7) The learned trial judge framed 21 issues. Issues nos. 18 and 18(a) related to the failure to appoint an umpire by the arbitrators and its effect upon the award delivered by them. The rest of the issues (except issues nos. 18(a) and 21 but including issue no. 16 concerning misconduct on the part of the arbitrators) were found in the negative.

(8) The learned judge held that the failure of the arbitrators to appoint an umpire in compliance with clause 2 of the First Schedule vitiated the award. The award was also held to be invalid on the ground that it ultimately partitioned properties assessed to the payment of revenue to the Government. So the Court had no jurisdiction to act on the award and pass a decree in accordance with it by reason of S. 54, Civil P. C. read with O. 20, R. 18 thereof. The learned judge called in aid S. 220(n), C. P. Land Revenue Act also for holding the award invalid.

(9) In appeal while the appellant contested the findings of the learned trial judge on issues 18, 19 and 21 decided against him, the respondents contested the rest of the issues which were decided against them. The respondents also filed a cross-objection though they could have supported the decision without doing so by contesting the points which were adversely decided against them.

(10) The principal points for decision are:

(i) whether the award is vitiated because of the failure of the arbitrators to appoint an umpire.

(ii) whether the award is invalid because of S. 54, Civil P. C. read with O. 20, R. 18, thereof,

(iii) whether the jurisdiction of the Court as well as the arbitrators is excluded by S. 220(n), C. P. Land Revenue Act,

(iv) whether the award is liable to be set aside because of misconduct on the part of the arbitrators, and

(v) whether the award is liable to be set aside because the arbitrators took a perverse view of the case.

(11) Point no. (i) : According to the appellant, having regard to the terms of the reference, S. 3 of the Act does not apply to the case and clause 2 of the First Schedule cannot be deemed to be included in the arbitration agreement. We cannot accede to the contention that there is an intention expressed to show that the parties required the award to be given only by the two arbitrators chosen and in case they did not agree the reference was to be revoked. The language employed in the application (13-9-1943) is not capable of such a construction. We hold that clause 2 of the First Schedule must be deemed to be included in the arbitration agreement. The question then is what is the effect of the arbitrators in not complying with the requirement of that clause.

(12) The arbitrators delivered their award on 21-9-1943 i.e., within 8 days of the reference made to them. There was no disagreement between the arbitrators and consequently no necessity arose for an umpire. The contention is that the award is vitiated because of the failure of the arbitrators to appoint an umpire.

(13) The second clause of the First Schedule to the Act runs :

"If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

(14) It is true that the word "shall" now appears in the second clause in place of the word "may" in the corresponding provision in Act 9 of 1899. But the mere presence of the word "shall" does not necessarily mean that proceedings in disregard of the requirement of the statute are null and void. See — 'The King v. Justices of Leicester', (1827)108 E.R. 627 (A); 'Le Feuvre v. Miller', (1857)26 L.J.M.C. 175 at p. 177 (B), and — 'The Queen v. Lofthouse', (1865) 1 Q.B. 433(C).

(15) As observed by the Lord Chancellor, no universal rule can be laid down for the construction of the statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. See — 'Liverpool Borough Bank v. Turner', (1860)45 E.R. 715 (D). According to Lord Penzance,

"in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory".

— 'Howard v. Bodington', (1877)2 P.D. 203 at p. 211 (E).

(16) When the command of the Legislature is disregarded, nullification may be the usual consequence. But to quote Maxwell,

"the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature." (Maxwell on Interpretation of Statutes, 9th edition, page 374.)

Two cases may be cited to illustrate the statement of Maxwell.

(17) In — 'Margate Pier Co. v. Hannam', (1819) 106 E.R. 661 (F), the Court had to construe the effect of non-compliance of a statutory provision according to which no person is authorised to act as a justice of the peace unless he shall have taken and subscribed the oaths and delivered the certificate as required by that provision. Objection was raised to the validity of the acts of a justice who had omitted to deliver a certificate or take an oath as prescribed by the statute. The objection failed. The Court construed the provision as making it unlawful for the justice to act as such but not to make his acts invalid. Otherwise, a literal construction of the statute would have led to much inconvenience.

(18) In — 'Montreal Street Railway Co. v. Normandin', AIR 1917 P.C. 142 (G), the verdict of a jury in an action was sought to be set aside on the ground that the trial was 'coram non judice' and the verdict, a nullity, because of a series of infringements of very elaborate and minute enactments made for the constitution of jury. In the absence of any prejudice to the objector the

Privy Council ruled that it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the lists 'ipso facto' null & void so that no jury trials could be held until a duly revised list had been prepared.

(19) The Arbitration Act does not say that when the reference is to an even number of arbitrators the failure to appoint an umpire vitiates the award. On the contrary, the statute provides in section 8(1)(c) for action to be taken where the parties or the arbitrators are required to appoint an umpire and fail to do so. Clause 2 cannot be construed as a prohibition against the arbitrators making the award without appointing an umpire. The provision is intended to facilitate the smooth progress of the procedings before the arbitrators.

Whereas under the third clause the arbitrators have as a rule to make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement, under the second clause they have to appoint an umpire not later than one month from the latest date of their respective appointments. The intention appears to be that the umpire whose function it is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. Whatever may be the result in a case of a disagreement between the arbitrators, where, as here, no disagreement arose between the arbitrators and there was no need for an umpire, to regard the omission to appoint him as fatal to the validity of all the proceedings would only result in general inconvenience without promoting any object considered essential by the statute.

(20) The statute could in this case have been complied with by the arbitrators appointing an umpire just before delivering their award. But such a compliance, though punctilious, is purposeless. The objector cannot point to any prejudice because of the omission to appoint an umpire. We are therefore of the view that the omission did not vitiate the award.

That is also the view taken in — 'Louis Dreyfus & Co. v. Hemandas Hotchand', AIR 1940 Sind 37 at p. 40 (H). True, that case was not under the Act of 1940. But in that case even though the arbitration agreement specifically provided that "the arbitrators shall within three days after their appointment and before entering upon the business of the said reference appoint an umpire in writing to whom the matters in disputes shall be referred", the failure to appoint an umpire was held not to vitiate the award.

(21) We reverse the findings of the learned judge on issues 18 and 18(a). We hold that the award cannot fail by reason of the failure to appoint an umpire.

(22) On the second point, we are of opinion that merely because the claim includes revenue paying estate the Court or the arbitrators are not precluded from dealing with the case. In the present case, if a decree can be passed in terms of the award, that decree would not be one for "partition of an undivided estate assessed to the payment of revenue to the Government", or "for the separate possession of a share of such an estate" as would attract S. 54, Civil P. C. read with sub-rule (1) of R. 18 of Order 20 thereof.

(23) There is a dictum of Maclean C. J. in — 'Jogodishury Debea v. Kailash Chandra', 24 Cal 725 (FB) (I), that S. 54 is not intended to make it compulsory that the Collector should make the partition, save in cases where as the result of the partition the revenue would or might be affected. Section 54 read with O. 20 R. 18, Civil P. C. does not preclude a civil Court from making a partition of land of a revenue paying estate where no separate allotment of the revenue is asked for. See — 'Priyanath Roy v. Sreedhar Chandra Roy', AIR 1945 Cal 28 (J), and — 'Radha Kishun v. Bhola Chaudhri', AIR 1934 Pat 365 (K).

(24) In the present case, the award did not even divide any of the revenue paying properties but only allotted different items intact to the different parties.

(25) The objection based upon S. 220(n) of the Land Revenue Act must also fail. Clause (n) comes into play only when the jurisdiction of the civil Court is invoked over "the partition or union of mahals or pattis". In the instant case, the civil Court is not asked to partition a mahal or a patti. Merely because revenue paying property is included as an item in a suit for partition, jurisdiction of the civil Court is not barred. The civil Court can decide rights with respect to a mahal or a patti which under the Act are not left to the determination, decision or disposal by the State Government or a Revenue Officer.

(26) We take up the fourth point for consideration. The objection to the award on the ground that the arbitrators recorded the claim of Seth Motilal, though it was false, has no force. In paragraph 6 of the award the arbitrators allotted patti of Bharada, land at 'mouza' Dhamna, Chogmalwala house, the house at Kandeli and the two small houses of Bhusawal to Seth Hansraj. The house of Chogmalwala is referred to as the house "in which house Seth Motilalji claims to have a half share". The arbitrators only mentioned the claim deposed to by Seth Motilal ('vide' his statement paragraph 9(v)). The arbitrators gave no decision upon the claim. The casual mention of such a claim put forward by the witness cannot be said to vitiate the award. It has no more significance than the description of the house at Kandeli as being "on the other side Ripta in which there are bandas built". ('vide' paragraph 6 of the award).

(27) There is no evidence sufficient to hold that Motilal improperly influenced the arbitrators. Motilal's statement before the arbitrators is on record. Though there is some evidence about Motilal's going to the house of Seth Hansraj (1 D. W. 1) and Karnik (1 D. W. 5), the evidence is vague and inconclusive on the point of improper influence. The arbitrator (Shri Bhojraj) himself was not cross-examined on the point. We reverse the finding of the learned trial judge on issue no. 8. But we affirm the findings on issues nos. 4, 5, 6 and 9.

(28-29) The next ground of misconduct relied upon by the first defendant is that Seth Motilal, Lalsingh and the plaintiff were examined in the absence of the defendant. There is very little to show that Lalsingh was examined. No question was put to the arbitrator on this point. Motilal was examined on 18-9-1948. The plaintiff and defendant no. 2 were examined on 19-9-1948. The complaint of defendant no. 1 is that the arbitrators asked him to go out when they were examining Motilal. On the 18th the arbitrators told the defendant that his presence before them was unnecessary, and that they would take his evidence on the subsequent day after taking the statements of the other parties. The same thing was repeated on the 19th. (His Lordship then examined the evidence and stated :)

(30) We find that the arbitrators examined Motilal, the plaintiff and defendant no. 2 after excluding the first defendant from the proceedings. The learned trial judge failed to give sufficient attention to this point and negatived misconduct because of the term in the arbitration agreement. According to the learned judge the agreement did not enjoin upon the arbitrators to follow any particular procedure in coming to their conclusions.

(31) It is true that the arbitration agreement empowers the arbitrators to "take the whole case into consideration, and according to their judgment do whatever they think proper after inspecting the account books, examining any person or party or without doing so and after consulting anyone they please". Bhojraj did not say that the arbitrators considered it necessary to consult anyone. According to him, Motilal was examined as a witness. In any case, when the arbitrators were taking the statements of the parties, it cannot be said that they were in consultation with them.

Because it was quite open to the arbitrators to decide the case without examining any person, it does not follow that when they considered it necessary to take the statements of parties or witnesses for the disposal of the case, they were free to take such statements in the absence of any of the parties. In —'W. Ramsden & Co. v. Jacobs', 1922-1 KB 640 (L), the evidence for each side was heard separately apparently without any objection by the parties. But the Court held such a procedure was wrong. The Court set aside the award expressing its disapproval of the procedure adopted. There is a decision of Madhavan Nair J. in — 'Venkata Subbayya v. Venkataramanayya', AIR 1930 Mad 646 at p. 648 (M), which covers the present case and has our respectful concurrence.

(32) The explanation of Shri Bhojraj for the refusal of the arbitrators to look into the documents and the evidence relied upon by the first defendant is that the arbitrators did not consider such a course necessary. On the 18th the arbitrators evidently thought that they would call the first defendant again if necessary after taking the statements of the other parties. On the 19th the arbitrators took the statements of the other parties behind the back of the first defendant. It was after taking the statements in that manner that they did not think it necessary to further examine the first defendant on the 19th or take his evidence. The opinion of the arbitrators on the 19th that no more evidence was necessary on behalf of the first defendant was thus induced by a grave defect in procedure. Clearly there was prejudice to the first defendant in so far as the witness and parties made statements which he had no opportunity to controvert or explain.

(33) As observed by the Master of the Rolls in — 'Harvey v. Shelton', (1844) 49 ER 1141 at p. 1144 (N):

> "you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side."

The Court cannot countenance any departure from so fundamental a principle of judicial procedure.

On the fourth point we hold that the arbitrators misconducted themselves by refusing to see the first defendant on the 19th and by taking statements or evidence behind his back. They denied him a fair opportunity in presenting his case. This naturally affects the findings on most of the issues. We reverse the findings of the learned trial judge on issues nos. 3, 7 (so far as Motilal is concerned), 10, 11, 12, 13, 14, 15, 20 and 21. On issue no. 16 we reverse the finding only in relation to misconduct. There is no evidence that there was any fraud or any preconceived plan on the part of the arbitrators to allow the plaintiff and defendant shares to which they were not entitled. The finding on issue no. 17 is affirmed. About the perversity referred to in issues nos. 2, 11, and 16 we will presently deal while considering the fifth point for decision.

(34) On the fifth point we agree with the learned trial judge that the award in question cannot be set aside on the ground that it is perverse. Normally the Court is not concerned with the merits of the decision given by the arbitrators. As observed by Lord Justice Turner in — 'Haigh v. Haigh', (1861) 5 LT 507 at p. 509 (O):

> "an arbitrator being a judge selected by the parties and chosen to decide without appeal, this court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination; and by that determination, if fairly and properly made, they must be content to be bound; but, on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this court, when called upon to review their proceedings, is bound to see that those rules have been observed."

(35) But for the finding on point no. (4), we do not think that the award is liable to be set aside on the ground that the arbitrators have taken a perverse view. There is nothing to show that the arbitrators personally knew that some of the property was the self-acquired property of the first defendant. Besides, the arbitration agreement does not authorize them to make an award on the basis of their own personal knowledge. It was open to them on considering the evidence before them to accept either the story of partial partition as set up by the plaintiff and the second defendant or that of a complete partition as pleaded by the first defendant ('vide' paragraphs 7(c) of the plaint and the written statements of defendants nos. 1 and 2). We affirm the findings of the learned judge on issues nos. 1 and 2 and, in so far as perversity forms the subject-matter, issues nos. 11 and 16 also.

(36) In the result, we affirm the decision of the learned trial judge in setting aside the award, though for reasons different from those given by him. The appeal is dismissed with costs. There is no order as to costs of the cross-objection.

B/M.K.S. Order accordingly.

A.I.R. 1954 NAGPUR 245 (Vol. 41, C.N. 82)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (24-9-1953)

Ajabrao Domajee, Plaintiff-Appellant v. Atmaram Sadasheorao and others, Defendants-Respondents.

First Appeal No. 46 of 1945 from decree of 2nd Sub-J., 1st Class, Nagpur, D/- 30-11-1944.

Civil P. C. (1908), S. 47, O. 21, R. 32(5) — Possession obtained under decree for possession

and perpetual injunction — Fresh dispossession by same defendant — Remedy by suit — Bar under S. 47 — Limitation — (Limitation Act (1908), Art. 142). AIR 1919 Cal 674, Dissented from.

A obtained a decree on the basis of his mortgage without joining B, a subsequent mortgagee, and obtained possession in execution of it. B also sued on his mortgage and received possession subject to A's mortgage. A again brought a suit against B to give him a chance to redeem and B having failed to redeem, A obtained possession under that decree against B in 1933. B having dispossessed A again, A sued B for possession in 1935 and obtained possession through Court in 1939. A had also obtained perpetual injunction against B under that decree. B again dispossessed A who had to sue A and his lessees for possession on 7-2-1944. Question was whether the suit was barred under S. 47, Civil P. C. or by limitation.

Held (1) that A had sufficiently established his title to the property against B by his decree in 1933; (Para 10)

(2) that since there was evidence of A's possession in 1941-42 and since there was no evidence of any act of dispossession on part of B from 1936 to 1942-43, possession of the fallow lands in question would be referrable to the lawful title of A and hence the suit brought in 1944 was well within limitation; (Para 12)

(3) that the words of sub-rule (5) of R. 32, Civil P. C., clearly indicate that they are apposite only to mandatory injunctions and not to prohibitory injunctions; (Para 14)

(4) that after A's suit for possession was decreed and execution of that decree was had and A obtained possession in 1939, that decree was exhausted and was incapable of execution a second time. All that remained was only a prohibitory injunction against B which could only be enforced against B by the penalty of commitment to detention. That remedy was inappropriate to a case in which possession had been lost. Once A had lost possession of the fields at the instance of B he could only obtain possession by bringing a fresh suit, which, therefore, could not be barred under S. 47, Civil P. C. Case law referred. AIR 1919 Cal 674, Dissented from. (Para 15)

Anno: Civil P. C., S. 47 N. 72.

1953 Mulla: S. 47, P. 180, N. "And.....defence" (Calcutta view in AIR 1932 Cal 825 and AIR 1929 Cal 247, and views of Bombay, Nagpur and Oudh not noticed in Mulla — 7 Pts. extra in N. 72 to S. 47 in AIR Com.).

Civil P. C., O. 21, R. 32, N. 9 Pt. 10.

1953 Mulla: O. 21, R. 32, P. 804 N "Sub-rule (5)" (5 Pts. extra in N. 9 to O. 21, R. 32 in AIR Com.).

Lim. Act, Arts. 142-144 N. 9; Art. 142 N. 10; Art. 142 N. 15.

CASES REFERRED: Paras

(A) (V6) AIR 1919 Cal 674: 46 Cal 103 7, 14
(B) (V37) AIR 1950 All 415: 1950 All LJ 296 13
(C) (V21) AIR 1934 Cal 402: 61 Cal 148 14
(D) (V25) AIR 1938 All 416: ILR (1938) All 673 14
(E) (V37) AIR 1950 Mad 237: ILR (1950) Mad 764 14
(F) (V25) AIR 1938 Pat 522: 178 Ind Cas 807 14

Y. S. Tambe, for Appellant; B. R. Mandlekar, (for Nos. 1 to 3) and Y. C. Joshi, (for No. 5) for Respondents.

JUDGMENT: This appeal is by the plaintiff Ajabrao in a suit for possession of two fields Nos. 148 and 217 situated at mouza Dahegaon Joshi, tahsil Ramtek, district Nagpur, and for injunction. The suit was dismissed by the trial Court on the ground that it was barred under S. 47, Civil P. C.

(2) The facts of the case go back to the year 1879. The plaintiff's case is that he was a mortgagee from one Ganesh in respect of these two fields. This mortgage was executed by Ganesh in the year 1879 and Ajabrao filed a suit on foot of this mortgage and obtained a decree in 1913. Ajabrao then purchased these fields in his own decree and obtained possession in 1924. Ganesh had executed a subsequent mortgage in favour of the malguzar of the village, Sadasheorao. Sadasheorao also brought a suit on his mortgage and obtained a decree and purchased these fields subject to Ajabrao's mortgage. Ajabrao had not joined Sadasheorao, the subsequent mortgagee, in his first suit.

(3) Ajabrao thereupon brought a second suit against Sadasheorao on the basis of his mortgage of 1879. That was Civil Suit No. 227 of 1925. In that suit Ajabrao obtained a decree (Ex. P-8) against Sadasheorao. By that decree Sadasheorao was given the chance of redeeming the mortgage on payment of Rs. 1,582/-. On failure to pay that amount, Ajabrao's suit against him for possession was to be decreed. It appears that Sadasheorao did not redeem the mortgage of Ajabrao and as a result, possession of these fields was given to Ajabrao on 31st March 1933. Exhibit P-11 is the receipt of possession in favour of Ajabrao.

(4) Sadasheorao thereafter interfered with the possession of Ajabrao and dispossessed him and leased out field No. 217 to one Chindhu. Ajabrao was forced to file another suit (Civil Suit No. 32-A of 1935, decided on 17th December 1936) for possession and injunction. This suit was decreed in favour of Ajabrao. Exhibit P-6 is the judgment of the Court. A warrant for possession was taken out by Ajabrao (Ex. P-9) and on 21st May 1939 possession was again handed over to Ajabrao. Exhibit P-10 is the receipt of possession.

(5) We now come to the happenings which furnished the cause of action in the present suit. Ajabrao's allegation is that he was again dispossessed of these two fields by Sadasheorao on or about 1st May 1942. Sadasheorao also leased out the fields to defendants 4 and 5 (Krishnarao and Laxman who are father and son). The present suit (Civil Suit No. 3-A of 1944) was accordingly brought by Ajabrao on 7th February 1944. Before the suit was brought, it appears, Sadasheorao had died and the suit was therefore directed against his two minor sons who are the first two respondents and Sadasheorao's widow who is the third respondent in this appeal.

(6) The defendants in the case contested all the facts pleaded by Ajabrao. They also pleaded that the suit was barred under S. 47, Civil P. C. A question of limitation was also raised by the defendants.

(7) The learned Judge of the Court below found all the facts in favour of Ajabrao but held on the authority of — 'Sachi Prasad v. Amar Nath Roy', AIR 1919 Cal 674 (A), that the present suit was incompetent because remedy by way of execution of the decree in Civil Suit No. 32-A of 1935 was available. On the question whether the plaint should be treated as an application for execution, the learned Judge did not allow it to be so treated, holding that the application could only be made to another Court.

(8) Against this decision Ajabrao appeals. During the pendency of this appeal the fourth respondent Krishnarao died. An application for substitution of the name of his widow Satyabhamabai was made 790 days after his death. Together with the application for substitution of the name, the appellant applied for setting aside the abatement and also for condonation of the delay in making the application for setting aside the abatement. These applications came for hearing before the Honourable the Chief Justice on 2nd September 1952. The learned Chief Justice passed the following order on all the applications:

> "Let the widow of the deceased respondent No. 4 be brought on the record of this case, and the question whether or not in the circumstances of this case the appeal or any portion of it abates will be determined at the hearing of the appeal itself."

Notice of the application for substitution or of setting aside the abatement or of condonation of the delay in making these applications was not sent to Satyabhamabai. Notice of the appeal on merits was, however, sent to her. The office also got the cause title corrected and Satyabhamabai's name is shown in place of the deceased Krishnarao. We mention these facts because the respondents argue that the appeal has abated in so far as Krishnarao is concerned and this has caused a total abatement of the entire appeal. We shall take this question at the end.

(9) There can be no doubt that Ajabrao is a very ill-used man. He has been required to bring a succession of suits and has been unable to enjoy the fruits of his decree obtained as far back as 1913. The learned counsel for the respondents argue that the findings given by the first Court are erroneous and Ajabrao has failed to prove his title to these two fields. Their contention is that since the suit is one for possession after dispossession by the defendants, it is incumbent upon Ajabrao to establish his title and also that he was dispossessed within three years of the filing of the suit as in a suit falling under Art. 142, Limitation Act.

(10) As regards the title of Ajabrao, there can be no doubt that as between him and Sadasheorao, the title is established. Both Sadasheorao and Ajabrao were purchasers of these two fields in their two decrees. Ajabrao had not joined the subsequent mortgagee Sadasheorao in his suit and was thus bound to afford him a chance of redeeming his mortgage. Sadasheorao, on the other hand, had obtained a decree on his mortgage and obtained possession of the property subject to the mortgage of Ajabrao. Ajabrao's suit, therefore, against Sadasheorao on the basis of his mortgage clearly established the title which the learned counsel for the respondents say ought to have been proved in the case. Ajabrao was in the position of a mortgagee and Sadasheorao was set to redeem the mortgage, which he failed to do. As a result, Ajabrao obtained possession from Sadasheorao in 1933. These matters being 'inter partes' cannot now be reopened and Ajabrao has, therefore, successfully established his title to the property as against Sadasheorao.

(11) Sadasheorao thereafter took the law into his own hands and dispossessed Ajabrao, but Ajabrao established his right to the property in the second suit which he filed in 1935. In that suit again Ajabrao obtained possession in May 1939 and also obtained a perpetual injunction against Sadasheorao.

(12) The only questions which arise in this case are whether the present suit is within time and, secondly, whether it is barred under S. 47, Civil P. C. The learned Judge of the trial Court has given a finding that the suit is not barred by time. The evidence of Kushaba (P. W. 1) who has attested the receipt of possession and of Mahadeo (P. W. 2) who was the process server shows that actual possession was delivered to Ajabrao on 21st May 1939. Both these witnesses have stated that Ajabrao obtained possession of these fields by actually ploughing them. We see no reason to doubt their testimony, particularly as it has not been controverted by any evidence on the side of the defendants.

It would thus appear that in 1939 Ajabrao obtained actual possession of these two fields and Sadasheorao was prohibited by a perpetual injunction from interfering with his possession. The present suit was filed on 7th February 1944. We have therefore to see whether within three years of that date Ajabrao was in possession and was dispossessed by an act of Sadasheorao and defendants 4 and 5. Ajabrao led evidence on this point. His witnesses are Ramkrishna (P. W. 3), Anandrao (P. W. 4) and Sardar (P. W. 5). These witnesses establish that in 1941 Ajabrao had ploughed these fields and had sown 'juar' and 'tur' crop in them. The learned Judge of the Court below has accepted the evidence of these witnesses and we find nothing to reject that finding. It is obvious that during the years which followed the grant of possession in 1939 these fields were lying fallow. The defendants have filed Jamabandis up to the year 1936-37 and from 1942-43 onwards. They have purposely refrained from filing any Jamabandi or document for the intervening years. The evidence of the defendants' witnesses also shows no act of cultivation or possession by Sadasheorao during these vital years. The possession, which Ajabrao obtained in 1939, thus remained undisturbed till the summer of 1941, when, one of the witnesses for Ajabrao states, the summer operations had been done by some other person.

There is no evidence of any act of dispossession on the part of Sadasheorao during the years following the agricultural year 1936-37 up to the agricultural year 1942-43. Since we have held that Ajabrao established his title against Sadasheorao in the two suits which had gone before, possession of these fallow lands will be referable to the lawful title in Ajabrao. In the absence of any evidence to show that Ajabrao had been dispossessed, we cannot hold that Ajabrao was dispossessed at any time prior to the summer of 1941. Even if we accept the evidence of the witness who states this, the suit which has been brought in 1944 (February) would be well within limitation. Further, Ajabrao also obtained possession when he cultivated the lands during 1941-42. The suit is, therefore, not barred by limitation.

(13) This brings us to the main controversy in the case, namely, whether the decree which had been passed in Civil Suit No. 32-A of 1935 ought to have been executed by Ajabrao and whether the present suit is barred under S. 47, Civil P. C. because Ajabrao did not resort to execution but brought the present suit. The learned counsel for respondents 1 to 3 argues that Order 21, R. 32, applies to all grants of injunctions, whether prohibitory or mandatory. His contention is that under sub-rule (5) of R. 32 the Court could, while punishing Sadasheorao, also grant possession to Ajabrao. He argues, therefore, that Ajabrao ought to have applied for execution of the decree in Civil Suit No. 32-A of 1935 and asked for possession and not brought this suit. He refers to — 'Arjun Singh v. Sahu Maharaj Narain', AIR 1950 All 415 (B) and

contends that the principle in that case should be applied to the present matter.

(14) That case was concerned with a suit for specific performance of a contract for sale and possession was considered as an ancillary matter. The present case is one of perpetual injunction and the reasoning in the Allahabad case does not apply to the present facts. A decree of perpetual injunction can only be executed by locking up the recalcitrant judgment-debtor in a civil jail by proceedings under the law of Contempt of Courts. Sub-rule (5) of R. 32 covers only mandatory injunctions and not prohibitory injunctions. The ruling in — 'Sachi Prasad v. Amar Nath Roy (A)' (cit. sup.) is itself no authority for the proposition which the learned Judge has enunciated. In that case, of the two learned Judges Richardson J. took the view which has appealed to the learned Judge of the Court below, while the other learned Judge, Beachcroft J. expressed no opinion.

The decision in — 'Sachi Prasad v. Amar Nath Roy, (A)' (cit. sup.) was expressly dissented from in that very Court in — 'Hemchandra Naskar v. Narendra Nath', AIR 1934 Cal 402 (C), and also in — 'Angad v. Madho Ram', AIR 1938 All 416 (D) and — 'Chinnabha Chetty v. Chengalroya', AIR 1950 Mad 237 (E). A contrary reasoning is also to be found in — 'Toon Lal v. Sonoo Lall', AIR 1938 Pat 522 (F). With all due respect, the much dissented dictum of Richardson J. does not appeal to us. The words of sub-r. (5) of R. 32 clearly indicate that they are apposite only to mandatory injunctions & not to prohibitory injunctions. The earlier sub-rules may contemplate both kinds of injunctions, but the wording in those sub-rules is not the same as in sub-rule (5). This matter has been elaborated in the rulings to which we have referred and we need not therefore go more elaborately into this matter. We accordingly hold that the earlier decree did not afford the relief of possession by way of execution which Ajabrao seeks in the present case.

(15) After Ajabrao's suit for possession was decreed and execution of that decree was had and Ajabrao obtained possession, that decree was exhausted and was incapable of execution a second time. All that remained was only a prohibitory injunction against Sadasheorao and that injunction could only be enforced against Sadasheorao by the penalty of commitment to detention. That remedy was inappropriate to a case in which possession had been lost. Once Ajabrao had lost possession of these fields at the instance of Sadasheorao, he could only obtain possession by bringing a fresh suit. In our opinion, the learned Judge of the Court below was in error in holding that the present suit was barred under S. 47, Civil P. C.

(16) Once we reverse that decision, the entire decision is in favour of Ajabrao and a decree for possession must therefore follow. It was pointed out that Ajabrao has again asked for a perpetual injunction against the defendants in the case. There was no perpetual injunction against the first three defendants because that injunction was against Sadasheorao personally. Similarly, there was no perpetual injunction against the other defendants in the earlier suit because they were not parties thereto. The relief of perpetual injunction was therefore correct in the present case. We accordingly reverse the decision of the lower Court and decree the entire claim of Ajabrao for possession as well as perpetual injunction against the defendants in the case. This, of course, is subject to our decision on the question of abatement.

(17) As regards abatement, it is unfortunate — and we say it respectfully — that no notice of the application for substitution etc., was sent to Satyabhamabai before her name was brought on the record of the case. The learned counsel for the appellant contends that since the name of Satyabhamabai is on the record of the case it must be held that substitution has already been effected and no question of abatement can now arise. The learned counsel for the respondents contend the opposite. It is clear that the learned Chief Justice intended substituting the name of Satyabhamabai subject to any objection at the time of hearing. The order which has been passed cannot be interpreted differently. Of course, the appropriate course was to make the order about substitution prior to bringing the legal representative on the record and not leave it to be considered at the hearing. Perhaps the learned Chief Justice did not wish to join her but merely brought her on record to afford her an opportunity to state what she wished. Satyabhamabai was sent a notice of this appeal but has not cared to put in an appearance. She was personally served with the notice and her son was represented before us.

We also examined this matter from the point of view of the application itself. We are of opinion that the affidavit which has been filed by the appellant explaining the delay in making the application for substitution should be accepted. A long time has now elapsed and the learned counsel for the respondents have not attempted to controvert that affidavit. Even at the hearing no effort was made to controvert it or to challenge the affidavit of Ajabrao in any way. In view of this, even if the matter were open to us, we allow the applications for substitution, for setting aside the abatement and for extending the time for making the application for setting aside the abatement. Since Satyabhamabai has had an opportunity of contending the contrary, we see no reason to issue a fresh notice to her. It may also be pointed out that the fourth and fifth defendants are father and son, and the son is already on the record of the case representing such interest as Satyabhamabai may have obtained under the Hindu Women's Rights to Property Act. However, we need not go into that question because we think the application for substitution should be allowed and the abatement set aside.

(18) In view of this, we see no reason to order the abatement of the appeal. The judgment and decree of the Court below are reversed and in place thereof the claim of the plaintiff for possession and injunction is decreed. The respondents shall bear the entire costs of this appeal as also of the Court below.

B/D.R.R. Appeal allowed.

A.I.R. 1954 NAGPUR 248 (Vol. 41, C.N. 83)

SINHA C. J. AND BHUTT J. (30-9-1953).

Ramkrishna Ashanna, Petitioner v. Board of Revenue, Madhya Pradesh, Nagpur, and others, Respondents.

Misc. Petn. No. 131 of 1953, to quash order of Board of Revenue, Warora, D/- 7-4-1953.

Tenancy Laws — M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), S. 23 (1) — Objection that debt is not secured — Jurisdiction of Claims Officer to decide.

The Claims Officer is not entitled under the Act to determine whether or not the debt is a secured debt within the meaning of S. 17 (a). The fact that the Act defines a secured debt does not mean that the Claims Officer is em-

powered to determine the secured character of the debt. (Para 4)

The only provision in the Act, under which the Claims Officer can make an enquiry at this stage, is S. 23. Under sub-s. (1) of which the enquiry is directed to the following two points and no others, viz., (1) validity of the secured debt or claim, and (2) subsisting character of the secured debt or claim. This postulates that the enquiry does not cover the question whether the debt or claim is at all secured. It is only when its character as a secured debt or claim is not in dispute that the Claims Officer may require proof regarding the two points mentioned above. (Para 6)

CASE REFERRED: Para

(A) (1888) 21 Q. B. D. 313: 59 LT 455 8

M. R. Bobde and K. G. Chendke, for Petitioner; D. T. Mangalmurti, for Respondent No. 3.

ORDER: This application under Art. 226 of the Constitution, is directed against the order of the Claims Officer, Warora, respondent No. 2, and that of the Board of Revenue, respondent No. 1, confirming the order of the Claims Officer in appeal, by which they held that the debt due to the petitioner by respondent No. 3 is a secured debt within the meaning of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951).

(2) The petitioner held a simple money decree against respondent No. 3, in execution of which he attached certain properties belonging to respondent No. 3. During the pendency of the execution proceedings, respondent No. 3 applied under S. 11, C. P. & Berar Money Lenders Act, 1939, for payment of the decretal amount in instalments. Parties ultimately compromised the claim and an application was filed, which was signed by both of them, for recording the terms of compromise. It was agreed that the decree would be payable in instalments, for the due payment of which two of the properties attached would be subject to a charge. However, in the order recording the terms of compromise, it was stated that the said two properties would remain under attachment. The circumstances under which the charge was not mentioned in the order may be gathered from the order-sheet which is reproduced below:

" '26-2-1944': Applicant with Mr. Hastak and Mr. Kakde, N. A. with Mr. Chendke.

Commission back duly executed. Parties however (have) come to terms and apply jointly to record the terms of settlement. Parties admit and agree to those terms.

Order delivered. Witnesses are all discharged. Applicant's property except what is agreed to be charged today will be released from attachment. N. A. agrees that he would be content with continuance of attachment over the property agreed to be charged."

(3) After the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951), came into force, respondent No. 3 made an application under S. 19(1) of the Act for settlement of the debt. The petitioner raised an objection that the debt was not a secured debt and was not, therefore, subject to the Act. This objection was, however, overruled by the Claims Officer whose order was upheld in appeal, by the Board of Revenue. These are the orders that are impugned in these proceedings.

(4) As we read the provisions of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951), hereinafter called the Act, we are clearly of the opinion that the Claims Officer is not entitled under the Act to determine whether or not the debt is a secured debt within the meaning of S. 17(a). The fact that the Act defines a secured debt does not mean that the Claims Officer is empowered to determine the secured character of the debt. This matter will have to be determined with reference to other provisions of the Act.

(5) Section 18 of the Act deals with the appointment of Claims Officers and provides that the purpose of their appointment is to determine

"the 'amount' of secured debts or claims owed by proprietors divested of proprietary rights under this Act". (Underlining (here into ' ') is ours).

This section does not, therefore, in terms contemplate that they are empowered to determine the character of the debt where it is in question. Sub-section (1) of S. 19 gives power to the debtor to make an application for determination of the secured debts or claims. Sub-section (2) thereof likewise empowers the creditor to make a similar application. It will mostly be in the case of a debtor's application that the creditor may be interested in denying the secured character of the debt so as to take it out of the operation of S. 24 and subsequent sections of the Act whereunder a secured debt or claim is liable to be scaled down. Before this stage is reached, he is entitled to raise a preliminary objection to the proceedings, under S. 21(2), on the ground that the debtor is not wholly or mainly an agriculturist. If, after enquiry, this objection prevails, then no further provisions of the Act will apply to the secured debts or claims against the debtor. Sub-section (5) of S. 21 provides:

"If no objection is made under sub-s. (2) or if an objection is made and decided, the jurisdiction of the Claims Officer to proceed in accordance with the provisions of this Chapter shall not be questioned in any Civil Court."

This sub-section only authorises the Claims Officer to proceed as provided in the Act, which does not mean that he is empowered to decide all questions relating to the secured debts or claims. It is only the jurisdiction to proceed further in accordance with the provisions of the Act, that is guaranteed to him at this stage, and it is this limited jurisdiction that cannot be questioned in any Civil Court. What is the extent of his power is provided in the following sections.

(6) We are not concerned in these proceedings with S. 22 or S. 24 or subsequent sections of the Act. The objection that was raised by the petitioner in regard to the character of the debt is not related to any specific provision of the Act. Nevertheless, it was an objection that he was entitled to raise in order to safeguard his rights. The only provision in the Act, under which the Claims Officer can make an enquiry at this stage, is section 23 which is reproduced below:

"23(1). On the date fixed for the hearing of the case, or on any subsequent day to which the hearing may be adjourned, the Claims Officer shall require proof of the validity and subsisting character of the secured debt or claim.

(2) Where the debtor objects to the claim preferred by any creditor on the ground that the debt was not incurred or that it is not binding on the debtor, the Claims Officer shall not determine the amount due on any such claim and nothing con-

tained in Ss. 24 to 27 shall apply to any such claim."

The enquiry that is contemplated is only under S. 23(1), for if an objection is raised to the creditor's application by the debtor that the debt was either not incurred or is not otherwise binding on him, the Claims Officer cannot proceed further under the Act. This enquiry under sub-s. (1) of S. 23 is directed to the following two points and no others, viz.,

(1) validity of the secured debt or claim, and
(2) subsisting character of the secured debt or claim.

This postulates that the enquiry does not cover the question whether the debt or claim is at all secured. It is only when its character as a secured debt or claim is not in dispute that the Claims Officer may require proof regarding the two points mentioned above. This is in keeping with the provisions of S. 18 of the Act, which defines the purpose for which the Claims Officers are appointed.

(7) It was contended on behalf of the debtor, respondent No. 3, that as in this case the charge was already created by the parties either orally before they presented the application to the Court to record the terms of compromise, or by embodying it in the said application, the objection raised by the petitioner could not relate to the existence of the secured debt but to its validity or subsisting character, due either to want of registration of the application or the order passed thereon, or due to the failure of the Court to record the charge in the order. What exactly, however, was the character of the objection is not a matter of interpretation or conjecture and must be referable to the objection itself. On a reading of the petitioner's written statement, dated 19th May 1951, it appears that he clearly denied the existence of the debt as a secured debt for the reason that although the parties prayed that the proprietary shares should be kept under charge "but the Court did not accept the prayer of the parties and merely directed the previous attachment of the shares to continue as before". He accordingly prayed:

"As the non-applicant's debt does not constitute a 'secured debt' under S. 17(a), the present application does not lie."

It is, therefore, clear that it was the character of the debt as a secured debt that was denied by the petitioner in the proceedings before the Claims Officer; therefore, the enquiry under S. 23(1) of the Act could not be directed on that point, however apparent the question might be considered to be.

(8) In the view that we have taken it is not necessary to consider the question that was posed in — 'Queen v. Commrs. for Special Purposes of the Income Tax', (1888) 21 Q B D 313 (A), which in terms of the instant case may be stated thus, viz., whether the statute does or does not entrust to the Claims Officer himself the jurisdiction to determine whether or not the preliminary state of facts essential to give him jurisdiction to act under the statute exists. This question may arise in the matter provided in S. 21(2) of the Act. So far as S. 23 is concerned, the Claims Officer's enquiry is limited to the two questions expressly mentioned in it, which do not cover the question as to whether a charge was at all created either at law or by act of the parties. Where this question is raised, the Claims Officer should obviously keep the proceedings pending until the debtor gets the point decided in a competent Civil Court.

(9) The impugned orders of the Claims Officer and the Board of Revenue are accordingly quashed, and it is directed that further proceedings be stayed until respondent No. 3 obtains a declaration from a competent Civil Court that the debt was a secured debt within the meaning of S. 17(a), M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951). Parties shall suffer their own costs. The petitioner is entitled to refund of the outstanding amount of the security.

B/D.R.R. Petition allowed.

A.I.R. 1954 NAGPUR 250 (Vol. 41, C.N. 84)

R. KAUSHALENDRA RAO AND DEO JJ.(17-4-1953)

Supaji Sahu, Applicant v. Nagorao Sakharam and others, Non-Applicants.

Misc. Civil Case No. 208 of 1951 from order of Addl. Dist. J., Akola, D/- 18-6-1945.

Civil P. C. (1908), O. 3, R. 4 — Counsel's authority to compromise or not to prosecute appeal.

The authority to compromise is implicit in the appointment of an advocate unless it is expressly countermanded, whether there is authority expressly conferred by the power or not. AIR 1947 Nag 17 (FB), Foll.; Case law referred. (Para 7)

Similarly a counsel's action in not prosecuting an appeal once filed because of a settlement is also included in his authority. (1888) 38 Ch. D. 51, Rel. on. (Para 9)

Anno: C. P. C., O. 3, R. 4 N. 7.

1953 Mulla: S. 2(15), Pp. 13-15 N. "Authority to compromise", "Counsel and Advocate", "Attorney or Solicitor" and "Pleader" (3 Pts. extra in N. 7 to O. 3, R. 4 in AIR Com. — 3 Pts. extra in Mulla).

CASES REFERRED: Paras

(A) (V38) AIR 1941 Sind 28: ILR (1940) Kar 467 6
(B) (V26) AIR 1939 Bom 490: 185 Ind Cas 669 6
(C) (V10) AIR 1923 PC 13: 71 Ind Cas 632 (PC) 6, 7
(D) (V10) AIR 1923 PC 98: 84 Ind Cas 721 (PC) 6, 7
(E) (V34) AIR 1947 Nag 17: ILR (1946) Nag 824 (FB) 6
(F) (V17) AIR 1930 PC 158: 57 Cal 1311 (PC) 7
(G) (1888) 38 Ch D 51: 57 LJ Ch 850 9

S. M. Meshram, for Applicant; N. A. Athlay, (for Nos. 1 to 3), and S. T. Bhave, (for Nos. 7, 8, 10), for Non-Applicants.

ORDER: This application is for restoration to file and decision on merits of First Appeal No. 90 of 1945 which was dismissed for want of prosecution in the following circumstances. The applicant was appellant No. 2 to the appeal.

(2) The appeal came up for hearing on 24th September 1951. On that date an application was filed by the two appellants. The application is as follows:

"The respondent No. 1 Mahadeo for himself and respondents 3 and 2 have undertaken to hand over the portion of (marked A in the plaint map) the building to a registered society of members of Mahar community to be formed for the purposes of running a hostel for Mahar students and to use a part thereof as a Dharmashala as is being used today. The society shall be handed over this building on condition that the said building will be used only for the purpose of

running a hostel and Dharmashala and no other purpose and the said society shall maintain the building in good state of repairs and pay regularly all the taxes of municipal committee and the taxes due to the Government; and the hostel will be known as Shrawgi Hostel. In view of this statement the appellants do not press the appeal and it be dismissed for want of prosecution. Plaintiff-appellant and defendants-respondents 1 to 6 to bear their costs as incurred and the question of costs of defendants 7-8 and 10 & 11 are left to the discretion of this Honourable Court.

Sd. K. B. Tare, counsel
for plaintiff-appellants
No. 1 & 2.
Nagorao Sakharam applt.

The respondents 1 to 6 have no objection to orders being passed as prayed for."

(3) The Court passed the following order on the application:

"24-9-51: Shri K. B. Tare counsel for the appellants. Shri N. A. Athlay counsel for the respondents 1 to 6. Shri S. T. Bhave for the respondents 7, 8 & 10. Application No. 8959 filed today by appellants 1 and 2 and respondents 1 to 6 have no objection to the prayer of the appellants that the appeal be dismissed for want of prosecution. Accordingly the appeal is dismissed. Respondents 7, 8 & 10 will be entitled to the costs of the appeal including Rs. 20 as counsel's fee. Other respondents will bear their costs as incurred. Respondent No. 11 in person."

(4) The applicant alleges that he never desired to get the appeal dismissed. He complains that the action taken by his learned advocate was unauthorized and unwarranted. The applicant, however, does not say that the advocate was by a special direction prohibited or restricted from entering into any compromise. Though the applicant alleges collusion between the first appellant and the first respondent, the applicant does not impeach the 'bona fides' of his learned advocate. Nor is it suggested that the advocate's consent is vitiated because of any mistake induced or fraud practised by the appellant and the respondent alleged to be colluding. So the vague allegation about collusion between them is immaterial for the decision of the present application.

(5) We have recorded the statement of Shri Tare. Shri Tare does not say that his consent to the application was induced by either fraud or mistake. He candidly admitted that he had no instructions from the applicant for the compromise. But it is evident that Shri Tare's action was deliberate after weighing the pros and cons of the matter. From the application filed it is clear that respondent No. 1 for himself and for respondents 2 and 3 undertook to hand over a portion of the building to a registered society of the Mahar community to be formed for the purpose of running a hostel and for using a part thereof as a Dharmashala. Shri Tare explains why he got the appeal dismissed for want of prosecution instead of getting a decree passed in terms of the compromise. Had there been a decree in terms of the compromise, the court-fees would have been a charge on the subject-matter of the suit because the appellants' suit had originally been filed in 'forma pauperis' vide O. 23, R. 1, Civil P. C. The society to be formed is enabled to get a portion of the property in suit free from any burden and further litigation.

It may also be mentioned that it was because of the settlement that the Court did not make any order as to costs against the appellants in respect of the costs of the first six respondents, though there was such an order with respect to respondents 7, 8 and 10. So it is not the case that the appeal was got dismissed without any consideration. The appellants secured from the respondents an undertaking to use a portion of the building as a hostel and Dharmashala, avoided a decree which would have resulted in a charge on the property and also avoided the cost of the six respondents in the appeal. In the circumstances, it is not for the Court to weigh the balance of advantage to the parties.

(6) The question that arises is whether Shri Tare was authorized to get the appeal dismissed on the settlement arrived at as disclosed in the application without reference to his client. The learned counsel for the applicant relies on — 'Hussain Habibullah v. Vali Mahammad', AIR 1941 Sind 28 (A); — 'Keshav Ramkrishna v. Subba Manga', AIR 1939 Bom 490 (B); — Sarathkumari v. Amulyadhan', AIR 1923 PC 13 (C) and — 'Sourindra Nath v. Heramba Nath', AIR 1923 PC 98 (D), in support of the contention that Shri Tare could not do so. The last three cases cited were concerned with the power of a pleader or a vakil and not an advocate. Shri Tare is an advocate of this Court. The first case is in support of the contention, but we cannot act on that view because of a Full Bench decision of our own Court in — 'Jiwibai v. Ramkuwar Shriniwas', AIR 1947 Nag 17 (E).

(7) The Full Bench examined the question whether an advocate can compromise claims without the authority or consent of his client and answered it in the affirmative. The Full Bench extended the rule laid down by Lord Atkin in — 'Sourendranath Mitra v. Tarubala Dasi', AIR 1930 PC 158 (F), with respect to an advocate entitled to appear without a power from his client to the case of all advocates. According to the Full Bench, the authority to compromise is implicit in the appointment of an advocate unless it is expressly countermanded and that whether there is authority expressly conferred by the power or not. The Full Bench also expressed the view that there is no distinction in this matter between an advocate and a pleader. The two decisions of the Privy Council, — 'Sarathkumari v. Amulyadhan (C)' and — 'Sourindra Nath v. Heramba Nath (D)', (supra), were not noticed by the Full Bench. As we are, in the present case, concerned with the authority of an advocate, it is not necessary to examine the question whether a vakil or a pleader can without reference to his client bring about a compromise when the power filed by him confers no such authority. That was the question dealt with in — 'Sarathkumari v. Amulyadhan (C)' and — 'Sourindra Nath v. Heramba Nath (D)' (supra).

(8) The applicant does not plead any express prohibition or limitation on the authority of Shri Tare. On the contrary, the power to make a compromise is expressly included in the powers conferred on the advocate by the vakalatnama filed in the case. It must therefore be held that there is nothing in the instant case to take it out of the general rule as stated by the Full Bench.

(9) The point that remains for consideration is whether an agreement not to prosecute the appeal and get it dismissed can be said to be included within the power to compromise. The applicant must lose on this point also. Reference may be made to the decision in — 'In re West Devon Great Consols Mine', (1888) 38 Ch D 51 (G). In that case on the hearing of the motion as to the allowance of certain claims the Vice-Warden de-

cided in favour of the claims. But the case was not ended for he had not decided as to costs. Then on counsel for the contributories consenting not to appeal the Vice-Warden allowed them their costs. Later there was an application by the contributories to withdraw the consent given by their counsel at the hearing of the motion. The questions were raised in argument whether an undertaking not to appeal could at all be given by a counsel without express authority, and, if it could, whether it could be given after the decision on the merits. Lord Justice Cotton observed:

"every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his clients shall not appeal. As to the other point the counsel in fact says: 'The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise. The undertaking, therefore, is 'prima facie' binding."

If an undertaking by a counsel not to appeal must be held to be within his authority, a counsel's action in not prosecuting an appeal once filed because of a settlement must likewise be held to be included in his authority.

(10) We therefore see no adequate reason for setting aside the order of dismissal and restoring the case to file. We accordingly reject the application with costs.

B/D.R.R. Application rejected.

A.I.R. 1954 NAGPUR 252 (Vol. 41, C.N. 85)

SINHA C. J. (30-10-1952)

Dwarkabai, Plaintiff-Applicant v. Ukharda Ganpat, Defendant-Non-Applicant.

Civil Revn. No. 58 of 1952 from Order of Civil J., 2nd Class, Malkapur, D/- 7-12-1951.

(a) Evidence Act (1872), S. 137 — Cross-examination — Pleader of party absent — Practice.

The Court is not bound to wait for any length of time and thus waste public time if the pleaders do not turn up in Court at the right moment to cross-examine the opposite party's witnesses. This cannot be made a ground of attack against the orders passed. (Para 3)

Anno: Evid. Act, S. 137 N. 7.

(b) Civil P. C. (1908), O. 33, R. 1 and S. 115 — Finding that applicant for leave to sue in forma pauperis is possessed of sufficient means, is one of fact and even if erroneous is binding in revision. (Para 4)

Anno: Civil P. C., S. 115 N. 2.

1953 Mulla: S. 115 P. 408 "Limits .....jurisdiction" (Pts 4, 6 to 11 extra in N. 2 to S. 115 in AIR Com.)

Civil P. C., S. 115 N. 26.

1953 Mulla: S. 115, P. 410 N. "Interlocutory order" and O. 33, R. 5, P. 1066, N. "Revision" (Various conflicts noted in N. 26 to S. 115 in AIR Com. not noticed in Mulla — N. "Interlocutory order" under S. 115 in Mulla does not particularly deal with the topic discussed in N. 26 to S. 115 in AIR Com.).

Civil P. C., O. 33, R. 1 N. 3.

1953 Mulla: O. 33 R. 1, P. 1059, N. "Is .....of" (19 Pts. extra in N. 3 to O. 33, R. 1 in AIR Com. — Conflict on the question of meaning of "means" and as to what it includes not noticed in Mulla).

(c) Civil P. C. (1908), S. 115 — Point not raised in petition.

Once the matter has come to the notice of the Court that there has been a material irregularity, whether that point had or had not been specifically taken in the application under S. 115, the High Court may take that into consideration, specially when the whole record is before it, and there is no doubt about what actually took place. (Para 5)

Anno: C. P. C., S. 115 N. 2.

1953 Mulla: S. 115, P. 408 N. "Limits..... jurisdiction" (Pts. 4, 6 to 11 extra in N. 2 to S. 115 in AIR Com.).

(d) Civil P. C. (1908), O. 33, Rr. 6 and 7 — Report from Collector as to pauperisum of applicant.

Where upon an application of a person for leave to sue as pauper the Court directed a notice to issue to Collector but the notice was not issued or at least there was nothing to show the return of such notice or there was no report from the Collector or the Government pleader as to the means of the applicant, and the Court passed an order rejecting the application:

Held that though the report of the Collector might not be conclusive of the matter, still the weight had to be given to it, and that therefore there was essential irregularity in the procedure adopted by the Court. (Para 5)

Anno: Civil P. C., O. 33, R. 6 N. 1.

1953 Mulla: O. 33, R. 6, P. 1067 N. "Notice" (3 Pts. extra in N. 1 to O. 33, R. 6 in AIR Com.).

Civil P. C., O. 33, R. 7 N. 1.

1953 Mulla: O. 33, R. 7 (Topic discussed in N. 1 to O. 33, R. 7 in AIR Com. extra — See, however, N. "Distinction.....rule 5" under O. 33, R. 7 on P. 1068 in Mulla).

CASE REFERRED: Para

(A) (V28) AIR 1941 Pat 594: 20 Pat 765 3

Y. V. Jakatdar, for Applicant; C. B. Parekh, for Non-Applicant.

ORDER: This application in revision is directed against the orders dated 7-12-1951 passed by the Civil Judge Class II, Malkapur, refusing the petitioner's application for leave to sue in 'forma pauperis'.

(2) It appears that when the application was made the Court directed notice to issue to the non-applicant as also the Collector by its order dated 19-6-1951. The case had to be adjourned for non-service of notice, but even then it does not appear from the order-sheet or from the record that the notice was actually served on the Collector or the Government Pleader.

On 29th November in the last hours, at about 4-30 p.m., the Court examined the applicant and adjourned the case for further hearing on 1-12-1951.

On 1-12-1951 the case was called out in the early hours, and as the pleader for the petitioner was absent, the Court examined the three witnesses of the opposite party and passed orders on 7th December disallowing the application chiefly on the ground that the petitioner was possessed of a gold ring and 'Patalyas' without coming to any conclusion as to the value of those ornaments, assuming that they are there with her.

(3) This application was moved in this Court chiefly on the ground that the Court below had passed the orders completely ignoring the result

of the enquiry by the Collector; but on examining the record the learned counsel for the petitioner has completely changed his front and has argued that as a matter of fact though notice had been directed to be issued to the non-applicant and the Collector, there is nothing on record to show that the Collector had actually been served or that he put in any report.

I have examined the record, and it does appear that there is no report of service on the Collector or any report by him as to the alleged pauperism of the petitioner. Hence the learned counsel for the petitioner has put it at the forefront of his arguments that the proceedings are vitiated by this material irregularity as held in the case of the — 'Province of Orissa v. Dibyasingh Nand', AIR 1941 Pat 594 (A).

It has also been urged that the orders were passed by the Court below without any cross-examination of the non-applicant's witnesses by the petitioner's pleader. That is a ground which does not appeal to me because the petitioner has to thank herself or her pleader if they were not present at the time the case was taken up on the adjourned date. The Court is not bound to wait for any length of time and thus waste public time if the pleaders do not turn up in Court at the right moment.

(4) It has also been urged that the Court below has brushed aside the non-applicant's evidence to the effect that the petitioner was possessed of a large number of ornaments and that it has relied upon the testimony of the non-applicant's witnesses to the effect that she was possessed definitely of a gold ring and 'patalyas'. That again is a question of fact, which may have been determined by the Court rightly or wrongly, and such a decision, erroneous or otherwise, is not amenable to the revisional jurisdiction of this Court.

(5) Hence the only question which deserves serious consideration is whether the petitioner should be permitted to raise a ground not taken in her petition; as a matter of fact, a ground which is just to the contrary of what had been specifically taken in the petition made in this Court. In my opinion, once the matter has come to the notice of the Court that there has been a material irregularity, whether that point had or had not been specifically taken in the application, this Court may take that into consideration, specially when the whole record is before the Court and there is no doubt about what actually took place.

It appears on an examination of the record that in spite of the fact that the Court had directed notice to issue to the Collector notice was not actually served on the Collector, or, at any rate, there is no return of such notice. One thing is absolutely clear that there is no report by the Government Pleader on behalf of Revenue. Such a report may not be conclusive of the matter but is always given due weight. In this case such material was entirely wanting.

As that was a material irregularity in the procedure adopted by the Court below, I would set aside its orders and direct that the case be heard afresh after notice has been given to the Collector and after the parties have had a fresh opportunity of adducing all the evidence that they think fit to adduce in this case.

As the petitioner herself and her pleader are not entirely free from blame in so far as they kept 'ex parte' on the adjourned date the Court was not apprised of that irregularity. Hence I would not saddle the non-applicant with the costs in this Court or in the Court below. Costs to be incurred hereafter shall abide the result of the determination by the Court below, after remand.

B/R.G.D. Order accordingly.

A.I.R. 1954 NAGPUR 253 (Vol. 41, C.N. 86)

R. KAUSHALENDRA RAO J. (13-2-1953)

Lalji Lokman, Applicant v. A. K. Ghatpande, Non-Applicant.

Civ. Revn. No. 359 of 1952 from decree of Civil J., 2nd Class, Chhindwara, D/- 2-4-1952.

Legal Practitioners (Fees) Act (1926), S. 4 — Fees due under agreement — Case coming to abrupt end — Effect.

The mere fact that the case comes to an abrupt end or that the case is compromised does not disentitle an advocate from claiming the balance of his fee settled if the settlement was for the whole case. AIR 1930 Pat 403, Disting. 1942 Nag LJ 225; Civil Revn. No. 361 of 1948, D/- 15-2-1949 (Nag), Ref. (Para 5)

Anno: Legal Practitioners (Fees) Act, S. 4 N. 1.

CASES REFERRED: Paras

(A) (V17) AIR 1930 Pat 403: 9 Pat 865 4
(B) ('42) 1942 Nag LJ 225 5
(C) ('49) Civil Revn. No. 361 of 1948, D/- 15-2-1949 (Nag) 5

G. C. Banerji, for Applicant; R. R. Dandige, for Non-Applicant.

ORDER: This application is by the defendant. The suit was instituted by the non-applicant against the applicant claiming Rs. 215/-. The claim was decreed with costs.

(2) The claim arose in the following circumstances. The non-applicant is the seniormost advocate practising at Chhindwara. He was engaged by the applicant to conduct on his behalf civil suit no. 2-A of 1950 in the Court of the Additional District Judge, Chhindwara, which was valued over Rs. 20,000. The fee was settled for the whole case at Rs. 250/-. He received only Rs. 35/- in all. He attended all the hearings of the case from 6-11-1950 to 5-2-1951 and did all that was to be done in connection with the case. The suit was fixed for evidence from 5-2-1951 to 10-2-1951. On 5-2-1951, the applicant took away the brief from the non-applicant saying that he would bring it back after showing it to others. Thereafter the applicant did not see the non-applicant. The applicant engaged another practitioner, Shri Bhatia, on Rs. 300/- and paid the whole amount to him. The case was compromised on 9-2-1951.

(3) The applicant pleaded that the fees had been settled at Rs. 10 per hearing and the plaintiff had been overpaid by Rs. 5.

(4) The learned trial Judge found as a fact that the fees had been settled at Rs. 250/- in a lump sum for the whole case as pleaded by the non-applicant and not at Rs. 10 per hearing as pleaded by the applicant. He further found that the applicant had engaged no less than five counsel and had paid the non-applicant Rs. 35/- only out of the sum settled. These are findings of fact which are not disputed. But it is contended by the learned counsel for the applicant that as the case was compromised and as the non-applicant had not done any work after 5-2-1951, the learned trial Judge should not have decreed the whole claim. The applicant relies upon the decision in — 'Radhika Debi v. Ramasray Prasad', AIR 1930 Pat 403 (A). The decision does not

assist the applicant. In the case cited the fee was not settled for the whole case unlike in the present case.

(5) There is authority for the view that the mere fact that the case comes to an abrupt end or that the case is compromised does not disentitle an advocate from claiming the balance of the fee settled if the settlement was for the whole case. See — 'Ballabhdas v. Govind Ram', 1942 Nag LJ 225 (B) and — 'Kastur Chand v. J. M. Jaiswal', Civil Revn. No. 361 of 1948, D/- 15-2-1949 (Nag) (C).

(6) It is clear from the evidence that the non-applicant was ready and willing to perform his obligation. He actually reserved the dates from 5-2-1951 to 10-2-1951 and kept for himself no other work. It is the applicant who prevented the non-applicant from discharging his obligation under the agreement by taking away the papers. The applicant is clearly liable to pay the sum claimed. Even if the case be viewed as entitling the non-applicant to compensation and not the balance of the fees settled, the sum decreed cannot be considered unreasonable in the circumstances of the case.

(7) The decree of the Court below is correct. The revision is dismissed with costs.

B/H.G.P. Revision dismissed.

A.I.R. 1954 NAGPUR 254 (Vol. 41, C.N. 87)

MUDHOLKAR J. (30-9-1952).

Babulal Appellant v. Jugalkishor and others Respondents.

Misc. (First) Appeal No. 134 of 1948; against order of Dist. J. Hoshangabad; D/- 29-11-1947.

(a) Civil P. C. (1908), O. 22, Rr. 5 and 11 — Refusal to bring person on record as legal representative — Appeal.

There is no provision in law whereunder an order refusing to bring on record a person as legal representative of a deceased party can be appealed from. Hence an appeal from such an order is incompetent. The contention, that the consequence of such an order is abatement of the appeal and therefore the order must be deemed to be an order of abatement and so appealable as a decree, is not relevant; for, it may be that as a consequence of that order abatement has taken place but that is entirely a different matter.

(Paras 2, 4)

Anno: C. P. C., O. 22 R. 5 N. 10.

1953 Mulla: O. 22 R. 5, P. 955 N. "Appeal" (2 Pts extra in Mulla — 1 Pt extra in N. 10 to O. 22 R. 5 in AIR Com. — See also N. 26 to O. 5 R. 3 and N. 6 to S. 105 in AIR Com. and N. "Appeal" to O. 22 R. 3, on P. 943 in Mulla).

(b) Civil P. C. (1908), S. 115 — Error of law or fact — Admission of evidence.

It is open to the Court to decide whether the particular evidence adduced before it is admissible or not. Even though its decision on the point may be wrong that is not a question of jurisdiction and therefore its finding is not open to challenge in revision.

(Para 6)

Anno: C. P. C., S. 115 N. 13 Pt. 8.

1953 Mulla: S. 115 (Topic discussed in N. 13 to S. 115 scattered in various notes in Mulla).

CASE REFERRED: Para

(A) (V26) AIR 1939 Nag 39: 181 Ind Cas 411 4

G. B. Badkas for Appellant; D. B. S. C. Dubey for Respondents.

ORDER: This order will also govern the decision of Miscellaneous (First) Appeals Nos. 132 and 133 of 1948. Each of these three appeals has been preferred by Babulal against different respondents from an order passed by the lower appellate Court in three appeals filed by one Kaluram, now deceased, rejecting the application of the appellant for substitution of his name in place of Kaluram as his legal representative.

(2) A preliminary objection is taken before me by Shri Sita Charan Dube who appears for the respondent to the effect that the appeals are incompetent because there is no provision in law whereunder an order refusing to bring on record a person as legal representative of a deceased party can be appealed from.

(3) The objection is a good one. The order in question is not one which falls under Order 43 of the Code of Civil Procedure and is not made appealable thereunder; nor does this order amount to a decree.

(4) The learned counsel for the appellant says that the consequence of this order is abatement of the appeal and therefore the order must be deemed to be an order of abatement and so appealable as a decree. In support of his contention that an order of abatement is appealable as a decree he refers to a decision in — 'Purushottamdas v. Devkaran Kesheoji', AIR 1939 Nag 39 (A). Whether an order of abatement is appealable as a decree or not is to my mind not relevant to the present case because the present appeals are not against an order of abatement but against a different kind of order altogether. It may be that as a consequence of that order abatement has taken place but that is entirely a different matter.

Moreover, even so far as the order of abatement is concerned, it could only be the person who is a party to a suit or appeal who can appeal and not one whose right to continue a suit or appeal has been held to be not established. In this view I hold that the appeals are not tenable. I would, therefore treat these three appeals as revision applications. Treating them thus the learned counsel for the appellant is faced with a great difficulty. The powers of this Court in a revision matter are restricted to the question of jurisdiction and so the merits of a decision cannot be considered by it in such a proceeding.

(5) According to Shri Badkas, the Court below was bound to bring on record the appellant as the legal representative of Kaluram because there was no other contestant. In support of this he relies on O. 22 R. 5. That provision reads thus:

> "Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

It is clear from the language of the provision that in every case, whether there is one appellant or there are several, the Court is charged with the duty of making an enquiry and determining whether some or any of the persons applying to be brought on record are or is entitled to be brought on record.

(6) Shri Badkas then says that the Court below has refused to take into consideration some evidence which was adduced by the appellant and has thus committed an error in the exercise of its jurisdiction. What the Court below has done is that it has refused to treat as relevant the evidence of certain witnesses on the ground that it is hearsay. It was open to the Court to decide whe-

ther the particular evidence adduced before it was admissible or not. Even though its decision on the point may be wrong that is not a question of jurisdiction and therefore its finding is not open to challenge in revision.

(7) In this view I dismiss each of the appeals with costs. Counsel's fee Rs. 25/- in each case.

B/V.S.B. Appeals dismissed.

A.I.R. 1954 NAGPUR 255 (Vol. 41, C.N. 88)

SINHA, C. J. AND BHUTT J. (23-10-1953)

K. C. Sharma, Applicant v. Ramgulam Choubey and others, Non-Applicants.

Civil Revn. No. 566 of 1953 from order of Civil J., Class I, Sagar, D/- 5-8-1953.

Municipalities — C. P. and Berar Municipalities Act (2 of 1922), Ss. 15(1), 20-A and 45 — "Directly or indirectly interested in any contract" — Contract of lease with Municipal Committee — No disqualification.

Where a contract is completely executed by both the parties and nothing remains to be done by either side, the contract is wholly exhausted and ceases to have any effect. (Para 7)

The same principle, if carried to logical conclusion, would apply to a completed transfer by sale of immovable property. Where nothing remains to be done by either party, the principle should operate clearly. However even where something remains to be done by one party or the other after the transfer is completed and the matter would be taken out of the disqualification under S. 15. Where a contract for transfer of immoveable property is executed, it is merged in the transfer and ceases to have any independent existence as a contract. Thereafter, an interest is created in immoveable property and any continuing liability, although originating initially in the contract, attaches after the completion of the contract to the transfer itself and is enforceable as an incident of the transfer. (1869) 4 C. P. 296, Relied on. (Para 9)

The same principle applies to a case of lease which is also a transfer within the meaning of the Transfer of Property Act. Although, therefore, in a case of completed lease there is a continuing liability to pay rent, it cannot be referred to the contract after it is executed. This liability would, after the completion of the lease, be enforceable under S. 108-B(1) of the Transfer of Property Act and not under the provisions of the Contract Act or Specific Relief Act. AIR 1919 Mad 168 (SB), Relied on. (Para 9)

So far, however, a contract of lease which is still in an executory stage is concerned, the abovementioned principle cannot be applied. The question is whether it is of such a casual or transient character as is contemplated in — 'Tranton v. Astor', (1917) 33 TLR 383. In considering this question, the Courts need not take note of the continuing liability in respect of payment of rent, which would attach even on completion of the contract but would be referable to the statute and not to the contract on which it was initially based. The question whether the contract is casual or transient has no reference to the amount that may be due to or by the Committee. It is mainly concerned with the question of the continuity of the contract. If the contract, once completed, comes to an end and whatever has to be done thereafter has its basis in a statute, the contract should be deemed to be of a casual or ephemeral nature, creating no disability of any kind. (Paras 10, 11)

The defeated candidate made a petition under S. 20-A of the Act, contesting the election of his opponent to the presidential office 'inter alia', on the ground that he was interested in contracts with the Municipal Committee and was not, therefore, eligible for election under S. 15(1) of the Act. The Court found the following facts: (1) That the opponent entered into a contract of lease with the Committee in respect of three plots, towards which he paid only one-fourth of the premium, the balance being due by him to the Committee. (2) That he took lease of certain Municipal land over which he has built 'kothas'. This lease was subsisting in his favour, its transfer in favour of a third person being only nominal. (3) That he was interested in the lease of the Municipal land, standing in the name of his son. (4) That he was interested in the lease of the Municipal land, which has been taken by his brother.

Held that the transactions in question had either passed out of the domain of contracts or were of a casual or transient character, and were not consequently covered by S. 15 the Central Provinces and Berar Municipalities Act, 1922. (Para 12)

CASES REFERRED: Paras

(A) (V27) AIR 1940 Nag 81: ILR (1940) Nag 133: 41 Cri LJ 424 6
(B) (V40) AIR 1953 Nag 125: ILR (1953) Nag 245 7
(C) (1917) 33 TLR 383 7, 8, 10
(D) (1869) 4 C P 296: 20 L T 786 7, 9
(E) (V17) AIR 1930 All 1: 52 All 338 (FB) 9
(F) (V6) AIR 1919 Mad 168: 42 Mad 203 (SB) 9
(G) (1889) 22 QBD 744: 58 LJQB 443 12
(H) (V10) AIR 1923 Bom 305: 47 Bom 809 12
(I) (1920) 1920-2 KB 636: 89 LJKB 1062 12
(J) (1921) 1 Ch 550: 90 LJ Ch 395 12

M. N. Phadke, for Applicant; R. S. Dabir, V. M. Kulkarni and Kumari Rama Gupta, for Non-applicant No. 1.

ORDER: This order shall govern the disposal of Civil Revisions Nos. 566 and 606 of 1953 which have been directed against the order of Civil Judge, Class I, Sagar, passed under S. 20-A(3) of the Central Provinces Municipalities Act, 1922 (hereinafter called the Act).

(2) Civil Revision No. 566 of 1953 has been filed by K. C. Sharma and Civil Revision No. 606 of 1953, by Ramgulam Choubey. They were contestants for the office of President of Khurai Municipal Committee. Other persons who were nominated for the election were Vallabhdas Maheshiri, S. D. Muley, Komalchand Panawala and Ratanchand Nema who are non-applicants 2 to 5 in these proceedings, but they withdrew their candidature and did not contest the election. K. C. Sharma and Ramgulam Choubey secured respectively 2386 and 1971 votes, and accordingly the former was declared to be the duly elected President under section 20 of the Act.

(3) Ramgulam Choubey made a petition to the lower Court under S. 20-A of the Act, contesting the election of his opponent, 'inter alia', on the ground that he was interested in contracts with the Municipal Committee and was not, therefore, eligible for election under S. 15(1) of the Act.

The lower Court found the following facts:

"(1) That K. C. Sharma entered into a contract of lease with the Committee in respect of three plots, towards which he paid only one-fourth of the premium, the balance being due by him to the Committee.

(2) That he took lease of certain Municipal land over which he has built 'kothas'. This lease is subsisting in his favour, its transfer in favour of Singhai Bhaiyalal being only nominal.

(3) That he is interested in the lease of the Municipal land, standing in the name of his son.

(4) That Ramgulam Choubey is interested in the lease of the Municipal land, which has been taken by his brother."

In the opinion of the lower Court, all these transactions offend against S. 15(1) of the Act and made both the parties ineligible for contesting the election. In this view, the election as a whole was set aside.

(4) Before we take up the main question, we may mention that non-applicants 2 to 5 did not take part in the proceedings either in the lower Court or before us. The lower Court has remarked in para. 23 of its order that it was not proved that they had withdrawn their candidature before the due date. It was not the case of either party, nor indeed of these non-applicants, that they had not done so. Ramgulam Choubey had alleged in para. 1 of his petition that these non-applicants had withdrawn their candidature and that he and K. C. Sharma were the only contestants for the election. This meant that their withdrawal was valid according to the rules.

This was not denied by K. C. Sharma who only prayed that they should be discharged from the array of non-applicants. The lower Court was not, therefore, entitled to take up this question, and its finding thereon has consequently to be ignored.

(5) Clause (1) of S. 15, C. P. Municipalities Act, 1922, which governs the case is to the following effect:

"15. No person shall be eligible for election, selection or nomination as a member of a committee, if such person—

X X X X X

(1) has directly or indirectly any share or interest in any contract with, by or on behalf of the committee, while owning such share or interest:

Provided that.....in case (1) the disqualification may be removed by an order of the Deputy Commissioner in this behalf."

This is not a case in which the proviso to the section is applicable. If, therefore, the facts found by the lower Court against the two contestants are covered by cl. (1) of S. 15 of the Act, it would entail a disqualification which would vitiate their taking part in the election.

(6) The words "directly or indirectly interested in any contract made with such committee" also occur in sub-section (1) of S. 45, C. P. Municipalities Act, 1922. In —'Hazarimal Jagannath v. Emperor', AIR 1940 Nag 81 (A) the word "interested" used in this section was held to include not only an interest in money but also an interest arising out of friendship. This does not, however, help the case for it was not contested before us that the parties concerned would be deemed to be interested in the transactions found by the lower Court, within the meaning of cl. (1) of S. 15 of the Act. The question before us is to construe the term "contract" used in S. 15 or S. 45 of the Act.

(7) There can be no doubt that where a contract is completely executed by both the parties and nothing remains to be done by either side the contract is wholly exhausted and ceases to have any effect. Such, for instance, is a sale of goods on full payment of price.

In — 'Bhikulal v. State of M. P.', AIR 1953 Nag 125 (B) it was held that the sale of a commodity across the counter is not hit by S. 15(1) of the Act. Reliance was placed in this connection on — 'Tranton v. Astor', (1917) 33 TLR 383 (C), a case of insertion of Government advertisement in a newspaper, which was not held to entail a disqualification of the owner of the paper within the meaning of House of Commons (Disqualification) Acts, 1782 and 1801 (22 Geo. III c. 45 and 51, Geo. III, c. 52). Mr. Justice Low who delivered the considered judgment, remarked in this connection:

"I will say at once that I think that the real and sufficient answer to the claim of the plaintiff in this action is that even if Government department acting directly does give an order to a newspaper for the insertion of a Government advertisement in a particular issue of the newspaper, and the newspaper accepts and inserts the advertisement, and that is all, such a transaction is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government."

This principle was even extended to a case where a contractor had completely executed a contract and it only remained for him to receive payment. See — 'Royse v. Birley', (1869) 4 CP 296 at p. 317 (D).

(8) The word "contract" which was interpreted in — 'Tranton v. Astor, (C)' (supra) occurs in S. 1, House of Commons (Disqualification) Act, 1782, which is reproduced below:

"From and after the end of this present session of Parliament any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake, execute, hold or enjoy, in the whole or in part, any contract, agreement or commission made or entered into with, under or from the commissioners of His Majesty's Treasury, or of the Navy or Victualling Office, or with the master general or board of Ordnance, or with any one or more of such commissioners, or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide in pursuance of any such agreement, contract or commission which he or they shall have made or entered into as aforesaid, any money to be remitted abroad or any wares or merchandize to be used or employed in the service of the public, shall be incapable of being elected or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold or enjoy any such contract, agreement or commission or any part or share thereof, or any benefit or emolument arising from the same."

Section 2 of this Act provides that if any member shall enter into such a contract, etc., or having entered into such a contract etc., shall continue

to hold the same, the seat of such person shall be void.

It was with S. 2 ibid that 'Tranton v. Astor, (C)' (supra) was concerned, but it is obvious that the word "contract" has been used in the two sections in the same sense and would bear the same interpretation. Section 1 of this statute is, it will be observed, only an amplified form of S. 15(1), C. P. Municipalities Act, 1922, and the word "contract" used in it should bear the same interpretation which is eminently just and reasonable.

(9) The same principle, if carried to logical conclusion, would apply to a completed transfer by sale of immovable property. Where nothing remains to be done by either party, the principle would operate clearly. However even where something remains to be done by one party or the other after the transfer is completed, the principle followed in 'Royse v. Birley, (D)' (supra) would apply and the matter would be taken out of the disqualification. Where a contract for transfer of immovable property is executed, it is merged in the transfer and ceases to have any independent existence as a contract. Thereafter an interest is created in immoveable property and any continuing liability, although originating initially in the contract, attaches after the completion of the contract to the transfer itself and is enforceable as an incident of the transfer.

In — 'Dip Narain Singh v. Nageshar Prasad', AIR 1930 All 1 (FB) (E) it was held that once a document transferring immoveable property has been duly executed and registered, the transaction passes out of the domain of mere contract into one of conveyance, and that such a completed transaction is governed by the provisions of the Transfer of Property Act, 1882. That was a case of a mortgage and not of an out and out sale, but it was held that this made no difference as a mortgage was also a transfer.

In — 'Kandasami Pillai v. Ramasami Mannadi', AIR 1919 Mad 168 (F) the same view was held in a case of lease which is also a transfer within the meaning of the Transfer of Property Act. Although, therefore, in a case of completed lease there is a continuing liability to pay rent, it cannot be referred to the contract after it is executed. This liability would, after the completion of the lease, be enforceable under S. 108-B(1), T. P. Act, and not under the provisions of the Contract Act or Specific Relief Act, 1877.

(10) So far, however, a contract of lease which is still in an executory stage is concerned, the abovementioned principle cannot be applied. The question is whether it is of such a casual or transient character as is contemplated in 'Tranton v. Astor, (C)' (supra). In considering this question, we need not take note of the continuing liability in respect of payment of rent, which would attach even on completion of the contract but would be referable to the statute and not to the contract on which it was initially based. The only other consideration is regarding the payment of the premium which, in the instant case, amounts to Rs. 2306/4/- and has been directed to be recovered from K. C. Sharma vide Resolution No. 9(B) of the special meeting of the Committee held on 30-4-1952. This liability subsisted on the date of the nomination and is still continuing. The question is if it created a disability to contest the election.

(11) It appears certain that the question whether the contract is casual or transient has no reference to the amount that may be due to or by the Committee. It is mainly concerned with the question of the continuity of the contract. If the contract, once completed, comes to an end and whatever has to be done thereafter has its basis in a statute, the contract should, we consider, be deemed to be of a casual or ephemeral nature, creating no disability of any kind. It would be incongruous that a person who completes a contract of this kind in time should be qualified to contest the election, while in the case of another person where something remains to be done, there should be a disqualification.

(12) It was, however, contended that the test in such cases should be whether the liability that remains to be fulfilled under a contract would create a conflict between interest and duty if the person concerned returns to office. This contention is based on the observations in — 'Nutton v. Wilson' (1889) 22 Q B D 744 at p. 748 (G), which were cited with approval in — 'K. F. Nariman v. Municipal Corporation of Bombay', AIR 1923 Bom 395 (H). This test was accepted by the Court of Appeal in — 'England v. Inglis', (1920) 2 KB 636 (I) and was acted upon by Astbury J. in — 'Holden v. Southwark Borough Council', (1921) 1 Ch 550 (J). In 'Nutton v. Wilson, (G)' (supra) the question was regarding the interpretation of the expression "in any manner concerned" which occurs in Public Health Act, 1875 (38 & 39 Vic., c. 55).

Here we are not concerned, as already observed, with the question of the manner in which a person may be concerned or interested in a contract. The question that we have to consider is as to the nature of the contract which is contemplated by the statute. Even if this test is applied, the question still remains whether the contract is of the kind in which the conflict between interest and duty should create a disqualification. If this conflict arises from a contract or transaction which is not contemplated by the statute, the matter would be taken out of the mischief of the Act. For reasons already stated we are of the opinion that the transactions in question have either passed out of the domain of contracts or are of a casual or transient character, and are not consequently covered by C. P. and Berar Municipalities Act, 1922.

(13) The result is that Civil Revision No. 566 of 1953 is allowed and No. 606 of 1953 is dismissed. The order of the lower Court is accordingly set aside. The objector Ramgulam Choubey shall suffer his own costs throughout and pay that of the non-applicant K. C. Sharma both in the lower Court and in this Court. Counsel's fee Rs. 100/-.

B/R.G.D. Order accordingly.

A.I.R. 1954 NAGPUR 257 (Vol. 41, C.N. 89)

SINHA, C. J. AND BHUTT J. (14-10-1953)

F. K. Rahate, Petitioner v. Dr. D. N. Pendharkar and another, Opposite Party.

Misc. Petn. No. 129 of 1953.

(a) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 13(3)(ii) — Habitual defaulter.

The question whether the tenant was a habitual defaulter depends upon the initial agreement in respect of payment of rent or of any subsequent change in that agreement, either express or implied. In the absence of a finding on this point the decision that the tenant was not a habitual defaulter is without any basis. (Para 3)

(b) Houses and Rents — C. P. and Berar Letting of Houses and Rent Control Order (1949), Cl. 13(3)(vi)(a) — Scope.

Where a landlord is not in possession of any other residential house of his own, the ques-

tion of his need to occupy the part of the building let out to the tenant is not barred under cl. 13(3)(vi)(a) of the Rent Control Order, 1949. The question of grant of permission to terminate the tenancy in such a case depends upon whether he really needs the portion of the house for his bona fide residence. (Para 4)

L. D. Trivedi, for Petitioner; R. K. Manohar, for Non-Applicant No. 1.

ORDER: This petition under Art. 226 of the Constitution is directed against the order of the Rent Controller and that of the Additional Deputy Commissioner, Nagpur, rejecting the petitioner's application to terminate the tenancy of respondent No. 1.

(2) Respondent No. 1 is in occupation of half portion of the ground-floor of the petitioner's house as his tenant, the rest of the building being occupied by the petitioner himself for residence. The petitioner made an application to the Rent Controller for permission to terminate the tenancy on the following two grounds:

(i) That the tenant was a habitual defaulter in the payment of rent; and

(ii) That the petitioner needed the portion of the house in the tenant's possession for purposes of his 'bona fide' residence.

The Rent Controller did not give any finding on the first point because the tenant paid the amount of Rs. 426/- in Court due as arrears of rent. The second point was negatived by him and the application was dismissed. In appeal the learned Additional Deputy Commissioner considered the first point and held that the petitioner was not a habitual defaulter. On the second point he held that because the petitioner was in possession of a part of the building, he did not satisfy the conditions of Cl. 13(3)(vi)(a) of the Rent Control Order, 1949. In this view the appeal was dismissed.

(3) It was common ground between the parties that the tenancy was from month to month. The petitioner's case was that rent was payable every month, whereas respondent No. 1 contended that from a long time past he was paying the rent when demanded by the petitioner and on that account he should not be deemed to be a habitual defaulter. The question whether respondent No. 1 was a habitual defaulter would depend upon the initial agreement in respect of payment of rent or of any subsequent change in that agreement, either express or implied. There has been no finding on this point by the learned Additional Deputy Commissioner, without which his decision that respondent No. 1 was not a habitual defaulter is without any basis. Nor has he come to the finding whether the petitioner required the portion of the building in possession of respondent No. 1 for his 'bona fide' residence.

(4) It appears that where a landlord is not in possession of any other residential house of his own, the question of his need to occupy the part of the building let out to the tenant is not barred under Cl. 13(3)(vi)(a) of the Rent Control Order, 1949. The question of grant of permission to terminate the tenancy in such a case would depend upon whether he really needs the portion of the house for his bona fide residence. Therefore, this question is also a matter on which the Rent Controller will now direct his attention.

(5) The orders impugned are set aside and the case is remanded to the Rent Controller for a fresh decision with advertence to the above remarks. In the circumstances of the case, there will be no order as to costs. The outstanding amount of security be returned to the petitioner.

B/H.G.P. Case remanded.

A.I.R. 1954 NAGPUR 258 (Vol. 41, C.N. 90)

R. KAUSHALENDRA RAO AND DEO JJ.

(19-2-1951)

Hiralal Chunnilal Siriah; Applicant v. The State of Madhya Pradesh and others; Non-Petitioners.

Misc. Petn. No. 30 of 1950.

(a) **Government of India Act (1935), S. 240 (3) — Appointment by Governor — Dismissal by Deputy Commissioner.**

In view of the provisions of S. 240 (2), which are mandatory, where the appointment of a public servant is by an order of the Governor, the Deputy Commissioner cannot validly terminate his services even if so authorized by the State Government. (Para 5)

Anno: Govt. of India Act, S. 240, N. 1.

(b) **Constitution of India, Art. 226 — Power to issue directions etc. to Government.**

Even if no infringement of a fundamental right is involved the power of the Court extends to issuing to the Government directions, orders or writs for any other purposes. (Para 6)

(c) **Government of India Act (1935), S. 240 (3) — Dismissal of public servant — Question falling for consideration under S. 240(2) — Relief under Art. 226 of Constitution — (Constitution of India, Art. 226).**

Protection to a civil servant against arbitrary dismissal has been regarded as of sufficient importance to require the making of a provision about it in the Constitution itself. It is therefore but proper that the Court should afford, in a case where the material facts are not in dispute, immediate redress against the violation of the pledge enshrined in successive Constitutions, though the question of dismissal falls for consideration under S. 240 (2) of the Government of India Act. (Para 7)

Anno: Govt. of India Act, S. 240 N. 1.

(d) **Constitution of India, Art. 226 — Dismissal of public servant — Application under Art. 226 — Applicant if should be left to his ordinary remedy by suit.**

Where a public servant who has been ordered to be dismissed applies for a writ under Art. 226, he should not be left to his ordinary remedy by a suit. Public interest is not served by allowing the validity of the impugned order to remain in doubt till the final result of an ordinary litigation. Notwithstanding the impugned order, the applicant is deemed to be in service and would be entitled to receive his remuneration until his services are validly determined afresh, though he is kept out of actual service as a result of the impugned order. If the applicant is not to be retained in service, there is then no point in prolonging a situation which entitles him to his pay without rendering any service to the State. (Para 8)

(e) **Constitution of India, Art. 226 — Impugned order passed prior to commencement of Constitution — Exercise of power under Article.**

Though the impugned order was passed prior to the commencement of the Constitution, if it interferes with a right in praesenti of the

applicant and the order is in the eye of law no more than a piece of wastepaper, the High Court can exercise its power under Art. 226. (Para 9)

CASES REFERRED: Paras

(A) (V36) AIR 1949 PC 112: 50 Cri LJ 383 (PC) 5

(B) (V24) AIR 1937 PC 27: ILR (1937) Mad 517 (PC) 5, 7

(C) ('50) M. P. No. 5 of 1950 D/- 25-8-1950 (Nag) 6

(D) (V32) AIR 1945 Nag 190: ILR (1945) Nag 469 8

(E) (V34) AIR 1947 FC 23: 1947 FCR 89 (FC) 8, 9

(F) (V35) AIR 1948 PC 121: 75 Ind App 225 (PC) 8

P. K. Tare, for Applicant; T. P. Naik Addl. Govt. Pleader, for the State.

ORDER: The applicant was originally appointed a welfare Officer of the Refugee Relief Camp. Chakrabhata, tahsil and district Bilaspur, on a salary of Rs. 110 per month with effect from 12-8-1948. Subsequently, the applicant was appointed an Assistant Refugee Officer in the Tahsildar's grade on a salary of Rs. 200-375 with effect from the 19th January 1949 by an order of the Governor, Central Provinces and Berar, dated 4-3-1949.

(2) It is not disputed that the appointment was temporary and liable to be terminated at any time. According to the applicant, there arose some differences between the applicant & the Senior Refugee Officer which it is not necessary to refer in detail. The applicant was informed by the Senior Refugee Officer (non-applicant No. 3), who is also the Camp Commandant, that the applicant's services were terminated under order No. Q/-D.R.O. dated 31-10-1949 passed by the Camp Commandant himself. The applicant questions the legality of this order on the ground that the Camp Commandant had no jurisdiction to terminate the applicant's appointment.

(3) The learned Additional Government Pleader appeared on behalf of the non-applicants, the State of Madhya Pradesh, the Deputy Commissioner Bilaspur, and the Senior Refugee Officer. In the affidavit filed by non-applicant No. 2 in paragraph 3 it was admitted that the services were terminated by him 'vide' his order No. Q/DRO, dated 31st October 1949. It was however denied that the termination of services of the applicant was illegal. It was asserted that non-applicant No. 2 had been duly authorized in that behalf by the State Government: 'vide' their memorandum No. 13603-12240/ RRR, dated the 20th October 1949.

The Camp Commandant was asked by non-applicant No. 2 to communicate his said order to all the surplus staff whose services were terminated by the aforesaid order including the applicant. The order passed by non-applicant No. 2 was in fact the order passed by and on behalf of the State Government (non-applicant No. 1), the authority appointing the applicant. It was pleaded that the Senior Refugee Officer instead of forwarding the order passed by the Deputy Commissioner communicated only the substance of it without mentioning the fact that it was the order of the latter.

(4) The question is whether the order terminating the services of the non-applicant is valid. Under S. 240(2), Government of India Act, no person holding a civil post could be dismissed by an authority subordinate to that by which he had been appointed. We will consider the question on the footing that the impugned order was in fact passed by the Deputy Commissioner himself and not the Refugee Officer.

(5) In view of the fact that the appointment of the applicant to the post of Assistant Refugee Officer was by an order of the Governor, he could not be removed from service by the Deputy Commissioner (non-applicant 2). The provision has been construed by their Lordships of the Privy Council in — 'Suraj Narain Anand v. North West Frontier Province', AIR 1949 PC 112 (A), to be mandatory and not permissive. It is also clear from the decision in — 'Rangachari v. Secy. of State', AIR 1937 PC 27 (B), which arose under the corresponding provision, section 96-B (1) of the Government of India Act, 1919, that the authority making the appointment cannot delegate the power of dismissal so as to destroy the protection afforded by the provision. The dismissal of a civil servant by an authority subordinate to that by which he was appointed would be unlawful and inoperative. So the Deputy Commissioner could not validly terminate the services of the applicant even if so authorized by the State Government.

(6) The point still remains for consideration whether the Court should grant the relief which the applicant seeks in a proceeding under Article 226 of the Constitution. It is true that no infringement of a fundamental right is involved. But the power of the Court extends to issuing to the Government directions, orders or writs for any other purpose: see —'Firm of Danteshwari Transport Co. v. R. T. A. C. P. Region', Nagpur M. P. No. 5 of 1950 D/- 25-8-1950 (Nag) (C).

(7) Though the present question falls for consideration under S. 240(2) of the Government of India Act, the provision is repeated in Article 311(1) of the Constitution. Protection to a civil Servant against arbitrary dismissal has been regarded as of sufficient importance to require the making of a provision about it in the Constitution itself. The corresponding provision under the Constitution Act of 1919 was described by their Lordships of the Privy Council as a "charter" and a "pledge" in 'AIR 1937 P. C. 27 (B). It is but proper that the Court should afford in a case where as here, the material facts are not in dispute, immediate redress against the violation of the pledge enshrined in successive Constitution.

(8) Besides, there is another weighty consideration why the applicant should not be left to his ordinary remedy by a suit. Public interest is not served by allowing the validity of the impugned order to remain in doubt till the final result of an ordinary litigation. Notwithstanding the impugned order, on the principle of the decisions in — 'Hifz-ul Qadeer v. Provincial Govt. C. P. & Berar', AIR 1945 Nag 190 at pp. 191-192 (D) and — 'Punjab Province v. Tara Chand', AIR 1947 FC 23 (E) the applicant is deemed to be in service and would be entitled to receive his remuneration until his services are validly determined afresh, though he is kept out of actual service as a result of the impugned order. We are aware that in — 'High Commissioner for India v. I. M. Lall', AIR 1948 PC 121 (F) their Lordships of the Privy Council have held that a civil servant is not entitled to claim arrears of pay on his dismissal being held invalid. But it is unfortunate that — 'AIR 1947 FC 23 (E)' was not brought to the notice of their Lordships. Their Lordships' attention was also not invited to S. 60 and Order 21, R. 48, Civil P. C., and the implications arising therefrom. Consequently, we venture to state with the utmost respect that the correct statement of the law is to be found in the decision of their Lordships of the Federal Court. If the applicant

is not to be retained in service, there is then no point in prolonging a situation which entitles him to his pay without rendering any service to the State.

(9) One more point has given us great anxiety. The order in question was passed prior to the commencement of the Constitution. The question is whether the power under Article 226 should be invoked in respect of an order of that kind. But for the impugned order the applicant would be entitled to hold his office until his services are validly terminated. Though the impugned order was passed prior to the commencement of the Constitution it interferes with a right 'in praesenti' of the applicant. On the authorities the impugned order is wholly void and inoperative. In the words of their Lordships of the Federal Court in — 'AIR 1947 FC 23 (E)' (supra), the order is in the eye of law no more than a piece of waste paper. That being so, it is no objection to the exercise of our power under Art. 226 that the order was passed before the Constitution came into operation. A piece of waste paper cannot now be allowed to interfere with the right of the applicant.

(10) The above considerations impel us to give redress to the applicant under Art. 226. We accordingly direct the non-applicants not to give any effect to the order dated 31-10-1949 terminating the services of the applicant.

(11) The applicant also complains against some other actions of non-applicants Nos. 2 and 3. The main point in issue between the applicant and the authorities being decided in favour of the former, he will now be deemed to be in service. If he has any grievances against non-applicants Nos. 2 and 3, redress is obtainable by administrative process. So no further directions are called for from the Court.

(12) The application is allowed with costs.

A/V.R.B. Application allowed.

***A.I.R. 1954 NAGPUR 260 (Vol. 41, C.N. 91)**

SINHA C. J. AND HIDAYATULLAH J. (16-2-1954).

Kanhaiyalal S. Dadlani, Supdt. Central Excise Nagpur, Applicant v. Meghraj Ramkaranji, Non-Applicant.

Civil Revn. No. 537 of 1952, to revise order of 2nd Civil J. 2nd Class, Nagpur, D/- 9-8-1952.

†*(a) Civil P. C. (1908), O. 19, R. 2 — "Any application" — Meaning of — ILR (1944) Nag 436: AIR 1944 Nag 161: 216 Ind Cas 184 and AIR 1953 Nag 135: 1952 Nag LJ 590, Overruled.

The distinction between substantive and interlocutory applications in defining the term "any application" in R. 2 is without any foundation. The rule is applicable to any application which is made to the Court, irrespective of its nature. The Code itself does not define the word "application" nor does it make any distinction between one application and another. ILR (1944) Nag 436: AIR 1944 Nag 161: 216 Ind Cas 184 and AIR 1953 Nag 135: 1952 Nag LJ 590, Overruled. (Para 10)

Anno: C. P. C., O. 19, R. 2, N. 1, Pt. 1a.

***(b) Civil P. C. (1908), O. 19, R. 1 — Affidavit is evidence of facts alleged therein — ILR (1944) Nag 436: AIR 1944 Nag 161: 216 Ind Cas 184 and AIR 1953 Nag 135: 1952 Nag LJ 590, Overruled.**

An affidavit is evidence of the facts alleged therein. When the opposite party does not controvert the affidavit, or remains absent, it would be refining a technicality to order the applicant to file another affidavit and not to read the affidavit already filed. The order receiving the affidavit is tantamount to ordering it and complies with the law: ILR (1944) Nag 436: AIR 1944 Nag 161: 216 Ind Cas 184 and AIR 1953 Nag 135: 1952 Nag LJ 590, Overruled; AIR 1942 Oudh 350, Foll. (Para 18)

Anno: C. P. C., O. 19, R. 1, N. 7.

CASES REFERRED: Paras

(A) (V31) AIR 1944 Nag 161: ILR (1944) Nag 436 1, 4
(B) (V40) AIR 1953 Nag 135: 1952 Nag LJ 590 5
(C) (1883) 52 LJ Ch 83 8
(D) (V26) AIR 1939 Mad 927: 185 Ind Cas 421 12
(E) (V8) AIR 1921 Mad 381: 63 Ind Cas 258 12
(F) (V36) AIR 1949 Mad 689: 1949-1 Mad LJ 434 13
(G) (V13) AIR 1926 All 161(2): 89 Ind Cas 22 14
(H) (V20) AIR 1933 Mad 164: 142 Ind Cas 386 15
(I) ('50) ILR (1950) All 65 16
(J) (V11) AIR 1924 PC 198: 4 Pat 61 (PC) 16
(K) (V29) AIR 1942 Oudh 350: 18 Luck 104 16, 17

M. W. Puranik, for Applicant; N. B. Chandurkar, for Non-Applicant.

ORDER: This application for revision made by the first defendant against an order restoring to file a small cause suit was before a learned single Judge who referred it to a Bench because he doubted the correctness of the decision of Bobde J. (as he then was) in — 'Federal India Assurance Co. Ltd. v. Anandrao', AIR 1944 Nag 161 (A).

(2) The facts are simple. The non-applicant Seth Meghraj filed this suit against the first applicant for arrears of rent of a house or for damages for use and occupation. Later he joined one Jindani as defendant. It appears that the original tenant was Jindani and the present applicant was let in as a sub-tenant. With these matters, however, we are not concerned. The case was fixed for final disposal on 9th October 1951, but that day was declared a holiday and the suit was ordered to be fixed by a public notice on the following day. On that day the plaintiff was absent and it was found that he had not paid the publication charges for substituted service on Jindani nor were any witnesses summoned or present. The Judge, therefore, dismissed the suit.

(3) On the following day (11th October 1951) the plaintiff applied for restoration of the suit and in support of his application, filed an affidavit. The application for restoration was fixed for hearing on 9th August 1952, but the first defendant was absent. He sent a medical certificate but the learned Judge declined to adjourn the case, holding that the certificate was vague. Relying upon the affidavit, he restored the suit observing as follows:

"Relying on the applicant's affidavit, which has not been denied by means of a counter-affidavit or any evidence, I allow the application and restore the suit to file."

(4) It is contended on the authority of — 'Federal India Assurance Co. v. Anandrao (A)', (cit. sup.), that the Judge erred in using the affidavit as evidence without examining the plaintiff. On merits too, it is contended that the Judge ought to have given the defendant a chance to appear and not refused to adjourn the case.

(5) In view of the doubt expressed, it becomes necessary to examine the dictum of Bobde J. in the case cited. It may be pointed out that Deo J. has followed it in — 'Gopikabai v. Narayan Govinda', AIR 1953 Nag 135 (B). Deo J. is also of the opinion that affidavits cannot be received as evidence in support of applications which the learned Judge describes as 'substantive applica-

tions'. According to these two rulings, while affidavits may be received in evidence for interlocutory matters, they cannot be used as evidence in substantive matters like setting aside of abatements, restoration of suits, application for leave to sue in 'forma pauperis', etc.

(6) It is no doubt true that S. 1, Evidence Act which applies the evidence to all judicial proceedings in or before any Court does not extend it to affidavits presented to any Court or officer. But that is only meant to exclude the rules of evidence as laid down in the Act. The law on affidavits is not to be found in the Evidence Act but in the Civil Procedure Code. Section 30 of the Code which invests Civil Courts with certain powers says that the Court may, at any time, either of its own motion or on the application of any party, order any fact to be proved by an affidavit. This clearly shows that the Court can treat affidavits as proof of the facts contained therein, the prior requisite, of course, being there. The rules are to be found in O. 19. That Order consists of three rules. With the third rule we are not concerned because it provides for matters to which the affidavits have to be confined. The first two rules read as follows :

"1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable;

Provided that where it appears to the Court that either party 'bona fide' desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.
(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court 'otherwise' directs."

(7) The first question is whether the Court can read the affidavit already filed by a party as evidence in the case. According to Bobde J., an affidavit is not evidence within the Evidence Act and it cannot be read as evidence unless the Court makes an order under O. 19, R. 1, Civil P. C., that any particular fact be proved by an affidavit. The next question is whether the second rule of the Order does not apply to 'substantive applications' which initiate proceedings but only to interlocutory applications which are incidental to such proceedings and are made while they are pending. This interpretation was accepted by Deo J. in the second case. The learned Judge points out that the Rules and Orders of the High Court do not lay down that in support of applications made under O. 22, affidavits shall be filed. The learned Judge, therefore, observes :

"If affidavit is not evidence under law, the question is whether the practice of requiring such affidavits makes it an evidence. Section 1, Evidence Act, excludes the application of the Act to affidavits presented to any Court or officer. What 'evidence' means and includes is described in S. 3 of the Act, but affidavit is not within that description. (Sic.)."

The learned Judge then observes that the Evidence Act being a consolidatory enactment, one has to turn either to the Civil Procedure Code or the Rules of the High Court. He then refers to S. 30 and O. 19 and observes that the practice of relying upon affidavits without a proper order under O. 19 is incorrect. He also interprets R. 2 as applicable only to interlocutory applications but not to substantive applications.

(8) The law laid down in S. 30 and O. 19 of the Code of Civil Procedure is merely enabling. It enables the Court to order or to read an affidavit as evidence. The first rule of O. 19, is a general one. It is based on O. 37, R. 1 of the Rules of the Supreme Court in England. The second rule corresponds to Order 38, R. 1 of the Rules of the Supreme Court. In England, of course, that rule ordinarily applies to interlocutory applications, though its general purport was declined to cut down by implied exceptions by Chitty J. in — 'In re Fitzwater', (1383) 52 LJ Ch 83 at p. 85 (C). The words in the English rule are: "upon any motion, petition or summons", and Chitty J. was disinclined to exclude anything which fell properly within those words.

(9) The words of the second rule are : "upon any application". No distinction has been made between 'substantive applications' and 'interlocutory applications' and, with all due respect to the two learned single Judges, such implied exceptions cannot be read into the generality of the words employed. 'Any application' means 'any application' and to say that particular kinds of applications are only meant but not others is not to interpret the terms used but to legislate on the subject. 'Maledicta expositio quae corrumpit textum'.

(10) It appears that in Sarkar's Indian Evidence Act the commentator had made this distinction based upon English law even in Indian Law but without authority in support of it. The distinction was accepted by Bobde J. in this Court and the dictum of the learned Judge was affirmed by Deo J. The distinction between substantive and interlocutory applications in defining the term 'any application' in the second rule of O. 19 is without any foundation. The rule is applicable to any application which is made to the Court, irrespective of its nature. The Code itself does not define the word 'application' nor does it make any distinction between one application and another. We respectfully dissent from the view expressed in these two cases and overrule them in so far as they seek to make implied exceptions in the second rule of O. 19 of the Code. This disposes of the second question.

(11) We next turn to the first question whether affidavits are evidence and can be relied upon by the Court in proof of facts. Section 30 and O. 19 do intend that the Court should have the power to receive them as evidence and that really settles the matter. The question is whether an order or an application is the 'sine qua non' before the Court can act upon an affidavit.

(12) Opinion on this point is divergent in India. We have referred to the two decisions of single Judges of this Court already. They purport to follow — 'Gooru Narayana v. Lakshmayya', AIR 1939 Mad 927 (D). In that case an application for permission to sue as a pauper was made and to oppose the application two affidavits were filed from two villagers (strangers to the suit) stating that the petitioner had raised crops in the previous year of considerable value. 'The plaintiff required the attendance of the deponents for cross-examination'. The District Judge did not agree and proceeded to act upon the affidavits. Burn J., in an order composed of a few lines, held that the District Judge ought to have summoned the witnesses and observed that affidavits cannot

properly be acted upon unless both parties agree to have them treated as evidence.

The head-note in the All India Reporter does not indicate that there was a request to summon the deponents for cross-examination. It reproduces the latter part only of the observations of the learned Judge and is somewhat misleading. Bobde J. in relying upon this ruling overlooked the fundamental fact involved in the case. Bobde J. also refers to — 'Krishna Ayyar v. Madhava Panikkar', AIR 1921 Mad 381 (E), which lays down that an affidavit is not ordinarily evidence in the case unless O. 19 is complied with. That observation does not advance the matter at all.

(13) In — 'Marneedi Satyam v. Venkataswami', AIR 1949 Mad 689 (F), Raghava Rao J. lays down that though the Evidence Act is not applicable to affidavits, it does not mean that any affidavit of any person can go in as evidence 'proprio vigore' without necessity for him to enter the witness box. The learned Judge observes that affidavits are not evidence except (a) where there is an agreement between the parties that evidence be taken by affidavit, or (b) where under O. 19, R. 1, Civil P. C., there is an oder of the Court that particular facts may be proved by an affidavit or that the affidavit of any witness may be read at the hearing. The learned Judge merely reproduces O. 19, R. 1. Under certain circumstances, however, the rules themselves contemplate that affidavits can be read as evidence without the deponent entering the witness box.

(14) As against this, there are other authorities to which a brief reference may now be made. In — 'Habib Bux v. Samuel Fitz & Co.', AIR 1926 All 161(2) (G), Sulaiman J. (as he then was), in dealing with proof of documents by 'ex parte' affidavits, held that if the deponent did not submit to cross-examination, the affidavit should not be read as evidence. He, however, observed :

> "Of course, under special circumstances, affidavits under O. 19, may be allowed to be read in evidence, but even then if the opposite party 'bona fide' desires the attendance of the witness for cross-examination, he has to appear."

The observations of the learned Judge seem to suggest that affidavits may be received as evidence if the opposite party does not desire the attendance of the deponent for cross-examination or lacks in 'bona fides' when he does so.

(15) In — 'Shrinivasa Ayyangar v. Pichumani Ayyangar', AIR 1933 Mad 164 (H), there was a suit by a minor on the basis of the promissory note. The defendant, though served, did not appear. The learned Judge thereupon admitted an affidavit made by the plaintiff's next friend in proof of the execution of the promissory note and the 'yadast' and passed a decree. In revision the defendant raised the objection, not on the merits of the case, but that the affidavit could not be acted upon. Pandalai J. observed as follows :

> "In my opinion, the ground urged is without any substance. Order 19, Rule 1 enables any Court to order that any fact may be proved by affidavit and the proviso enables the Court to compel the attendance of the deponent in case of need. In Woodroffe and Ameer Ali it is stated that it is common practice to admit affidavits at the hearing when there is no contention as to the facts. This is what happened in this case and I can see nothing illegal in it. ....."

(16) In — 'Jamaluddin Abdul Wahab v. Dr. Abdul Ali Nazim', ILR (1950) All 65 (I), there was an accounts suit. A preliminary decree was passed and an application for a final decree was dismissed in default. An application for restoration was also rejected. The learned Judges, Kaul and Misra JJ., after holding on the authority of — 'Lachmi Narain v. Balmakund', AIR 1924 PC 198 (J), that the suit could not be dismissed, dealt with the affidavit filed in support of the application for restoration in these words :

> "There is the further consideration that the lower Court wrongly assessed the value of the affidavit which accompanied the application for restoration. The deponent averred in the affidavit that the plaintiff's 'pairokar' was unable to reach Court on account of illness and that the plaintiff's counsel from Lucknow failed to reach Bahraich on account of restrictions then imposed by the railway on journeys to Bahraich.
>
> As held in — 'Shib Sahai v. Tika', AIR 1942 Oudh 350 (K), it is wrong to say that an affidavit is no evidence of the facts alleged therein merely because there had been a verbal denial thereof by the opposite party without any attempt to controvert it by a counter-affidavit or without asking for the attendance of the party swearing the affidavit for the purpose of cross-examination. The order of the lower Court seems to indicate that it considered it incumbent upon the person swearing the affidavit to go into the witness box even though no request to cross-examine the deponent was made by the other side. This is not correct."

(17) Similarly, in AIR 1942 Oudh 350 (K)', we have the high authority of Ghulam Hasan J. (as he then was). In that ruling the ambit of the two rules was elaborately considered. After quoting the first rule of O. 19, the learned Judge observed as follows :

> "A perusal of this rule leaves no doubt that it is open to a Court on sufficient grounds to allow proof of facts by means of affidavits, but if the production of the declarant of the affidavit is required in good faith for cross-examination by any party, the court shall not use such affidavit in support of the facts alleged therein without the production of the declarant. Rule 2 of O. 19, Civil P. C., puts the matter further beyond doubt. This rule is to the effect that upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.
>
> It was perfectly open to the lower Court to have ordered the production of the witness either of its own motion or at the instance of the defendant, for cross-examination in order to satisfy itself about the truth of the allegations in the affidavit. It does not appear from the record that the defendant's counsel asked the Court to order the attendance of the plaintiff so as to give him an opportunity to cross-examine him, nor did the Court 'suo motu' think it necessary to order the plaintiff's attendance. There was no counter-affidavit filed by the defendant in answer to the allegations contained in the affidavit. Under the circumstances, it cannot be said that there was no evidence before the Court in support of the allegations contained in the plaintiff's application for restoration of the suit.
>
> The view of law taken by the lower Court that the affidavit was no evidence of the facts alleged therein merely because there had been a verbal denial by the defendant without any attempt to controvert it by a counter-affidavit or without asking for the attendance of the plaintiff for the purpose of cross-examination, is not

supported by the provisions of O. 19, Rr. 1 and 2, Civil P. C., referred to above. I have no doubt whatever that had the attention of the learned Judge been drawn to the provisions of O. 19, Rr. 1 and 2, he would not have expressed the opinion which he did, that the affidavit was no evidence of the facts alleged therein."

(18) We respectfully express our entire agreement with these observations. The Nagpur rulings have narrowed the law, if we may say so respectfully, to the extent of excluding affidavits, without a prior order, even in uncontested cases. After all, when the opposite party does not controvert the affidavit, or remains absent, it would be refining a technicality to order the applicant to file another affidavit and not to read the affidavit already filed. The order receiving the affidavit is tantamount to ordering it and complies with the law. We accordingly dissent from the strict view taken by the two learned single Judges of this Court and express our opinion that the correct approach is as laid down by Ghulam Hasan J. in the last mentioned case.

(19) Applying the law to the facts of this case, it is obvious that the first defendant sent a medical certificate but took no steps to request the Court to allow him a chance to cross-examine the plaintiff. No counter-affidavit was also filed and the defendant remained absent. The medical certificate did not satisfy the Court. The learned Judge was therefore perfectly justified in acting upon the affidavit because his order must be treated as equivalent to his having treated the affidavit as evidence. It was not necessary for the learned Judge to order the plaintiff to file another affidavit which alone he could read as evidence.

(20) The application for revision fails and is dismissed with costs. Counsel's fee Rs. 25/-.

A/V.R.B. Application dismissed.

A.I.R. 1954 NAGPUR 263 (Vol. 41, C.N. 92)

MANGALMURTI AND DEO JJ. (8-9-1953)

Chhaganlal Asaram, Appellant v. Jeevanlal Gangabisan and others, Respondents.

Misc. Appeal No. 81 of 1951, from order of Civil Judge, Class I, Khamgaon, D/- 22-3-1951.

Arbitration Act (1940), S. 30(a) — Misconducting proceedings — Absence of arbitrators — AIR 1941 Rang 22, Dissented from.

It is the fundamental principle of natural justice that arbitrators who are enjoined to act jointly must act together. Where the application for reference and the order for reference passed by the Court clearly enjoin this duty on the arbitrators, but one or the other of the arbitrators remains absent on material dates of hearing, the arbitrators misconduct the proceedings and the award is liable to be set aside under S. 30(a). AIR 1941 Rang 22, Dissented from.

(Paras 5 and 6)

Anno: Arbitration Act, S. 30 N. 10.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Bom 239: ILR (1942) Bom 558 4
(B) (V23) AIR 1936 Nag 291: ILR (1937) Nag 35 4
(C) (V25) AIR 1938 Nag 492: 178 Ind Cas 29 4
(D) (V21) AIR 1934 Bom 476: 155 Ind Cas 801 4, 5
(E) (V28) AIR 1941 Rang 22: 192 Ind Cas 801 5
(F) (V30) AIR 1943 Bom 221: 210 Ind Cas 144 5
(G) (1857) 1 CB (NS) 695: 140 ER 286 5
(H) (1844) 6 QB 845: 115 ER 319 5
(I) (1841) 2 M & G 351: 133 ER 781 5
(J) (1844) 13 M & W 466: 153 ER 194 5
(K) (1938) 1938-1 All ER 135 5
(L) ('85) 7 All 523: 1885 All WN 139 5
(M) ('89) 12 Mad 113 5
(N) (V17) AIR 1930 Rang 136: 7 Rang 715 5

V. V. Jakatdar and S. B. Karkarey, for Appellant; W. B. Pendharkar, for Respondents.

JUDGMENT: This is plaintiff's appeal against the order dated 22nd March 1951, setting aside the order dated 23rd April 1950.

(2) The plaintiff had instituted a suit for accounts of a dissolved partnership. On the application of the parties the Court passed an order on 13th August 1949 referring the matter in difference for determination to the three arbitrators Daudas, Kunjilal and Champalal. The arbitrators entered upon the reference on 16th October 1949 and the plaintiff was examined-in-chief. Arbitrator Kunjilal was however absent on that date. On 21st January 1950 and 22nd January 1950 when defendant No. 3 was examined-in-chief and partly cross-examined, arbitrator Champalal was absent. He was however present on 22nd April 1950 when defendant No. 3 was further cross-examined. On all other material hearings all the arbitrators were present and they filed a unanimous award in the lower Court.

(3) It will be seen from the above statement that all the three arbitrators were present on 13th November 1949 and 22nd April 1950 though according to the lower Court arbitrator Champalal was absent on these two dates. Our reasons for our finding on this point are: The order sheet of the former date was signed by Champalal. As appears from the order of the lower Court, one Bijairaj was examined on that date and his deposition was signed by all the three arbitrators. The recording of the evidence of Bijairaj is not mentioned in the order sheet dated 13th November 1949. The material is insufficient to warrant the conclusion of the learned Judge that Champalal was not present on 13th November 1949 and that his signature was obtained after the hearing was over. That is not the defendants' case, and there is no other evidence on record to warrant this conclusion.

What we find from the record is that Bijairaj cross-examined the plaintiff on 13th November 1949 and that deposition is signed by all the three arbitrators. Similarly, there is no warrant for the statement in the lower Court's order that Champalal was absent on 22nd April 1950. He has signed the deposition and the order sheet of that date.

(4) Because one of the arbitrators was absent on each of the dates 16-10-49, 21-1-1950 and 22-1-1950, which were material dates of hearing, the lower Court held that the proceedings were vitiated and it relied upon — 'Patel Brothers v. Shri Minakshi Mills Ltd.', AIR 1942 Bom 239 (A) — 'Badrilal v. Lakshya', AIR 1936 Nag 291 (B); — 'Ramdhar Ramkaranlal v. Santadhar Ramkaranlal', AIR 1938 Nag 492 (C) and — 'Fazalally Jiwaji Raja v. Khimaji Punji and Co.', AIR 1934 Bom 476 (D) in support. In the first Bombay case a member of the Board of Directors to whom an appeal lay had withdrawn from the Board. In the two Nagpur cases one arbitrator had absented himself throughout the proceedings. The learned Counsel for the respondents also relies on these decisions.

(5) The learned Counsel for the appellant relies on — 'U Po Hlaing v. Daw Ngwe', AIR 1941

Rang 22 (E) and — 'Laxmibai v. Shridhar', AIR 1943 Bom 221 (F). The facts in the Rangoon case are that out of four arbitrators one was absent owing to illness and the other three recorded evidence and prepared an award without any discussion or consultation with him. He did not read the evidence but signed the award after reading it. On a comparison of the award with the recorded evidence the learned Judge found that a precis of the evidence was correctly made in the award. It was therefore held that the award was valid as that arbitrator had acquainted himself with the proceedings by reading the award before signing it. No authority has been cited therein for this view and with respect we are unable to accept it as the contrary view is based on sound reasoning. In — 'In re Beck and Jackson', (1857) 1 CB (NS) 695 (G), Cresswell J. observed :

"I find the rule thus stated in Russell on Arbitration, p. 209 — speaking of the duty of joint arbitrators, — 'As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for, the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision: — 'Plews v. Middleton', (1844) 6 QB 845 (H); — 'Little v. Newton', (1841) 2 Man & G 351 (I); — 'Stalworth v. Inns', (1844) 13 M & W 466 (J).

This principle is also stated recently in — 'British Metal Corporation v. Ludlow', 1938-1 All ER 135 (K) where the two arbitrators appointed by the parties heard the parties and later on appointed a third arbitrator. By the terms of the arbitration agreement, if a third one was appointed the three constituted the Arbitration Tribunal. There was no hearing after the appointment of the third arbitrator. It was held that the award by the three arbitrators without hearing parties was bad. This view has been taken in this country in — 'Nand Ram v. Fakir Chand', 7 All 523 (L) — 'Thammiraju v. Bapiraju', 12 Mad 113 (M); — 'Ma Sin v. Ma Pu', AIR 1930 Rang 136 (N) and AIR 1934 Bom 476 (D). This general rule was accepted even in AIR 1943 Bom 221 (F) which was cited by the learned Counsel for the appellant. It was added that if some formal decision was taken in the absence of one arbitrator the irregularity may be waived if the circumstances of the case allow it.

We need not express any opinion on the question of a formal decision or step as the dates on which the arbitrators were absent in the instant case were "material dates of hearing"; and so far as they are concerned it is the fundamental principle of natural justice that arbitrators who are enjoined to act jointly must act together. In the instant case the application for reference and the order for reference passed by the lower Court clearly enjoin this duty on the arbitrators. The order of reference runs thus :

"That you shall have all the powers of this Court and that you (along with the other two) may take into consideration the pleadings and all the oral and documentary evidence on record of this case, and may also take any further evidence as the parties may choose to adduce, or you (along with the other two) may deem proper to take.

You along with the other two, are, therefore, directed to decide all the matters in dispute in this suit jointly."

It is further provided that the award was to be given by all the arbitrators though it be unanimous or by majority.

(6) The arbitrators have thus misconducted the proceedings in the present case and the award has been rightly set aside under S. 30(a), Arbitration Act.

(7) The other grounds on which the award has been set aside are that the arbitrators have not decided all the disputes referred to them and that they have not decided in the manner pointed out by the lower Court. It is not necessary to examine this aspect of the case in view of the fact that the award has been rightly set aside on the first ground.

(8) The appeal fails and is dismissed with costs. Counsel's fee Rs. 70/- as certified.

A/V.R.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 264 (Vol. 41, C.N. 93)

MUDHOLKAR J. (23-12-1952)

Ahilyabai Tiwari, Appellant v. Rambhajirao Gowardhan Bapu and others, Respondents.

Misc. First Appeal No. 198 of 1948, from order of 1st Addl. Dist. Judge, Nagpur, D/- 7-8-1948.

Civil P. C. (1908), S. 48 — Execution of partition decree — Execution pending — Application for execution after 12 years — Dismissal of application is erroneous.

The pendency of an application for execution of a partition decree is sufficient to keep alive the whole of the execution matter and the benefit thereof can be had even by a party other than the one who has made the application. Hence, the dismissal of another application made during such pendency, though after more than 12 years from the date of the decree is erroneous. (Para 2)

Anno: C. P. C., S. 48 N. 7.

R. J. Pawar, for Appellant; B. R. Mandlekar, for Respondent (No. 1).

ORDER : This appeal arises out of proceedings for execution of a final decree for partition. The appellant's application for execution was dismissed on the ground that it was barred by time.

(2) It seems to me that the dismissal of the application was erroneous. This application was made as far back as on 24th April 1947 which, no doubt, was more than 12 years after the decree was passed. It must, however, be pointed out that on that date another application for execution of the partition decree filed by Rambhajirao, respondent No. 1, was actually pending. The pendency of an application for execution of a partition decree is sufficient to keep alive the whole of the execution matter and the benefit thereof can be had even by a party other than the one who has made the application. In the circumstances, the Court below was in error in dismissing the appellant's application for execution. Accordingly, I set aside its order and remit the matter to it for being disposed of in accordance with law.

(3) Costs of this appeal will be borne as incurred because the bar of limitation was applied by the Court below 'suo motu' and not at the instance of the respondent No. 1. Counsel's fee Rs. 25/-.

B/V.S.B. Order accordingly.

A.I.R. 1954 NAGPUR 265 (Vol. 41, C.N. 94)

MUDHOLKAR AND CHOUDHURI JJ. (29-1-1954)

Ghanairam Pachhuram, Applicant v. The State

Misc. Criminal Case No. 112 of 1953.

(a) Criminal P. C. (1898), S. 197 — "Public servant .....the Central Government".

It is clear from S. 197 that the sanction of the Central Government for the prosecution of its employee for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is necessary only when such employee is not removable from his office save by or with the sanction of the Central Government. There are four classes of railway servants & the employees falling in the fourth class are removable by the head of the office. In the circumstances, therefore, the protection afforded by S. 197 of the Criminal P. C. cannot be availed of by such employees. (Para 5)

Anno: Cr. P. C. S. 197 N 4.

(b) Constitution of India, Art. 14 —— Validity of S. 197 Criminal P. C. —— (Criminal P. C. (1898), S. 197).

If S. 197 makes discrimination unreasonably or arbitrarily between one class of Government servants and another, then the only effect thereof would be that it will be rendered void. If it is rendered void, then there will be no need for any sanction at all, whether the person concerned falls in the category specified in S. 197 or outside that category. (Para 6)

Anno: Cr. P. C. S. 197 N 1.

(c) Constitution of India, Arts. 13, 14 — Validity of S. 197, Criminal P. C. — (Criminal P. C. (1898), S. 197) — (Interpretation of Statutes — Severability) — (Civil P. C. (1908), Pre.)

It is, no doubt, a well-known principle of construction that when a law happens to be unconstitutional in part, the whole of the law does not necessarily fail. But when the valid part of a law is so clearly dependent and so inseparably connected with the invalid part that they cannot be separated without defeating the object of the statute, that part must also fall with the part which is invalid. The power to make laws vests in the Legislature alone and it is not within the province of the Court to so use its power to construe a law as to alter the law made by the Legislature to a substantial extent. Thus, where the excision of a provision of an existing law would have the result of leaving on the statute book a law never intended by the Legislature to be enacted, then the whole of that law will be deemed to have been rendered void.

The words "who is not removable, etc." which were inserted by the Legislature in S. 197 of the Criminal Procedure Code are words of limitation and are inseparable from the words "public servant" and to excise them would have the result of widening its scope and would quite clearly bring into existence a law which was never within the contemplation of the Legislature. If the contention that the words "who is not removable from his office save by or with the sanction of a State Government or the Central Government" being inconsistent with Art. 14 can be excised under Art. 13(1), is accepted what would be left out of the law would be something which was never intended by the Legislature to enact. It being beyond the power of the Court to bring into existence a law which is not of the making of the Legislature the result that would ensue would be to render the whole of S. 197 of the Criminal P. C. void. If it is rendered void wholly then the accused does not stand to gain at all because there will then be no necessity for sanction for the prosecution of any class of Government servants whatsoever. (Paras 8, 9)

Anno: Cr. P. C. S. 197 N 1; C. P. C. Pre N 7

(d) Constitution of India, Art. 14 — Vaiidity of S. 197, Criminal P. C. — (Criminal P. C. (1898), S. 197)

What the equality clause in Art. 14 aims at is to strike down hostile discrimination or oppression of inequality and that since the guarantee applies to all persons similarly situated, it is open to the Legislature to classify persons and things to achieve particular legislative objects, but that such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the Legislature has in view. The object of S. 197 of the Criminal Procedure Code is to afford protection to public servants from harassment resulting from vexatious prosecutions to the extent it is necessary in the public interest and that object can be achieved by putting in one class those public servants who discharge responsible duties and perform important functions and by putting in another class those whose duties and functions are less important. Such a classification can in no sense be regarded as arbitrary or unreasonable. AIR 1953 SC 215, Foll. (Paras 10, 11)

Anno: Cr. P. C. S. 197 N 1

(e) Constitution of India, Art. 134 — Finding on evidence.

Held that whether to accept certain evidence or not was entirely for the Court of fact to decide. That Court having accepted the evidence which was received without objection from the accused the finding as to the speed limit could no longer be questioned in an application under Art. 134. (Para 12)

CASE REFERRED: Para

(A) (V40) AIR 1953 SC 215: 1953 SCR 1129 (SC) 10

P. Lobo for Applicant; W. K. Sheorey, Addl. Govt. Advocate for the State.

ORDER: This is an application for the grant of a certificate under Art. 134(1)(c) of the Constitution.

(2) The applicant who was a shunting driver on the Central Railway was prosecuted for an offence under S. 101 of the Railways Act on the allegation that he had negligentiy driven his shunting engine in excess of the prescribed speed limit and caused collision with two other engines, resulting in damaging the railway property. He was convicted of the offence and sentenced to pay a fine of Rs. 60/-. His appeal against his conviction was dismissed by the Additional Sessions Judge, Damoh. Thereupon he preferred an application for revision before this Court which was dismissed by Hemeon J.

(3) The applicant wants a certificate from us under Art. 134(1)(c) of the Constitution so that he can prefer an appeal before the Supreme Court. The grounds on which the certificate is sought are two. In the first place, it is said that the sanction of the Central Government under S. 197, Criminal P. C., for prosecuting the applicant was necessary and that in the absence of such sanction, his conviction and sentence are both void. Second-

17, it is said that the applicant could not be held to have exceeded the speed limit inasmuch as the Working Order for the station fixing the speed limit had not been proved in this case.

(4) Section 197(1) of the Criminal P. C. reads thus:

"(1) When any person who is a Judge within the meaning of S. 19 of the Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a (State Government) or (the Central Government) is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government."

(5) No doubt, the applicant was an employee of the Central Government; but S. 197 does not say that no employee of the Central Government can be prosecuted unless previous sanction is given by the Central Government. It is clear from S. 197 that the sanction of the Central Government for the prosecution of its employee for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is necessary only when such employee is not removable from his office save by or with the sanction of the Central Government. It is not disputed before us that there are four classes of railway servants and that the applicant falls in the fourth class. Reference to Schedule I to the Railway Code shows that the employees falling in this class are removable by the head of the office. In the circumstances, therefore, the protection afforded by S. 197 of the Criminal P. C. cannot be availed of by the applicant.

(6) It is, however, said that to the extent that S. 197 fails to afford protection to a certain class of railway servants, it is discriminatory and that by virtue of Art. 14 of the Constitution the applicant is entitled to the same protection as other classes of Government servants referred to in S. 197 of the Criminal P. C. If S. 197 makes discrimination unreasonably or arbitrarily between one class of Government servants and another, then the only effect thereof would be that it will be rendered void. If it is rendered void, then there will be no need for any sanction at all, whether the person concerned falls in the category specified in S. 197 or outside that category. Thus, in that case, the applicant would have no ground whatsoever for complaint.

(7) It is, however, said that the whole of S. 197 would not be rendered void because of the arbitrary discrimination made therein but only that part of the section which creates a discrimination. Thus, according to the learned counsel, the words "who is not removable from his office save by or with the sanction of a State or the Central Government" ought to be excised from S. 197(1) of the Criminal Procedure Code as being inconsistent with Art. 14 of the Constitution. This, according to him, is permitted by Art. 13(1) which runs thus:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

(8) It is, no doubt, a well-known principle of consrtuction that when a law happens to be unconstitutional in part, the whole of the law does not necessarily fail. But when the valid part of a law is so clearly dependent and so inseparably connected with the invalid part that they cannot be separated without defeating the object of the statute, that part must also fall with the part which is invalid.

As stated by the Crawford at page 216 in his Statutory Construction:

"In determining separability, the test is whether the Legislature has manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter, if such an intention is manifest, the subject-matter is separable. If the valid parts are complete in themselves and independent of the invalid parts and capable of being executed according to the intention of the Legislature, they must be sustained by the Court, notwithstanding partial invalidity. The invalid parts, however, may be dropped only where the part which is retained is fully operative as a law. And where the invalid and the valid parts are independent and essentially and inseparably connected in substance, there is a strong presumption that the Legislature would not have enacted one part without the other, and the entire statute will fall.

A similar result will occur where all the provisions of an Act are connected as parts of a single scheme. In such a case, if the main object or purpose is invalid, those provisions which are incidental will also fall. But in any instance, there is a presumption that the Legislature intended for the statute or Act to be effective in its entirety, unless something in the Act indicates to the contrary."

(9) The words "who is not removable etc." which were inserted by the Legislature in S. 197 of the Criminal Procedure Code are words of limitation and are inseparable from the words "public servant" and to excise them would have the result of widening its scope and would quite clearly bring into existence a law which was never within the contemplation of the Legislature. The power to make laws vests in the Legislature alone and it is not within the province of the Court to so use its power to construe a law as to alter the law made by the Legislature to a substantial extent. Thus, where the excision of a provision of an existing law would have the result of leaving on the statute book a law never intended by the Legislature to be enacted, then the whole of that law will be deemed to have been rendered void.

The law in question here is S. 197 of the Criminal P. C. and if we accept the contention of the learned counsel that the words "who is not removable from his office save by or with the sanction of a State Government or the Central Government" being inconsistent with Art. 14 can be exercised under Art. 13(1) what would be left out of the law would be something which was never intended by the Legislature to enact. It being beyond the power of the Court to bring into existence a law which is not of the making of the Legislature the result that would ensue would be to render the whole of S. 197 of the Criminal P. C. void. If it is rendered void wholly then the applicant does not stand to gain at all because there will then be no necessity for sanction for the prosecution of any class of Government servants whatsoever.

(10) However, we are clear that S. 197(1) does not create any arbitrary discrimination; on the

other hand, we are of opinion that it makes a reasonable classification amongst public servants. Thus, public servants who are not removable from their respective offices save by or with the sanction of the Central Government are concerned they are put in one class and the public servants who are removable from their respective offices even without the sanction of the Central Government are concerned are put in another class. The reason for this classification quite obviously is that the public servants who hold responsible positions and who discharge important functions shall alone be afforded certain amount of protection from the harassment resulting from vexatious prosecutions, while those who discharge comparatively unimportant functions or hold less responsible positions would not be accorded such protection.

For, it is not essential in the public interest that protection of this kind should be given to each and every public servant, but should be given to them alone who discharge important duties because the prosecution of such persons may interfere with the performance by them of their duties and ultimately the public interest may suffer. The law is thus not discriminatory in the sense that it arbitrarily prefers certain categories of Government servants to others. On the other hand, it does so for a good reason. As was pointed out by their Lordships of the Supreme Court in — 'Ramprasad v. State of Bihar', AIR 1953 SC 215 (A) what the quality clause aims at is to strike down hostile discrimination or oppression of inequality and that since the guarantee applies to all persons similarly situated, it is open to the Legislature to classify persons and things to achieve particular legislative objects, but that such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the Legislature has in view.

(11) We are clear that the object of S. 197 of the Criminal P. C. is to afford protection to public servants from harassment resulting from vexatious prosecutions to the extent it is necessary in the public interest and that object can be achieved by putting in one class those public servants who discharge responsible duties and perform important functions and by putting in another class those whose duties and functions are less important. Such a classification can in no sense be regarded as arbitrary or unreasonable.

(12) As regards the second point, it is sufficient to say that though the Station Working Order has not been placed on record, there is evidence of numerous witnesses to the effect that the speed limit fixed for a particular station was four miles per hour. Whether to accept that evidence or not was entirely for the Court of fact to decide. That Court having accepted the evidence which, it may be mentioned, was received without objection from the applicant, the finding as to the speed limit can no longer be questioned.

(13) Accordingly, we hold that no case has been made out for the grant of a certificate under Art. 134(1)(c) of the Constitution and dismiss this application.

A/D.H.Z. Application dismissed.

A.I.R. 1954 NAGPUR 267 (Vol. 41, C.N. 95)

R. KAUSHALENDRA RAO AND DEO JJ. (29-7-1953)

Radhakisan Laxminarayan, Applicant v. Shridhar Ramchandra and others, Non-Applicants.

Misc. Civil Case No. 8 of 1952, for leave to appeal to the Supreme Court, against decision in S. A. No. 720 of 1945, D/- 22-11-1951.

(a) Civil P. C. (1908), S. 110 — Applicability.

It is well settled that each of the two requirements laid down in the first paragraph of the section, viz., that the value of the subject-matter of the suit in the Court of first instance and the value of the subject-matter in dispute on appeal must be Rs. 10,000/- or upwards, has to be fulfilled separately. 24 All 174 (PC); AIR 1929 Nag 75; AIR 1930 PC 44 and AIR 1931 PC 125, Ref. (Para 4)

It is also clear that the second paragraph in the section is not an alternative to the whole of the first paragraph but only to the second requirement in that paragraph. AIR 1951 Pat 177 and AIR 1923 Rang 71, Ref. (Para 4)

Where, therefore, the value of the subject-matter of the suit in the Court of the first instance was below Rs. 10,000/-, it is futile for the applicant to invoke the second paragraph of the section. (Para 4)

Anno: C. P. C., S. 110 N. 3.

1953 Mulla: S. 110, P. 393 N. "The amount..... instance" (26 Pts. extra in N. 3 to S. 110 in AIR Com.).

C. P. C., S. 110 N. 8.

1953 Mulla: S. 110, P. 396 N. "The amount..... Supreme Court" (8 Pts. extra in N. 8 to S. 110 in AIR Com. Patna, Madras and P. C. views on Pt. (u) not noticed in Mulla).

(b) Civil P. C., (1908), S. 110 — Value of subject-matter of suit — Subsequent increase in value or potential market value.

Any increase in the value of the subject-matter of the suit subsequent to its institution cannot be taken into account in determining the value at the date of the suit. AIR 1931 PC 125 and AIR 1937 Bom 326, Ref. Case law referred. (Para 3)

Similarly, there is no authority for the proposition that in determining the value of the suit for purposes of S. 110, "potential market value" as distinguished from the actual market value cannot be the criterion. If actual increase in value during the suit is irrelevant, "potential market value" has no claim for consideration at all in deciding the question. (Paras 11, 12)

Anno: C. P. C., S. 110 N. 3 Pt. 2.

1953 Mulla: S. 110 P. 393 N. "The amount..... instance" (26 Pts. extra in N. 3 to S. 110 in AIR Com.).

C. P. C., S. 110 N. 5.

1953 Mulla: S. 110, P. 393 N. "Mesne profits and interest" (Applicability of rule in AIR 1930 PC 44 (44, 45) to mortgage suits not discussed in N. 5 to S. 110 in AIR Com.).

(c) Civil P C. (1908), S. 110 — Substantial question of law — Existence of right of pre-emption in absence of registered sale deed.

The question whether there is a right of pre-emption in respect of a sale in the absence of the execution of a registered document as required by S. 54 of the Transfer of Property Act, is not a substantial question of law within the meaning of S. 110, particularly when the registered document was not executed only with a view to defeating the right of pre-emption. (Paras 5, 6)

Anno: C. P. C., S. 110 N. 17 (see also N. 16).

1953 Mulla: S. 110, P. 404, N. "The appeal..... law" (Lahore view on Pt. (q) and contra Calcutta view on Pt. (r) not noticed in Mulla — 2 Pts. extra in Mulla — 25 Pts. extra in Ns. 16 and 17 to S. 110 in AIR Com.).

CASES REFERRED: Paras

(A) (V18) AIR 1931 PC 125: 132 Ind Cas 605 (PC) 3, 4

(B) (V24) AIR 1937 Bom 326: ILR (1937) Bom 402 3

(C) ('02) 24 All 174: 29 Ind App 40 (PC) 4

(D) (V16) AIR 1929 Nag 75: 124 Ind Cas 697 4

(E) (V17) AIR 1930 PC 44: 53 Mad 167 (PC) 4, 12

(F) (V38) AIR 1951 Pat 177: 30 Pat 690 4

(G) (V10) AIR 1923 Rang 71: 11 Low Bur Rul 335 4

(H) (V10) AIR 1923 PC 41: 45 Bom 1056 (PC) 5

(I) (V26) AIR 1939 Nag 35: 180 Ind Cas 963 5

(J) (V37) AIR 1950 Nag 177: ILR (1950) Nag 532 (FB) 8

(K) (1857-59) 7 Moo Ind App 428: 1 Sar 739 (PC) 12

(L) (V6) AIR 1919 Pat 486 (1): 51 Ind Cas 975 12

(M) (V3) AIR 1916 Mad 985: 39 Mad 843 12

G. R. Mudholkar and J. R. Chandurkar, for Applicant; Y. S. Tambe, for Non-Applicant No. 1.

ORDER: This is an application for leave to appeal to the Supreme Court against our decision in Second Appeal No. 720 of 1945.

(2) The appeal arose out of a suit for pre-emption of one field of the area of 17 acres 16 gunthas. The applicant pleaded that the value of the field was Rs. 8,500, while the non-applicant asserted that the value was no more than Rs. 3,000. Both the Courts found the value at Rs. 3,306. That value was not disturbed by this Court. On those findings the value of the subject-matter of the suit in the Court of first instance was below Rs. 10,000.

(3) The learned counsel for the applicant, however, contends that the price paid for the field was as for agricultural land and that the value of the land has since increased and is further likely to increase because of the permission obtained to divert the land to non-agricultural uses. The applicant's allegation was that on 22-1-1944, i.e. after the institution of the suit he had paid Rs. 9,222 for converting the land to non-agricultural uses (vide Exhibit 1-D-8). We dealt with this point in paragraph 23 of our decision. Any increase in the value of the subject-matter of the suit subsequent to its institution cannot be taken into account in determining the value at the date of the suit. See — Rajendra Kumar v. Rash Behari', AIR 1931 PC 125 at p. 127 (A) and — 'Govindbhai Lallubhai v. Dahyabhai Nathabhai', AIR 1937 Bom 326 at p. 329 (B). We must therefore hold that the case does not satisfy the first requirement of the first paragraph of S. 110, Civil P. C.

(4) The learned counsel for the applicant, however, contends that he is entitled to appeal because of the second paragraph of the section. It is well settled that each of the two requirements laid down in the first paragraph of the section, viz. that the value of the subject-matter of the suit in the Court of first instance and the value of the subject-matter in dispute on appeal must be Rs. 10,000 or upwards, has to be fulfilled separately. See — 'Moti Chand v. Ganga Pershad Singh', 24 All 174 (PC) (C); — 'Bhawarlal v. Lachmandas', AIR 1929 Nag 75 (D); — 'Mangamma v. Mahalakshmamma', AIR 1930 PC 44 (E) and — 'AIR 1931 PC 125 (A)' (supra). Further, it is also clear that the second paragraph in the section is not an alternative to the 'whole' of the first paragraph but only to the second requirement in that paragraph. See — 'Champamani Bibi v. Mohammad Yunus', AIR 1951 Pat 177 (F) and — 'Maung Thwe v. A. L. A. R. Chetty Firm', AIR 1923 Rang 71 (G). As in the instant case, the value of the subject-matter of the suit in the Court of the first instance was below Rs. 10,000, it is futile for the applicant to invoke the second paragraph of the section.

(5) Our decision only affirmed the decree of the Court below. That being so, the applicant has to further satisfy that the case involves a substantial question of law. The substantial question of law, according to the applicant, is whether there is a right of pre-emption in respect of a sale in the absence of the execution of a registered document as required by S. 54 of the Transfer of Property Act. So far as cases governed by the Mahomedan Law of pre-emption are concerned, it is not disputed that the question is concluded by the decision of their Lordships of the Privy Council in — 'Sitaram Bhaurao v. Jiaul Hasan Khan', AIR 1923 PC 41 (H). In — 'Jainarayan Ramgopal v. Balwant Maroti', AIR 1939 Nag 35 (I), Bose J. (as he then was) was of the view that the decision of the Privy Council also concludes the question under the general law of pre-emption in India. Two Division Benches of this Court before the decision under consideration also took the same view.

(6) It may, however, be pointed out that the decision of the appeal is not concluded by an answer to the question as posed by the applicant. The failure of the applicant was due to three facts: that the vendor received the full consideration as agreed, that the vendee obtained possession of the property and that the registered document was not executed only with a view to defeating the right of pre-emption. The first fact was not disputed and the remaining two facts were concluded by the findings in the two Courts below. No decision has been brought to our notice that in the circumstances as found in the instant case, there is no right of pre-emption. Accordingly we are of the view that the question as posed by the applicant is not material and on the facts found no substantial question of law arises in the case.

(7) We accordingly hold that the case does not fulfil the requirements laid down in S. 110, Civil P. C.

(8) On the order being posted for delivery, Shri Mudholkar brought to our notice the order of the Chief Justice on 6-4-1950 and the admission and the statement of the counsel for respondent No. 1 on 6-4-1950. The question before Bose C. J. (as he then was) was whether the case should be heard by a Division Bench or by a single Judge in the light of the opinion of the Full Bench reported in — 'Radhakisan Laxminarayan v. Sridhar Ramchandra', AIR 1950 Nag 177 at p. 186 (FB) (J). The learned Chief Justice observed:

"The Full Bench holds that a case of this kind cannot be tried by a single Judge if it satisfies the condition of valuation given in S. 109(a) and (b) read with S. 110, Civil P. C. In other words, if the real value of the property was over Rs. 10,000 at the date of the suit and is still of that value at the date of the appeal to this Court—at the least that is the only interpretation I can give to the Full Bench because it is impossible for me to foretell what the value of the property will be at the date of an appeal to the Supreme Court even if it be taken for granted that there will be such an appeal—then the appeal must be tried by a Division Bench. As the parties are not agreed about the valuation it will be necessary for me (to) determine it. But before doing that counsel ask me to adjourn the case till next week to enable them to reach an agreement if that is possible. Put up after a week."

(9) On 6-4-1950 the counsel for the respondent made the following statement:

"That without prejudice to his contention in respect of the pre-emption price this respondent does not dispute that the potential market value of the property in suit is over Rs. 10,000/- for purposes of Ss. 109 and 110, Civil P. C., on the date of suit."

(10) On the basis of the statement, the learned Chief Justice ordered as under:

"Both sides are now agreed that the 'potential market value' of the property is over Rs. 10,000 for the purposes of Ss. 109 and 110, Civil P. C. Counsel for the respondent files a statement to that effect. This appeal will accordingly have to be heard by a Division Bench. It be sent to a Division Bench accordingly."

(11) In pursuance of that order the appeal was heard by us. But the point now is whether there is anything in the statement of the counsel or in the order based thereon which would preclude us from considering the question that arises in granting leave to appeal whether the value of the subject-matter of the suit was Rs. 10,000 in the Court of first instance. It is true that a party cannot be permitted to approbate and reprobate on a question of valuation. The statement of the counsel was without prejudice to his contention in respect of the pre-emption price and the admission, if any, was about the "potential market value". No decision has been brought to our notice that in determining the value of the suit for purposes of S. 110, "potential market value" as distinguished from the actual market value is to be the criterion. There was no decision in the order dated 6-4-1950 that the value of the subject-matter in suit in the Court of first instance was Rs. 10,000 or upwards. If the actual market value is the criterion—as we hold it is—then having regard to the discussion in paragraphs 2 and 3 of our order, the applicant must fail.

(12) The value for the purposes of the first condition in paragraph 1 of S. 110, Civil P. C., must be the market value on the date of the suit and has nothing to do with the future increase or decrease thereof. See — 'Mohun Lall Sookul v. Bebee Doss', 7 Moo Ind App 428 at pp. 429-430 (PC) (K) and — 'Rash Mohan Lal v. Ram Mohan Lal', AIR 1919 Pat 486 (1) (L). In — 'AIR 1930 PC 44 (E)' interest that accrued on promissory notes upto the date of the decree of the first Court was not permitted to be added to the face value of the notes so as to take the value of the subject-matter of the suit beyond Rs. 10,000, and their Lordships of the Privy Council approved of a similar decision of the Madras High Court in — 'Subramania Ayyar v. Sellammal', AIR 1916 Mad 985 (M) concerning mesne profits which accrued 'pendente lite'. If actual increase in value during the suit is irrelevant, "potential market value" has no claim for consideration at all in deciding the present question.

(13) The application is rejected with costs.

B/D.R.R. Application rejected.

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HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (3-2-1953)

Kisan Yeshwant, Defendant-Appellant v. Nuraji Dagdu, Plaintiff-Respondent.

Misc. First Appeal No. 212 of 1950, from order of Addl. D. J., Buldana, D/- 6-11-1950.

Berar Land Revenue Code (1928), S. 112(2) — Applicability — Suit for pre-emption — (Civil P. C. (1908), O. 41, R. 23).

The nature of the claim in a suit for pre-emption and the decree which the plaintiff seeks make such a suit one "relating to land", and the plaintiff in such a suit has to comply with the requirement of sub-s. (1) of S. 112. (Para 7)

In the pre-emption suit the trial court after framing issues granted ample time to the plaintiff to file the copy of record of rights. The plaintiff however failed to do so and did not show sufficient cause for the failure. The trial court finding him grossly negligent dismissed the suit. The appellate court also found him extremely negligent and careless but thinking that no prejudice would be caused to the defendant if the order was altered subject to payment of costs, by the plaintiff, remanded the case. On an appeal against that order:

Held that the question was not whether any prejudice would be caused to the defendant, but it was whether there was sufficient cause for the failure of the plaintiff to file the copy in time. Whether in any particular case there was sufficient cause for the failure to produce the document would depend on facts of that case. Both the lower courts having found the plaintiff to be grossly negligent the order of remand was not correct. AIR 1954 Nag 59, Disting. (Paras 11, 12)

Anno: Civil P. C., O. 41, R. 23 N. 13.

CASES REFERRED: Paras

(A) ('43) Second Appeal No. 368 of 1941, D/- 24-12-1943 (Nag) 5

(B) (V41) AIR 1954 Nag 59: (S. A. No. 103 of 1952, D/- 14-10-1952) 12

S. N. Kherdekar, for Appellant; L. D. Khapre for Respondent.

JUDGMENT: This appeal is by the defendant in a suit for pre-emption instituted by the respondent-plaintiff.

(2) The suit was dismissed by the learned trial Judge under S. 112(2) of the Berar Land Revenue Code for failure to file a copy of the record-of-rights within the time fixed by the Court. The plaintiff appealed to the Court of the Additional District Judge, Buldana. In the appellate Court he filed a copy of the record-of-rights. The learned appellate Judge remanded the case for trial on merits subject to payment of costs by the plaintiff. The present appeal is against the order of remand.

(3) The suit was instituted on 19-12-1949 without a copy of the record-of-rights. On 17-2-1950 the issues were framed and explained, and the case was adjourned to 22-2-1950. The case could not be taken up on that date and was adjourned to 27-2-1950. On that date the Court noticed that the plaintiff had not filed a copy of the record-of-rights. The Court accordingly directed the plaintiff to file the same on or before the date of next hearing failing which the suit would stand dismissed. The case was fixed for evidence of parties on 11-7-1950.

(4) Even by 11-7-1950 the plaintiff did not file a copy of the record-of-rights. He prayed for further time to file the same. The learned trial Judge observed that though the plaintiff had more than four months time to obtain the copy and file the same on record, he failed to do so. The suit was accordingly dismissed.

(5) It is contended by the appellant that S. 112(1) of the Berar Land Revenue Code does not apply to the case. The argument is that a suit for pre-emption is not "a suit relating to land." The appellant relies upon the observations of

Bose J. (as he then was) in — 'Sakharam v. Pandurang', Second Appeal No. 368 of 1941, D/- 24-12-1943 (Nag) (A). The learned Judge only expressed a doubt about the applicability of S. 112(1) to a suit for pre-emption but did not decide the point.

(6) In our view — we state it with due respect — a suit for pre-emption relates to land. The right in question in such a suit is to obtain possession of the pre-emptional property in spite of its sale in disregard of the plaintiff's right. A decree in a suit for pre-emption under O. 20, R. 14, Civil P. C. directs that on payment into Court of the purchase-money together with costs decreed. the defendant shall deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from the date of such payment.

(7) It may be noticed that under sub-s. (4) of S. 112 "suit" means a suit to which the provisions of the Code of Civil Procedure, 1908, apply; and under cl. (c) of that sub-section an application is deemed to relate to land if the decree or other matter, with respect to which the application is made, relates to land. The nature of the claim in a suit for pre-emption and the decree which the plaintiff seeks make such a suit one "relating to land". We hold that the plaintiff in a pre-emption suit has to comply with the requirement of sub-s. (1) of S. 112.

(8) The question then is whether the trial Judge was right in dismissing the suit or the appellate Judge was right in remanding the case for trial on merits.

(9) The expression "first hearing" in S. 112 has been interpreted to mean the hearing at which the Court examines the pleadings of the parties with a view to understanding their contentions and framing issues. This was done in the present case on 17-2-1950. It is after that the Court granted time to the plaintiff. The plaintiff was given ample time to comply with the requirement of law. He failed to do so and gave no explanation in the trial Court as to why he could not file the document within the time granted to him.

Actually it would appear from the certified copy filed in the appellate Court that he applied for the same only on 13-9-1950, i.e. two months after the suit was dismissed. He obtained the copy in less than a month of his appiication. Even in the application made in the appellate Court for permission to file the copy, the plaintiff made no attempt to explain the delay till 13-9-1950 when he had applied for the copy. There is nothing to indicate that he took any steps to obtain the copy between 27-2-1950 and 11-7-1950. In these circumstances, the learned trial Judge was right in finding that the plaintiff had been grossly negligent.

(10) The learned appellate Judge concurred with the trial Judge in holding that the plaintiff had been extremely negligent and careless. The Judge observed :

"It is therefore clear that both in law and fact the appellant has no case for getting the order passed on 11-7-1950 revised. But it seems to me that no prejudice would be caused to the defendant if this order is altered and if he is sufficiently compensated by costs."

(11) In our opinion, the learned appellate Judge was clearly in error in the view he took of the case. The question is not whether any prejudice would be caused to the defendant, but the question is whether there was sufficient cause for the failure of the plaintiff to file the document in time. The plaintiff was given, after the first hearing, more than reasonable time to comply with the requirement of the statute. He failed to give any satisfactory explanation why he could not apply for the copy until two months after the dismissal of the suit.

(12) It is not necessary to enter into an examination of all the cases under S. 112. Whether in any particular case there is sufficient cause for the omission to produce the document would depend on the facts of that case. Our attention was drawn to — 'Shri Kishan v. Ramprasad Singh', AIR 1954 Nag 59 (B). The case is, however, distinguishable on facts. There the noncompliance of the order directing the production of a certified copy was not noticed by the trial Court and the defendants did not take any objection. The plaintiffs obtained a decree in the first Court. In the grounds of appeal the point was not raised. In the appellate Court also nothing was made of the omission. The appellate Court noticed the omission only at the time of writing judgment and dismissed the suit for that omission. Deo J. found that the plaintiffs had the document with them "all along". The learned Judge gave time to the appellants to make a proper application for enabling them to show sufficient cause for the non-production of the document.

The facts of the instant case are entirely different. The plaintiff in this case failed to file the document after the extension of time granted to him and has not shown sufficient cause for his failure. The application already made by him is unsatisfactory and unconvincing. Both the Courts have found the plaintiff to be grossly negligent.

(13) We accordingly set aside the order of the learned appellate Judge and restore the order of the trial Judge dismissing the suit. The appeal is allowed with costs throughout.

B/H.G.P. Appeal allowed

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HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (26-2-1953)

Narayanrao Jageshwar Rao, and others, Judgment-debtors-Appellants v. Tanbaji Damaji and another, Decree-holders-Respondents.

Letters Patent Appeal No. 29 of 1950, from judgment of Deo J., in Misc. F. A. No. 92 of 1950, D/- 30-10-1950.

(a) Contract Act (1872), S. 47 — Instalment in arrear — Debt Laws — C. P. and Berar Relief of Indebteness Act (14 of 1939), Ss. 12(1), 13(3).

The instalment due in 1947 was payable on 1-5-1947. Held that the remittance of the money order from Bramhapuri could not be said to be payment to the creditor on or before 1-5-1947. It was not suggested that the remittance reached the creditor on the same day. So the creditor was not bound to accept the remittance towards the instalment due on 1-5-1947. (Para 4)

Anno: Contract Act, S. 47 N. 1.

(b) Debt Laws — C. P. and Berar Relief of Indebtedness Act (14 of 1939), S. 13(3) — Scope.

Where the claim is in respect of a mortgage with a term that the property shall stand foreclosed in default of payment, then the effect of the order of the Deputy Com-

missioner under S. 13(3) is that a final decree for foreclosure is deemed to have been passed by a Court of Civil Jurisdiction. The decree-holder in such a case is entitled to execute the notional decree in the Civil Court by asking for delivery of possession of the property mortgaged to him. In short, the decree-holder obtains the mortgaged property in lieu of the balance due. Where the scheme comprises two mortgages of foreclosure, the creditor is clearly entitled to the relief he is claiming. It is no answer to such a claim to say that the scheme was also in respect of two other unsecured debts. As the terms of S. 13(3) are complied with, the creditor can execute the notional final decree by asking for possession of the mortgaged property. Case law Rel. on.

(Paras 7, 8, 9)

CASES REFERRED: Paras

(A) (V33) AIR 1946 Nag 45: ILR (1945) Nag 973 7

(B) (V35) AIR 1948 Nag 136: ILR (1947) Nag 838 7

(C) ('49) Misc. Appeal No. 40 of 1948, D/- 23-3-1949 (Nag) 7

(D) ('46) Misc Second Appeal No. 173 of 1944, D/- 13-8-1946 (Nag) 9

N. S. Nandedkar and A. L. Halve, for Appellants; D. T. Mangalmuti, for Respondents.

JUDGMENT: The appellants are the judgment-debtors. The appeal is against the decision of Deo J. dismissing the judgment-debtors' appeal against the order of the Additional District Judge, Chanda, delivering possession of property mentioned in two mortgage deeds.

(2) The Debt Relief Court framed a scheme determining the debts of the respondents at Rs. 11,341. The sum was payable by annual instalments of Rs. 568 beginning on 1-5-1941, the last instalment was to be of whatever balance remained due. Originally the appellants were indebted to the respondents under two mortgages dated 29-6-1932 and 16-7-1935 as well as under two money decrees in respect of unsecured debts in civil suit No. 54 of 1938 dated 2-3-1938 and in civil suit No. 135 of 1938 dated 21-3-1938.

(3) On 23-3-1949, the Deputy Commissioner, Chanda, issued a certificate under S. 13(3) of the Relief of Indebtedness Act on the ground that two consecutive instalments falling due on 1-5-1946 and 1-5-1948 remained in arrears. It is urged on behalf of the appellants that the order granting the certificate was without jurisdiction. The contention is that the appellants sent a money order on 1-5-1947 to the respondents for the instalment falling due on that date. Later, however, the instalment due on 1-5-1947 became payable on 1-5-1948 because of remission of revenue (vide S. 12(2)). It is, therefore, submitted that there were no arrears of two consecutive instalments which contingency alone authorizes the Deputy Commissioner to issue a certificate under S. 13(3) of the Act. The contention cannot be accepted.

(4) It is not disputed that there was one instalment in arrear on 1-5-1946. The instalment due in 1947 was payable on 1-5-1947. Under sub-s. (1) of S. 12 the instalment is payable 'on or before' the date fixed at the option of the debtor either to the Deputy Commissioner or such other revenue officer as may be authorized in this behalf or to the creditor. The remittance of the money order from Bramhapuri cannot be said to be payment to the creditor on or before 1-5-1947. It is not suggested that the remittance reached the creditor on the same day. So the creditor was not bound to accept the remittance towards the instalment due on 1-5-1947.

(5) As, however, the instalment need not have been paid on 1-5-1947 because of the suspension of the land revenue, the debtors should have paid that instalment on 1-5-1948. Admittedly, this was not done. It must therefore be held that two consecutive instalments were in arrears and the certificate under S. 13(3) cannot be impugned as without jurisdiction.

(6) The appellants, however, contended that as the scheme comprised debts on mortgages as well as unsecured debts, "one single fictional decree" in respect of them was unexecutable. So the creditors could not have been placed in possession of the mortgaged property. According to the appellants the application for execution was premature on the construction of the mortgage deed dated 29-6-1932. It may be mentioned that under both the mortgages the mortgaged property is to be foreclosed. Under the first mortgage the mortgage money was however to be repaid in instalments, the last of which was to have fallen due in 1952. Only on default of four instalments, the property was to be foreclosed. There is however no force in the contention that the application dated 22-6-1949 for possession of the mortgaged property was premature because under the first mortgage the last instalment was payable in 1952.

(7) The construction of S. 13(3) of the Relief of Indebtedness Act has been the subject-matter of a number of decisions and is now well settled. See — Vithal v. Laxman', AIR 1946 Nag 45 (A); — 'Kamlu v. Eknath', AIR 1948 Nag 136 (B) and — 'Saru v. Raja Pannalal', Misc. Appeal No. 40 of 1948, D/- 23-3-1949 (Nag) (C). Where the claim is in respect of a mortgage with a term that the property shall stand foreclosed in default of payment, then the effect of the order of the Deputy Commissioner under S. 13(3) is that a final decree for foreclosure is deemed to have been passed by a Court of Civil jurisdiction. The decree-holder in such a case is entitled to execute the notional decree in the civil Court by asking for delivery of possession of the property mortgaged to him. In short, the decree-holder obtains the mortgaged property in lieu of the balance due. Sub-section (3) comes into play on two consecutive instalments as fixed by the Debt Relief Court under sub-s. (3) of S. 11 remaining in arrears and has no reference to the instalments as originally agreed under the mortgage.

(8) In the present case, the creditors are claiming not the balance of the original mortgage money as such but the balance of the debt as determined by the Debt Relief Court under S. 10. The debt was determined by the Debt Relief Court, at Rs. 11,341, the repayments came to Rs. 2,840 and the respondents were only claiming to be placed in possession of the property mortgaged for the balance of the sum, i.e. Rs. 8,501 remaining due. As the scheme comprises two mortgages of foreclosure, they are clearly entitled to the relief they are claiming. It is no answer to such a claim to say that the scheme was also in respect of two other unsecured debts. As the terms of S. 13(3) are complied with, the respondents can execute the notional final decree by asking for possession of the mortgaged property.

(9) Reference may be made to — 'Mst. Menda v. Kanchedilal', Misc. Second Appeal No. 173 of 1944, D/- 13-8-1946 (Nag) (D) decided by one of us (Hidayatullah J.). In that case the scheme was in respect of the debts due on two mortgages, one a mortgage for foreclosure and another

a simple mortgage. A certificate was issued under S. 13(3). The contention of the debtor was that the village could not be foreclosed in respect of the whole of the balance as part of it was liable to a decree for sale of the village and the debtor could pay that amount. The contention was rejected on the ground that if two decrees were held to have been passed in respect of the two mortgage debts, the position of the objector did not materially alter in consequence. If there is a final decree for foreclosure, there would be no need to execute any other kind of decree because all that would be necessary would be to put the decree-holder in possession. So long as there is a decree for foreclosure the creditor is entitled to be placed in possession of the property, no matter what the rights of the creditor might be under the second decree.

Here, as we have already observed, the creditor is asking for being placed in possession of the mortgaged property in lieu of the whole of the balance remaining due. If, according to the appellants, the entire balance remaining due (Rs. 8,501) cannot be regarded as in respect of only the two mortgages because the scheme comprised two simple decretal debts as well, then the position is that the respondents could have asked for possession of all the mortgaged property even for less than Rs. 8,501. The appellants are in no way prejudiced because the respondents asked for possession of the mortgaged property for the whole of the balance remaining due (Rs. 8,501) and do not choose to exercise their rights, if any, in respect of the unsecured debts separately. The decision under appeal is correct.

(10) It may be noted that grounds Nos. 2, 3, 5 and 6 in the memorandum of appeal were not pressed by the appellants at the hearing.

(11) The appeal is dismissed with costs.

B/D.H.Z. Appeal dismissed.

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SINHA C. J. AND BHUTT J. (22-10-1953)

Dharamchand Parmanand, Appellant v. Hazarilal Mungalal and others, Respondents.

Misc. First Appeal No. 55 of 1946, Second Appeal No. 293 of 1946 and L. P. A. No. 13 of 1949 from order of Addl. D. J., Sagar, D/- 8-2-1946.

(a) Civil P. C. (1908), O. 32 — General; O. 21, R. 90 — Execution proceedings.

Suit on simple mortgage against P and his two sons B and D — D being minor allowed to be sued under guardianship of Court Reader — Decree passed with exemplary costs against P and B personally — In appeal D brought into category of appellants under guardianship of B — Meanwhile final decree passed and execution taken out in which D was shown under guardianship of Court Reader — Court passing order for sale — Objection under O. 21 R. 90 by P alone dismissed and sale confirmed — Subsequently suit brought by D questioning legality of sale on the ground that the execution proceedings did not bind him inasmuch as the Reader of the Court had been displaced as guardian by virtue of the order appointing B as his guardian ad litem.

Held, that when the execution proceedings started against all the defendants, including D under the guardianship of the Reader of the Court, those proceedings had been regularly commenced and the entire execution proceedings ending up with the order of the Court to sell the property had been passed against all the defendants, including D under a proper guardian-ad-litem. Hence, the subsequent order changing the guardian-ad-litem had no effect on the regularity or legality of the sale. Even assuming that there was any irregularity in the last stages of the sale, so far as D was concerned, that was not an illegality which would vitiate the sale itself. It was a mere irregularity which could have been taken advantage of in a proceeding under O. 21, R. 90, Civil P. C. AIR 1926 Lah 490; AIR 1926 Cal 109; AIR 1921 Cal 476, Ref. (Paras 4, 6, 7)

Anno: Civil P. C., O. 32, General N. 2; O. 21, R. 90 N. 35.

(b) Limitation Act (1908), Article 182, Clause 2 — Starting point — (Civil P. C. (1908), S. 35A, S. 104(ff)).

Preliminary decree on simple mortgage passed on 25-7-1935 also making defendants personally liable for exemplary costs under S. 35A — Final decree passed on 10-3-1941 — Decree affirmed in appeal on 13-1-1942 — Execution first on 12-3-1941 and again on 11-1-1944 — Objection that execution was barred by time inasmuch as decree passed on 25-7-1935 was final decree so far as exemplary costs was concerned and was executable within three years from that date — Contention that order under S. 35A was not a decree as defined in S. 2(2) since it is appealable under S. 104(ff) — Held that though an order passed under S. 35A, Civil P. C., by itself is appealable as an order in terms of S. 104, Civil P. C., that does not mean that such an order cannot form part of a decree. The decree having been the subject-matter of appeal decree-holder was entitled to the benefit of the second provision in the third column of the First Schedule to the Limitation Act opposite to Art. 182. (Para 9)

Anno: Limitation Act, Art. 182 N. 35, 46; Civil P. C., S. 35A N. 3; Civil P. C., S. 104 N. 16.

CASES REFERRED:	Paras
(A) (V13) AIR 1926 Lah 490: 97 Ind Cas 181	7
(B) (V13) AIR 1926 Cal 109: 30 Cal WN 86	7
(C) (V8) AIR 1921 Cal 476: 35 Cal LJ 9	7

N. B. Chandurkar and D. R. Bhagade, for Appellant; A. L. Halve and H. N. Chaudhuri, for Respondent No. 1.

ORDER: This order shall govern Miscellaneous First Appeal No. 55 of 1946, Second Appeal No. 293 of 1946 and Letters Patent Appeal No. 13 of 1949.

(2) These three appeals arise out of three distinct judgments given at different stages arising out of the same litigation which began more than 20 years ago. It appears that respondent No. 1 had in his favour a simple mortgage bond executed as long ago as 12-7-1923 by Parmanand, the father of the family of the appellant. The mortgagee had to institute a suit for sale on the mortgage, being suit No. 9 of 1932. He also prayed therein that if the mortgaged property did not prove sufficient to liquidate the mortgage decree a money decree in terms of R. 6 of O. 34, Civil P. C., might also be passed.

The suit was instituted against the mortgagor himself and his two sons named Babulal and Dharamchand; the latter being a minor was allowed to be sued under the guardianship of the Reader of the Court. The first two defendants, the father and the elder son, appear to have raised all sorts of objections in their written statement and ultimately the Court passed a preliminary decree on 25-7-1935. The Court decreed the suit with costs, making the first two defendants also personally

liable for exemplary costs in view of the judgment of the Court that they had taken frivolous grounds of attack in their defence to the action.

The defendants filed an appeal from the preliminary decree, which was dismissed on 15-3-1940. The final decree was passed on 10-3-1941, from which another appeal was brought to this Court, which was also ultimately dismissed on 13-1-1942. In both the preliminary and final decrees prepared in the trial Court the third defendant was shown as being under the guardianship of the Reader of the Court; but it appears that during the pendency of the appeal in this Court the third defendant Dharamchand, who had been impleaded as a 'pro forma' respondent, was allowed to be brought into the category of appellants under the guardianship of his brother Babulal. This order was passed in this Court on 5-12-1941; but before this date proceedings had been taken in the trial Court on 12-3-1941 for execution of the final decree already passed as aforesaid. In that application for execution the third defendant Dharamchand was shown under the guardianship of the Reader of the Court. The decree-holder prayed for the sale of the mortgaged property in execution of the decree for sale and also prayed for realization of the Rs. 400/- granted by way of special costs as against the first two defendants by attachment and sale of their movable property.

In this connexion it is also relevant to mention that before this Court passed its orders, which may be said to have had the effect of discharging the original guardian-ad-litem. viz., the Reader of the Court, on 5-12-1941 the executing Court had already passed an order for the sale of the mortgaged property, though at the request of the judgment-debtors the sale was postponed on their agreeing to forego their claim to any fresh sale proclamation and the sale was ultimately held on 31-1-1942. The first defendant, the executant of the mortgage bond, the father of the family of the defendants, had taken objection under R. 90 of O. 21, Civil P. C., for setting aside the sale; but that objection ultimately failed, and the sale was confirmed on 21-8-1943.

(3) Thereafter a suit was commenced by the third defendant Dharamchand, in effect questioning the legality of the sale so held. The entire proceedings in the previous suit between the parties were assailed on the ground that no proper guardian had been appointed for the minor and that so far as he was concerned the sale should be declared to be of no effect. That suit has failed in both the Courts below and has led to second appeal No. 293 of 1946.

(4) Alongside of the suit the said minor Dharamchand, who subsequently is said to have suffered from the disability of being an idiot and who still continues to suffer from that disability, instituted proceedings under section 47, Civil P. C., for practically the same relief as was claimed in the suit itself and on the self-same grounds, viz., that the execution proceedings did not bind him inasmuch as the Reader of the Court had been displaced as guardian by virtue of the order of this Court already referred to passed on 5-12-1941 appointing his brother Babulal as his guardian-ad-litem. The Court below had dismissed that application also on the ground that that was a matter which could not be agitated at that stage because there was a decree against him for sale and that decree had been put into execution and the mortgaged property sold. Miscellaneous first appeal No. 55 of 1946 arises from that order.

(5) As already indicated, an order had been passed by the trial Court granting special costs against the first two defendants in terms of section 35-A, Civil P. C. That decree was put into execution, first on 12-3-1941, and again on 11-1-1944. In the second execution case the objection was taken by the first two judgment-debtors that the execution taken out on that date was barred by time inasmuch as the decree having been passed on 25-7-1935 was a final decree so far as this amount was concerned and was thus executable on that date. That objection failed in the first Court and was brought to this Court in Miscellaneous First Appeal No. 50 of 1945. This appeal was heard and decided by Mudholkar J. on 4-7-1949. Letters Patent Appeal No. 13 of 1949 is directed against the order of the learned single Judge of this Court.

(6) We shall take up the second appeal and the miscellaneous first appeal together because both of them rest on a common ground of law, viz., that the execution proceedings had been taken against the minor without a proper guardian-ad-litem and that therefore the entire proceedings were null and void so far as his interest in the property was concerned. The Courts below have proceeded on the assumption that there is no proof of the fact that the original guardian-ad-litem, viz., the Reader of the Court had been displaced by another person as guardian-ad-litem.

That finding of the Courts below is not well founded in fact. It does appear that by an order of this Court dated 5-12-1941 Dharamchand was placed under the guardianship of his brother Babulal (second defendant), and that strictly speaking after that date he would represent the interest of the minor in the litigation.

But it should be remembered that the order for sale of the property had been passed earlier than 5-12-1941. That sale was postponed at the request of all the judgment-debtors and ultimately held, as already indicated, on 31-1-1942. Hence, when the execution proceedings started in March 1941 against all the defendants, including Dharamchand under the guardianship of the Reader of the Court, those proceedings had been regularly commenced and the entire execution proceedings ending up with the order of the Court to sell the property had been passed against all the defendants, including Dharamchand under a proper guardian-ad-litem. Hence, there is no substance in the contention that the subsequent order of this Court changing the guardian-ad-litem could have any effect on the regularity or legality of the sale held on 31-1-1942.

(7) Even assuming that there was any irregularity in the last stages of the sale, viz., after 5-12-1941, so far as Dharamchand was concerned, that was not an illegality which would vitiate the sale itself. It was a mere irregularity which could have been taken advantage of in a proceeding under O. 21, R. 90, Civil P. C., and if the Court was satisfied that that irregularity had resulted in prejudice to the minor the Court would have been entitled to pass the necessary orders; but neither Babulal nor Dharamchand took any steps in that direction. Only the father, apparently in the interests of the entire family, took proceedings under O. 21, R. 90, Civil P. C., with the result already indicated.

That the sale was not void as a consequence of any irregularity in the appointment of a guardian-ad-litem for the third judgment-debtor Dharamchand is supported by a number of authorities. For example, the decision of the Lahore High Court in — 'Bansi Dhar v. Muhammad Suleman', AIR 1926 Lah 490 (A) is to the effect that the provisions of O. 32, Civil P. C., have no direct

application to proceedings in execution and that the absence of a formal order appointing a guardian-ad-litem of a minor has not the effect of vitiating the sale so held. To the same effect are the decisions of the Calcutta High Court in — 'Matiur Rasul v. Abdul Said', AIR 1926 Cal 109 (B) and — 'Fani Bhusan v. Surendra Nath', AIR 1921 Cal 476 (C). There are other authorities to the same effect, but it is not necessary to multiply decisions. No authority of the contrary has been brought to our notice.

It must therefore be held that any irregularity that may have occurred in the appointment of a guardian-ad-litem in respect of the third judgment-debtor did not render the sale held as aforesaid of no effect so far as he was concerned. In our opinion, therefore, the decisions arrived at by the Courts below in the suit and the execution proceedings were correct in substance, though not for the same reasons.

(8) It was urged on behalf of the appellants that the case should be remanded for a fresh decision on the question whether the irregularity had prejudicially affected the interest of Dharamchand. But, in our opinion, there is no justification for making such an order. It must be remembered that the transaction in question took place over 30 years ago. The litigation in respect of that transaction commenced more than 20 years ago, and it is high time that these several grounds of litigation should now come to an end. It was open to the judgment-debtor concerned to show that he was as a matter of fact materially prejudiced by the sale held in the circumstances already indicated. Not having done so it is now too late to make that prayer. Similar must be the fate of the application made at this stage for amending the pleadings both in the suit and the execution proceedings. In our opinion, it is too late to pray for amendment of the plaint and of the application under S. 47, Civil P. C., because we are not satisfied that the application has been made either at the proper stage or that it is bona fide.

(9) Now coming to the Letters Patent appeal, the only question which has been canvassed in this Court relates to limitation. It was urged before the single Judge of this Court and in the Courts below that the decree of 25-7-1935 was a final decree and that therefore the execution should have commenced within three years from that date. That ground has failed all along, but the learned counsel for the appellants has raised the same question in a very ingenious way by contending that an order under S. 35-A, Civil P. C., is not a decree within the meaning of S. 2 of the Code.

In this connexion it has been argued that such an order is not a decree as defined in S. 2(2) of the Code, because the definition expressly excludes 'any adjudication from which an appeal lies as an appeal from an order', and it is argued that an order under S. 35-A is appealable as such. Reference is rightly made to the provisions of S. 104(ff) of the Code. It is true that such an order by itself is appealable as an order in terms of S. 104, Civil P. C., but that does not mean that such an order cannot form part of a decree. We know as a matter of fact in this case that that order formed part and parcel of the decree passed by the Court, both at the preliminary and the final stages. But, it has been argued, not without justification, that the decree-holder himself got the trial Court to pass an order to the effect that the order in respect of Rs. 400/- should be excluded from the purview of the decree to be passed at the final stage.

But in spite of that order of the Court the direction as regards the payment of Rs. 400/- found a place in the decree as drawn up in the trial Court as also in the decree as drawn up in this Court. Hence, in spite of a foolish mistake made by the decree-holder the decree as drawn up has all along shown the sum of Rs. 400/- as a part of the decree, though payable only by the first two defendants. It has rightly been argued that that decree had been wrongly drawn up. But the executing Court must take the decree as it stands, and the judgment-debtor has no relief in that Court. We must therefore proceed on the assumption that the decree as it stands was passed at the preliminary stage on 25-7-1935 and at the final stage on 10-3-1941, which was affirmed by the appellate decree of this Court on 13-1-1942. That being so, in our opinion, there is no substance in the contention that the order for the payment of Rs. 400/- by the first two judgment-debtors had not the effect of a decree to which the terms of Art. 182 of the Limitation Act would be attracted. The learned single Judge of this Court has rightly pointed out that the decree having been the subject-matter of appeal to this Court the decree-holder was entitled to the benefit of the second provision in the third column of the First Schedule to the Limitation Act opposite to Art. 182. We must therefore hold that the judgment of the single Judge of this Court is entirely correct.

(10) It is some satisfaction to find that this litigation which commenced more than 20 years ago has now been finally set at rest without doing any injustice in spite of the fact that some technicalities could have been availed of by the judgment-debtors. The Courts below have taken the correct view of the legal position, and the judgments appealed from do not call for any interference. The appeals are therefore dismissed with costs.

B/H.G.P. Appeals dismissed.

A.I.R. 1954 NAGPUR 274 (Vol. 41, C.N. 99)

SINHA C. J. AND BHUTT J. (2-11-1953)

Kanhaiyalal, Appellant v. Balaram and others, Respondents.

Letters Patent Appeal No. 18 of 1952, from judgment of Mangalmurti J., in S. A. No. 485 of 1946 D/-8-9-1952 .

C. P. C. (1908), O. 22, R. 4 — Abatement of appeal — Death of one of the respondents.

B, D and R were three brothers who were separate in estate. B died leaving him surviving his widow G and his daughter-in-law M (defendant No. 2, widow of L, who predeceased his father B). Plaintiffs Nos. 1 and 2 were the sons of D and plaintiffs 3 and 4 were the sons of R, the other son of R having been impleaded as defendant No. 3 in the suit. The plaintiffs in their plaint claimed a declaration of title to a residential house and possession in respect of only a portion of the house shown in red as block I, which the second defendant had sold to the first defendant. The plaintiffs based their claim to declaration of title and possession as the heirs of B on the death of G, aforesaid. They alleged, further, that the second defendant had no title to the house in question, except a right of residence in a portion in respect of which possession was not claimed in the suit. The trial Court decreed the suit and granted a declaration

that the plaintiffs and the third defendant were the owners of the house except block I, shown in red, which it held had been legally sold by the second defendant to the first defendant. Thus, the trial court dismissed the suit for declaration and possession in respect of block I aforesaid, but did not grant any costs to the first defendant. From the decree of the trial Court the plaintiffs went in appeal. Their appeal related to the portion of the house shown in red as block I. The first defendant filed a cross-objection in respect of the costs which had not been granted to him by the decree of the trial Court. The second defendant also preferred a cross-objection in respect of the declaration granted by the trial Court to the plaintiffs for that portion of the house which had not been sold to the first defendant. The lower appellate Court dismissed both the cross-objections and allowed the appeal hoding that the second defendant had no title which she could convey to the first defendant. In the result the plaintiff's entire suit stood decreed as a result of the decision of the lower appellate Court. From the decision of the lower appellate Court the first defendant only came up in second appeal. The second defendant was also impleaded as respondent along with the plaintiffs. One of the plaintiffs-respondents, (respondent No. 3) and respondent No. 6 (defendant No. 3) died during the pendency of the appeal in the High Court. No substitution having been made in time the appeal abated in respect of those persons, and the application for setting aside abatement was also dismissed. The question arose whether the appeal by reason of the death of respondent No. 3 (plaintiff), if not by reason also of the death of respondent No. 6 (defendant No. 3), had abated as a whole.

Held that the case was an illustration of that class of cases where several persons having separate and definite interest in the property sue for possession and obtain a decree for possession. It was therefore possible for the Court to determine the controversy as between the parties before the Court without affecting the interest of the plaintiff not represented before it. The case was outside the class of cases covered by the leading judgment in 'AIR 1938 Nag 42'. Consequently the appeal had abated, not as a whole but only as against the heirs of the deceased respondent. AIR 1938 Nag 42 discussed. Case law Ref. (Paras 18, 20)

Anno: C. P. C. O. 22, R. 4, N. 22, 23.

CASES REFERRED

	Paras
(A) (V25) AIR 1938 Nag 42: ILR (1938) Nag 370	10, 18
(B) (V6) AIR 1919 PC 24: 47 Cal 175 (PC)	11
(C) (V16) AIR 1929 PC 58: 51 All 267 (PC)	12
(D) (V13) AIR 1926 Cal 893: 53 Cal 752	13
(E) (V13) AIR 1926 Cal 335: 30 Cal WN 45	13
(F) (V7) AIR 1920 Cal 264: 24 Cal WN 44	13
(G) (V16) AIR 1929 Cal 519: 56 Cal 622	14, 16
(H) (V40) AIR 1953 Nag 12: 1952 Nag LJ 421	15
(I) ('50) LPA No. 3 of 1946, D/- 28-7-1950 (Nag)	16, 17
(J) ('52) First Appeal No. 88 of 1942, D/- 18-4-1952 (Nag)	16
(K) (V29) AIR 1942 Oudh 155: 17 Luck 327	19
(L) (V30) AIR 1943 Oudh 11: 18 Luck 567	19

K. G. Chendke, for Appellant; A. P. Sen (for Nos. 1 to 3) and V. M. Holay and G. B. Gandhe (for No. 4), for Respondents.

JUDGMENT: This is a Letters Patent appeal from the decision of Mangalmurti J. dismissing second appeal No. 485 of 1946 on the ground that in the events which had happened in this Court the appeal has abated as a whole.

(2) In so far it is necessary to state the facts of the case for the purposes of this appeal they may be stated as follows:

Bhawani, Dashrath and Badrinath were three brothers (omitting the other branch, which does not figure in this controversy). The three brothers were separate in estate. Bhawani died in 1926 leaving him surviving his widow Girjabai and his daughter-in-law Mahirin (defendant No. 2) (widow of Bhola, who predeceased his father Bhawani in 1909). Plaintiffs Nos. 1 and 2 are the sons of Dashrath and plaintiffs 3 and 4 are the sons of Badrinath, the other son of Badrinath having been impleaded as defendant No. 3 in the suit.

The plaintiffs in their plaint claimed a declaration of title to a residential house and possession in respect of only a portion of the house shown in red as block I, which the second defendant had sold to the first defendant in the year 1944. The plaintiffs based their claim to declaration of title and possession as the heirs of Bhawani on the death of Girjabai aforesaid in December 1941. They alleged, further, that the second defendant had no title to the house in question. except a right of residence in a portion in respect of which possession was not claimed in this suit.

(3) The suit was contested mainly by the first two defendants. They denied the plaintiffs' title as heirs of Bhawani and asserted title in defendant No. 2. They also asserted that the second defendant had sold the portion of the house in respect of which possession was claimed by the plaintiffs, to the first defendant for payment of a debt which was binding on the estate of Bhawani, even assuming that the plaintiffs were his heirs. Other pleas in defence to the suit were raised, but it is not necessary to notice them here.

(4) The trial Court decreed the suit and granted a declaration that the plaintiffs and the third defendant were the owners of the house except block I shown in red, which it held had been legally sold by the second defendant to the first defendant. Thus, the trial Court dismissed the suit for declaration and possession in respect of block I aforesaid, but did not grant any costs to the first defendant.

(5) From the decree of the trial Court the plaintiffs preferred an appeal. Their appeal related to the portion of the house shown in red as block I. The first defendant filed a cross-objection in respect of the costs which had not been granted to him by the decree of the trial Court. The second defendant also preferred a cross-objection in respect of the declaration granted by the trial Court to the plaintiffs for that portion of the house which had not been sold to the first defendant.

The lower appellate Court dismissed both the cross-objections and allowed the appeal holding that the second defendant had no title which she could convey to the first defendant. In the result the plaintiffs' entire suit stood decreed as a result of the decision of the lower appellate Court.

(6) From the decision of the lower-appellate Court the first defendant only came up in second appeal to this Court. The second defendant was also impleaded as respondent along with the plaintiffs. One of the plaintiffs-respondents, Parbatsingh (respondent No. 3), and respondent No. 6 (defendant No. 3) died during the pendency of the appeal in this Court. No substitution having

been made in time the appeal abated in respect of those persons, and the application for setting aside abatment was also dismissed.

(7) Hence, when the second appeal was placed before the single Judge of this Court for hearing, a preliminary objection was taken on behalf of the surviving plaintiffs-respondents to the hearing of the appeal on merits on the ground that the appeal by reason of the death of respondent No. 3, (plaintiff), if not by reason also of the death of respondent No. 6 (defendant No. 3), had abated as a whole. That preliminary objection was upheld by the learned Judge of this Court, with the result that the appeal was held to have abated as a whole and was accordingly dismissed with costs. No decision on the merits of the case was given by this Court.

(8) Hence, the only question for determination in this appeal before us is whether the learned Judge of this Court has rightly held the appeal to have abated as a whole.

(9) Whatever may have been the position under the Civil Procedure Code of 1882, under the Code of 1908 the death of a plaintiff or of a defendant does not by itself cause the abatement of the entire suit if substitution is not made within the time limited by law. The suit on the death of a plaintiff (which under Rule 11 of Order 22 includes an appellant) abates only so far as the deceased plaintiff is concerned, and similarly in the case of a deceased defendant (including a deceased respondent) abates as against the deceased defendant. Hence, strictly speaking, an abatement in terms of O. 22, Civil P. C. is only in respect of a deceased plaintiff or a deceased defendant. But the question then arises as to what is the effect of such an abatement on the case as a whole, whether in the absence of the deceased party's legal representatives the suit or the appeal could be said to be properly constituted. Naturally, therefore, the question whether on the abatement of a suit or an appeal the suit or the appeal could proceed must depend upon the nature of the suit and the circumstances of each individual case. General rules have been deduced, and it has been laid down that if a suit or an appeal relates to partition or redemption of a mortgage or a partnership business or pre-emption, the absence of one of the parties renders the suit or the appeal as imperfectly constituted, so that it has to be dismissed, because no effective relief can be granted by the Court in the absence of that necessary party.

(10) In the leading case of — 'Ghanaram v. Balbhadra Sai', AIR 1938 Nag 42 (A) it was laid down that the whole appeal abates if no substitution is made in respect of the death of one of the mortgagee-respondents. In that case on an examination of a number of precedents it was laid down that two broad propositions had been clearly established, viz, (1) that a suit or an appeal may continue if the Court can pass a decree and give effect to it in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of other parties not represented, and (2) that the Court will not pass a decree which may not be executable owing to the fact that the decree in favour of the deceased-respondent has become final and no substitution has been made in his place. It is mainly on this case that the learned Single Judge of this Court has based his decision holding that the entire appeal had abated.

(11) We have therefore to examine the 'ratio decidendi' of that case to determine the question now in controversy before us.

Relying upon the observations of their Lordships of the Privy Council in — 'Sunitibala Debi v. Dhara Sundari Debi', AIR 1919 PC 24 (B) this Court held in the reported case that a mortgage was indivisible and therefore no redemption could be granted in respect of a part of the property. The terms of a mortgage have to be enforced as a single transaction affecting the entire mortgaged property. In the case decided by this Court referred to above three plaintiffs had obtained a preliminary decree for foreclosure. The defendants appealed from such a decree, to this Court. During the pendency of the appeal one of the plaintiffs-respondents died and no substitution having been made of his legal representatives the appeal abated as against his legal representatives. In those circumstances, it was held that the appeal had become incompetent and no relief could be granted against the surviving plaintiffs-respondents alone, without affecting the interests of the deceased plaintiff-respondent.

(12) The right of redemption of a mortgage vests in every co-sharer in the mortgaged property and stands on the same footing as that of every co-sharer to pre-empt a property sold: see in this connexion the observations of their Lordships of the Judicial Committee in — 'Mahomed Wajid Ali Khan v. Puran Singh', AIR 1929 PC 58 (C).

(13) It is now firmly established by a series of decisions of the different High Courts in India that where a number of co-plaintiffs have obtained a decree for joint possession, in an appeal by the defendants from such a decree all the plaintiffs are necessary parties, and if one of them dies and no substitution is made in his stead, though the appeal abates only as against him the appeal becomes incompetent and cannot be heard as no effective relief could be given by the appellate Court in the absence of the legal representative of the deceased party. In that sense the appeal is held to have abated as a whole: see for instance — 'Midnapur Zamindary Co., Ltd. v. Amulya Nath Roy', AIR 1926 Cal 893 (D) following the decision in — 'Manindra Chandra v. Bhagabati Devi', AIR 1926 Cal 335 (E) and — 'Kali Dayal v. Nagendra Nath', AIR 1920 Cal 264 (F).

(14) The converse is not always true, that is to say, where a number of plaintiffs' have sued for joint possession and their suit stands dismissed, the death of one of the plaintiffs-appellants during the appellate stage will not necessarily entail the result that the whole appeal should be held to be incompetent by virtue of the fact that no substitution has been made in respect of the deceased appellant. In this connexion the observations of Rankin C. J. in —'Hari Charan Moulik v. Kalipada Chakravarti', AIR 1929 Cal 519 (G) may be referred to. The learned Chief Justice has pointed out that though in a suit in ejectment the joint title of three plaintiffs and the right to possess were not vested in only two of them it was equally clear that a suit for ejectment by two out of three persons entitled may lie and a relief by way of joint possession may be given.

Adverting to the argument that the decision with reference to the deceased plaintiff in the Court of first instance would be contradictory to the decision of the Appeal Court in the event of the success of the appeal on behalf of the surviving plaintiffs, the learned Chief Justice has pointed out that the decree of the trial Court was only one of dismissal 'simpliciter' and such a dismissal would not create 'such a contradiction as would make it impossible to proceed with the appeal'. He further pointed out that it would be a different matter where the relief claimed originally by the plaintiffs was one of declaration only. In

a suit for a mere declaration two contradictory declarations cannot be given in the same suit at different stages.

(15) There is a line of decisions to the effect that the Court should not grant a decree at the appellate stage in favour only of some of the parties in the absence of other parties who have died meanwhile, of a character which should be contradictory to the decree granted at an earlier stage of the litigation in favour of the party who is dead and in whose place no substitution has been made.

Reference may be made in this connection by way of illustration to the decision of a Division Bench of this Court in — 'Lilawatibai v. Gangadhar', AIR 1953 Nag 12 (H). In that case a suit of a number of plaintiffs for a declaration that the alienation by the widow as a limited owner was not binding on them had been decreed. During the pendency of the appeal by the defendants one of the defendants-appellants died and no substitution was made in his place. It was held by this Court that the defendants being joint transferees each one of them was a necessary party to the appeal and that therefore the appeal abated in its entirety. It was so held because if the appeal of the surviving defendants had been allowed there would have been two contradictory declarations in respect of the same transaction.

(16) The learned counsel for the respondents also invited our attention to the unreported decisions of this Court in — 'Mst. Jugibai v. Daryao singh', Letters Patent Appeal No. 3 of 1946, D/- 28-7-1950 Nag (I) and — 'Durgasingh v. Ujyarsingh', First Appeal No. 88 of 1942, D/- 18-4-1952 (Nag) (J).

In the earlier case, viz., First Appeal No. 88 of 1942, D/- 18-4-1952 (J), a suit had been filed by a number of persons claiming to be reversioners to the estate of the last male holder for declaration and possession. On the dismissal of the suit an appeal was filed by the plaintiffs. During the pendency of the appeal one of the appellants died and no substitution was made in his place. The learned Judges of the Division Bench held that the appeal had not abated in its entirety, though it might be that the surviving plaintiffs-appellants could not get 'khas' possession but would only be entitled to joint possession in the event of their success. They rely chiefly upon the decision of the Division Bench of the Calcutta High Court referred to above, viz., — 'AIR 1929 Cal 519 (G)'.

(17) The learned counsel for the respondents rely upon certain observations made in that case, but those observations are in the nature of mere 'obiter dicta'. The decision in — 'L. P. A. No. 3 of 1946 D/- 28-7-1950 (Nag) (I)' is also of no assistance to the respondents inasmuch as on an examination of the facts of the case the learned Judges came to the conclusion that in the absence of the legal representatives of the deceased party no effective relief even by way of joint possession could be granted.

(18) We have therefore to examine whether in the circumstances of the instant case no relief can be granted to the appellants in the absence of the legal representatives of the deceased plaintiff-respondent aforesaid. It has to be noted at this stage that the relief as regards mere declaration of the title of the plaintiffs in respect of the entire house minus block I shown in red had become final in the first appellate Court as no appeal had been preferred by the first defendant from that part of the decree, he having made a cross-objection only on the question of costs.

In the second appeal the only matter in controversy relates to that part of the decree whereby the plaintiffs-respondents were granted relief by way of recovery of possession. It is clear on the plaint itself that the plaintiffs were claiming as the heirs of the last male holder. Thus, each one had a definite interest in the property, each one taking an equal share. Two of the sharers died during the pendency of the appeal in this Court; but their interest is wholly distinct and separate from that of the plaintiffs-respondents still before the Court. Hence, this is an illustration of that class of case where several persons having saparate and definite interest in the property sue for possession and obtain a decree for possession. It is therefore possible for this Court to determine the controversy as between the parties before the Court without affecting the interest of the plaintiff not represented before this Court.

It is noteworthy that not a single case was brought to our notice by the learned counsel for the respondents to the effect that where a suit, as in the instant case, has been instituted by a number of persons, having distinct shares for declaration and possession and a decree has been granted, on the death of one of the plaintiffs during the pendency of the appeal the abatement as against him rendered the entire appeal incompetent. It must therefore be held that this case is outside the class of case covered by the leading judgment in 'Ghanaram's case (A)', on the basis of which the learned Judge of this Court has held the appeal to have abated in its entirety.

(19) Reference may be made to the decision of a Division Bench of the Chief Court of Oudh in — 'Lachmi Narain v. Musaddi Lal', AIR 1942 Oudh 155 (K). In that case the learned Judges pointed out that as the interest of each one of the respondents was separable and separate the death of one of them without substitution being made did not affect the appeal as against the others. To the same effect is another decision of the same Court in — 'Sarfaraz Ahmad v. Asghar Ali', AIR 1943 Oudh 11 (L).

(20) For the reasons given above it must be held that the appeal in this Court had abated, not as a whole but only as against the heirs of the deceased respondent. The appeal therefore should have been heard on merits so far as the other respondents are concerned. This appeal is accordingly allowed with costs and the judgment of the Single Judge of this Court set aside.

B/R.G.D. Appeal allowed.

A.I.R. 1954 NAGPUR 277 (Vol. 41, C.N. 100)

SINHA C. J. AND BHUTT J. (28-8-1953)

Satyabhamabai w/o Diwakar and another, Appellants v. Pushpalatabai w/o Dattatraya and others, Respondents.

Letters Patent Appeal No. 4 of 1953, from decree of this High Court, in S. A. No. 391 of 1952, D/- 12-12-1952.

(a) Succession Act (1925), Ss. 102 and 103 — Residuary legatee, who is — His right to vested remainder.

It is settled law that no particular form of expression is needed to constitute a residuary legatee. If on a reading of the will it becomes sufficiently clear that the testator intended to dispose of his entire estate and that after creating bequests in favour of the persons named in the will the rest of the estate is to vest in a person then in existence or to come into

existence later, the position emerges in law that such a person is the residuary legatee who becomes entitled to the vested remainder in respect of the property for the time being in possession of a person who has only a life interest.
(Para 6)

Anno: S. Act, S. 102 N. 1; S. 103 N. 1.

(b) **Succession Act (1925), S. 113 — Applicability to will by Hindu — (Hindu Law — Will) — (Hindu Disposition of Property Act (1916), S. 2).**

The contention that a residuary legacy cannot be created in favour of a person who had not been born at the date the will came into effect has no force, for it ignores the fact that S. 113 of the Succession Act 1925, becomes applicable to Madhya Pradesh by virtue of the Hindu Disposition of Property Act, 1916.
(Para 7)

Anno: S. Act, S. 113 N. 1; H. D. P. Act, S. 2 N. 1.

(c) **Succession Act (1925), S. 103 — Life interest and woman's life estate — Date of termination — Relevancy in deciding question of residuary legacy — (Hindu Law — Will).**

J, a Hindu, died on 21-9-1920 having executed a will the previous day. To his widow and to his widowed daughters-in-law, viz., L and S he left only a life estate each. J then provided that whatever property would be left after providing for the legacies made in his will would go to the son to be adopted in 'dattaka' form by S. Accordingly D was adopted in 1924. D died in 1942 and L died in 1948. In a suit brought by the widow of D against S the adoptive mother, S contended that D could not be treated in law as the residuary legatee because he had predeceased L.

Held that the date of the death of L was wholly irrelevant in considering the question whether D in law could be treated as the residuary legatee. The date of the death of L would be relevant only if it were held that she had a woman's estate in the property bequeathed to her by J. But as L had only a life interest the necessary legal consequence was that the vested remainder was either in J or in D.
(Para 8)

Anno: S. Act, S. 103 N. 1.

CASES REFERRED: Paras

(A) ('06) 29 Mad 412: 1 Mad LT 227 7
(B) (1861-63) 9 Moo Ind App 123: 1 Sar 837 (PC) 7
(C) ('97) 21 Bom 709: 24 Ind App 93 (PC) 7
(D) (V5) AIR 1918 Pat 469: 3 Pat LJ 199 (SB) 7

P. K. Tare, for Appellants; D. T. Mangalmurti, for Respondent No. 1.

JUDGMENT: This is a Letters Patent appeal from the decision of Deo J. in second appeal upholding the decision of the lower appellate Court decreeing the plaintiff's suit for possession.

(2) The facts of the case lie within a very narrow compass and may be stated thus: Jageshwar had two sons Gajanan and Diwakar. Both of them predeceased him. Gajanan's widow was Laxmi and Diwakar's widow is Satyabhamabai, appellant No. 1. Satyabhamabai adopted Dattatraya in 1924 as a 'dattaka' son. Dattatraya died in 1942 leaving him surviving his widow Pushpalata, who is the plaintiff (respondent No. 1).

(3) Jageshwar died on 21-9-1920 having executed a will the previous day. He bequeathed in absolute right certain properties to his three daugthers, who were not interested in the present litigation. To his widow and to his widowed daughters-in-law aforesaid, viz. Laxmi and Satyabhama, he left properties yielding an income of Rs. 500 a year each by way of making provision for their maintenance for their respective lives. It is agreed at the Bar at the hearing of this appeal that the widows aforesaid had only a life estate each. Jageshwar by his will provided that whatever property would be left after providing for the legacies made in his will would go to the son to be adopted in 'dattaka' form by Satyabhama. One of the principal questions in controversy between the parties is what is the position of Dattatraya, the adopted son, in relation to the properties left by Laxmi when she died on 20-3-1948. The plaintiff claimed the properties which were in the possession of Laxmi during her life time as a result of the legacy in her favour, as the heir at law of her deceased husband Dattatraya.

(4) The suit was contested by appellant No. 1 chiefly on the ground that on the death of Laxmi in 1948 the properties should devolve upon the heirs at law of Jageshwar treating the inheritance as opening on the date of the death of Laxmi. The learned Judge of this Court has affirmed the decisions of the Courts below holding that on Laxmi's death the property would be deemed to have belonged to Dattatraya and that on his death his widow is the preferential heir.

(5) It is manifest that the determination of this controversy must primarily depend upon the construction to be placed on the terms of the will admittedly left by Jageshwar; but we have not before us an authoritative translation of that document. The Counsel for the parties had agreed that the Court may proceed on the assumption that the estate created in favour of Laxmi was only a life estate and that the adopted son Dattatraya was constituted the residuary legatee, though at the later stages of the argument the learned counsel for the appellants apparently resiled from that position and contended that in terms the will did not constitute Dattatraya as the residuary legatee. It is therefore not necessary for us to determine for ourselves the question whether the property left by the will to Laxmi became her woman's estate or created in her favour only a life estate. We proceed to determine the points at issue between the parties on the basic assumption that Laxmi had been given only a life estate in the properties which she had to enjoy for her life-time by way of maintenance for herself. That being the position of things at the date of the will the legal position emerges that the remainder was vested either in the adopted son or in Jageshwar himself.

(6) Before we proceed to determine the other controversies we have to arrive at a conclusion of our own as to whether Dattatraya on his adoption in 1924 could claim the position of a residuary legatee in respect of that portion of the estate of the testator which had not been disposed of otherwise. Deo J. has held on a construction of the will that Dattatraya was the residuary legatee and that therefore S. 103 of the Succession Act came into operation and consequently the vested remainder in respect of the property for the time being in the possession of Laxmi, as a matter of law would come to Dattatraya. Though the will in terms does not specifically speak of the son to be adopted by Satyabhama as the residuary legatee, on a proper reading of the terms of the will we have no doubt in our minds that the construction placed upon it by Deo J. was correct. It is settled law that no particular form of expression is needed to constitute a residuary legatee. If on a reading of the document in question it becomes sufficiently clear that the testator intended to dispose of his entire estate and that

after creating bequests in favour of the persons named in the will the rest of the estate is to vest in a person then in existence or to come into existence later, the position emerges in law that such a person is the residuary legatee. Hence the conclusion of the learned Judge of this Court sitting singly seems to be well founded.

(7) But the learned counsel for the appellants contended that even on that supposition Dattatraya could not be said to be the residuary legatee because he was not born on the date of the testator's death. It was thus contended that a residuary legacy cannot be created in favour of a person who had not been born at the date the will came into effect. In our opinion, there is no substance in that contention. Reference was made in this connexion to the observations in Mulla's Principles of Hindu Law, 11th Edition, page 492, Art. 390, to the effect that the grant of a remainder could not be valid unless it was made in favour of a person in existence at the date of the death of the testator. — 'Ranganatha v. Bhagirathi', 29 Mad 412 (A), — 'Soorjeemoney Dossey v. Deenobundoo Mullick', 9 Moo Ind App 123 (PC) (B); — 'Bai Motivahu v. Bai Mamubai', 21 Bom 709 (PC) (C); and — 'Ram Bahadur v. Jagannath', Prasad', AIR 1918 Pat 469 (SB) (D), which have been relied upon in that text-book were also relied upon by the learned counsel for the appellants. But this argument ignores the provisions of the Hindu Disposition of Property Act, 1916, which applies to this State, and which has adopted the terms of S. 113 of the Succession Act as bearing on this controversy.

(8) It was next contended on behalf of the appellants that Dattatraya could not be treated in law as the residuary legatee because he had predeceased Laxmi. It is a fact that Dattatraya died in 1942 whereas Laxmi died in 1948. But the date of the death of Laxmi is wholly irrelevant in considering the question whether Dattatraya in law could be treated as the residuary legatee. The date of the death of Laxmi would be relevant only if it were held that she had a woman's estate in the property bequeathed to her by Jageshwar. Only then the succession could be said to have opened after her death. But, as we have already held, Laxmi had only a life interest with necessary legal consequence that the vested remainder was either in Jageshwar or in Dattatraya. That being so, the relevant date to determine the rights of the parties in this action must be either the date of Jageshwar's death if Jageshwar had the right to dispose of the vested remainder or the date of the death of Dattatraya if he can be said in law to have acquired a vested interest on his adoption in 1924. In either view of the case appellant No. 1 has no case because Dattatraya would be the heir at law if it were held that the vested remainder in respect of properties in Laxmi's possession was in Jageshwar himself. Dattatraya would also have the right in those properties if the alternative case is adopted, viz, that in the capacity of the residuary legatee he took that property as such on the death of Laxmi.

(9) The learned counsel for the appellants conceded that the appellant (No. 1) could claim the properties in dispute only if it was held that Laxmi had a woman's estate in the properties left to her by Jageshwar and that on any other hypothesis appellant No. 1 was out of Court. As already indicated, it was nobody's case that Laxmi had a woman's estate in the properties left to her by the testator. That being the position, there can be no two opinions as to the conclusions to be arrived at on the basic finding that Laxmi had only a life estate.

(10) It must therefore be held that there is no merit in this appeal. It is accordingly dismissed with costs.

B/V.S.B. Appeal dismissed.

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SINHA C. J. AND MUDHOLKAR J. (30-11-1953)

Chhogalal Meghraj Maheshri and others, Appellants v. Fakirji s/o Paikaji Bhalkar and others, Respondents.

Second Appeal No. 252 of 1946, from decree of 2nd Addl. Dist. J., Amraoti, D/- 9-11-1945.

(a) **Civil P. C. (1908), O. 22, R. 4 — Joint decree for ejectment — Appeal — Death of one respondent — Interest of each not ascertainable — Appeal held abated as whole.**

A suit for ejectment filed by A, B and C, was decreed. During the pendency of appeal against the decree A died but his legal representatives were not brought on record. A, B and C had represented three branches of the family. There was no allegation in the plaint that A sued as the manager of the family. Interest of A was not separate from those of the surviving respondents. What interest each of the plaintiffs had could not be ascertained from the plaint:

Held that the whole appeal had abated. AIR 1938 Nag 42; AIR 1952 Nag 181, Rel. on. Case law discussed. (Paras 23, 26)

Anno: Civil P. C., O. 22, R. 4 N. 23.

CASES REFERRED: Paras

(A) (V16) AIR 1929 PC 58: 51 All 267 (PC) 2, 28
(B) (V9) AIR 1922 Pat 606: 1 Pat 699 2, 27
(C) (V12) AIR 1925 All 623: 85 Ind Cas 563 2, 5
(D) (V13) AIR 1926 Cal 335: 90 Ind Cas 986 2
(E) (V13) AIR 1926 Cal 893: 53 Cal 752 2, 27
(F) (V16) AIR 1929 Nag 358: 121 Ind Cas 654 2
(G) (V19) AIR 1932 Mad 212: 137 Ind Cas 319 2
(H) (V21) AIR 1934 Pesh 14: 148 Ind Cas 889 2
(I) (V11) AIR 1924 PC 198: 4 Pat 61 (PC) 2
(J) (V15) AIR 1928 Lah 572: 10 Lah 7 (FB) 2, 8, 25
(K) (V18) AIR 1931 Nag 184: 27 Nag LR 220 2, 9
(L) (V23) AIR 1936 Nag 292: ILR (1937) Nag 423 2, 7
(M) (V25) AIR 1938 Nag 42: ILR (1938) Nag 370 2, 7, 24
(N) (V30) AIR 1943 Nag 13: ILR (1943) Nag 17 2, 7
(O) (V36) AIR 1949 Nag 91: ILR (1948) Nag 509 2, 7, 24
(P) (V39) AIR 1952 Nag 238: ILR (1949) Nag 313 2, 7, 24
(Q) (V38) AIR 1951 Nag 434: ILR (1951) Nag 294 2, 6, 7
(R) (V12) AIR 1925 PC 49: 48 Mad 254 (PC) 4
(S) (V25) AIR 1938 Bom 257: 175 Ind Cas 361 4
(T) ('03) 30 Cal 725: 30 Ind App 130 (PC) 4
(U) (V15) AIR 1928 Bom 367: 114 Ind Cas 392 4
(V) (V32) AIR 1945 Oudh 196: 20 Luck 305 6
(W) (V39) AIR 1952 Nag 181: ILR (1949) Nag 437 24
(X) ('48) First Appeal No. 83 of 1943, D/- 26-1-1948 (Nag) 26
(Y) (V33) AIR 1946 Nag 377: ILR (1946) Nag 433 26
(Z) ('96) 23 Cal 670: 23 Ind App 37 (PC) 26
(Z1 & 2) (V12) AIR 1925 Pat 123: 3 Pat 853 27
(Z3) (V15) AIR 1928 Pat 250: 7 Pat 285 27
(Z4) (V6) AIR 1919 Cal 200 (2): 51 Ind Cas 409 27
(Z5) (V20) AIR 1933 Lah 356 (2): 14 Lah 543 27

(Z6) (V16) AIR 1929 Cal 519: 56 Cal 622 29
(Z7) (V17) AIR 1930 Lah 561: 11 Lah 598 30
(Z8) (V23) AIR 1936 Pat 548: 15 Pat 326 30

Y. S. Tambe, for Appellants; K. G. Chendke, for Respondent (Nos. 2 & 3).

DEO J. (11-1-1952):

This is an appeal arising out of a suit for ejectment instituted by respondents 2 and 3 and one Krishna who died during the pendency of the appeal. His legal representatives have not been brought on record.

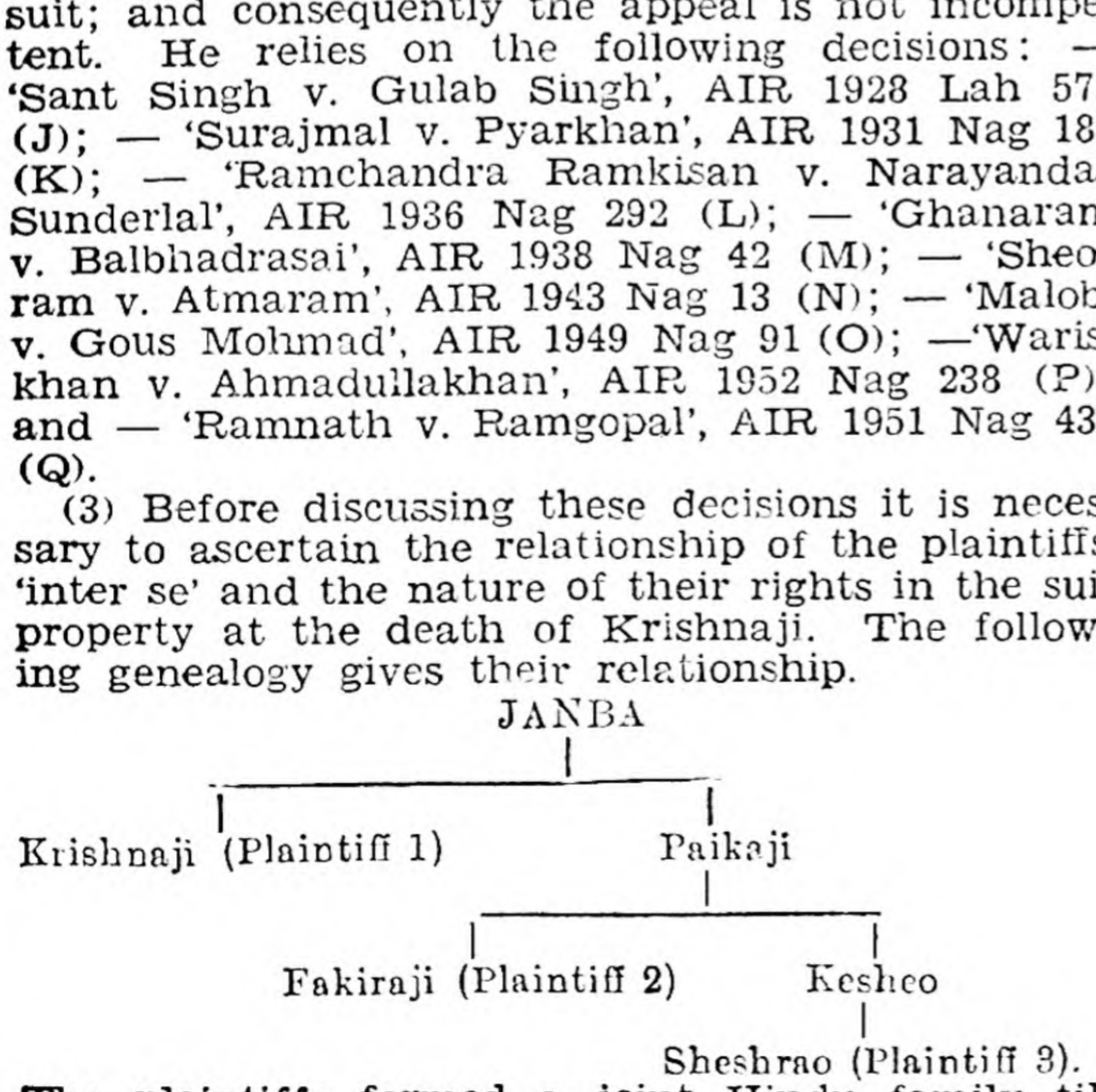
(2) Shri E. M. Joshi appearing for the remaining plaintiffs-respondents contends that the appeal has abated as against plaintiff No. 1 and his legal representatives cannot be affected by any decision made in this appeal, — 'Vide Mahomed Wajid Ali Khan v. Puran Singh', AIR 1929 PC 58 (A). Therefore this appeal cannot now be heard as it is improperly constituted and must be dismissed. He relies on — 'Tej Narain Sahu v. Dal Ram Sahu', AIR 1922 Pat 606 (B); — 'Dayaram v. Ram Narain', AIR 1925 All 623 (C); — 'Manindra Chandra v. Bhagabati Devi', AIR 1926 Cal 335 (D); — 'Midnapore Zamindari Co. Ltd. v. Amulya Nath', AIR 1926 Cal 893 (E); — 'Laxmanlal v. Narayan', AIR 1929 Nag 358 (F); — 'Muthu Vijaya Raghunatha v. Swaminathan', AIR 1932 Mad 212 (G) and—'Faujadar Khan v. Mohd. Kalu Khan', AIR 1934 Pesh 14 (H).

This decree is passed in favour of the plaintiffs without specification of their shares. It is therefore argued that on the making of the decree they have acquired rights which are fixed unless and until the decree is varied or set aside in appeal. The Counsel relies on — 'Lachmi Narain v. Balmukund', AIR 1924 PC 198 (I).

It is further contended that the decree being joint and indivisible, any one of the plaintiffs can apply for execution of the decree under Order 21, Rule 15, Civil P. C., for the benefit of them all or for the benefit of the legal representatives of any of them if he is dead, and that if this appeal is allowed there will be two inconsistent decrees. The learned Counsel therefore submits that this appeal should be dismissed as incompetent.

On the other hand, the learned Counsel for the appellant argues that the decree is severable, the plaintiffs having defined rights in the property in suit; and consequently the appeal is not incompetent. He relies on the following decisions: — 'Sant Singh v. Gulab Singh', AIR 1928 Lah 572 (J); — 'Surajmal v. Pyarkhan', AIR 1931 Nag 184 (K); — 'Ramchandra Ramkisan v. Narayandas Sunderlal', AIR 1936 Nag 292 (L); — 'Ghanaram v. Balbhadrasai', AIR 1938 Nag 42 (M); — 'Sheoram v. Atmaram', AIR 1943 Nag 13 (N); — 'Malobi v. Gous Mohmad', AIR 1949 Nag 91 (O); —'Wariskhan v. Ahmadullakhan', AIR 1952 Nag 238 (P); and — 'Ramnath v. Ramgopal', AIR 1951 Nag 434 (Q).

(3) Before discussing these decisions it is necessary to ascertain the relationship of the plaintiffs 'inter se' and the nature of their rights in the suit property at the death of Krishnaji. The following genealogy gives their relationship.



The plaintiffs formed a joint Hindu family till 3-3-1937 when they effected a partition of all their property held by them till then as coparcenary property. Exhibit D. 22 is the partition deed. It recites that as Fakira was demanding separation the two divisions were made, one division was allotted to Krishnaji and Sheshrao and the other was allotted to Fakiraji. According to P. W. 2 Fakiraji it was Krishnaji who proposed the partition.

Survey no. 9/2, area 2.29 acres was not physically divided but one-half undivided share was included in each division. According to P. W. 2 only the area that was in their actual possession was shown. As regards the remaining area of survey no. 9/2 it was to be dealt with later. Plaintiff No. 3 Sheshrao deposes that there was an oral agreement to get back the encroached portion. Anyway, the property in suit was not included in the partition.

(4) According to the learned Counsel for the appellant this partition made the plaintiffs tenants-in-common of the disputed property if they have any title to it. The share of Krishnaji would be one-half and the other two plaintiffs would get one-fourth each.

As observed by their Lordships of the Privy Council in — 'Palani Ammal v. Muthu Venkatachala Moniagar', AIR 1925 PC 49 (R)—

> "It is also now beyond doubt that a member of such joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property."

There is no presumption under law that there is a severance in interest as regards the remaining property in the family between the other members of the family also. — 'Rudragouda v. Basangouda', AIR 1938 Bom 257 at p. 273 (S). There is also no presumption that when one coparcener separates from the others, the remaining members remain united. — 'Balabux v. Rukhmabai', 30 Cal 725 (PC) (T). The question whether or not the other members of the family continued to be joint or separate is to be determined on the evidence in each case. — 'Bhimabai v. Gurunathgouda', AIR 1928 Bom 367 (U). Such evidence may be direct or circumstantial, including the subsequent conduct and dealings of the parties with respect to the property.

(5) In the instant case it is not possible at this stage without further pleadings and evidence to say whether Krishnaji and Sheshrao continued to be members of the joint family and had an undivided interest in the three-fourths share of the property in suit or were divided, each having specific shares therein.

The learned Counsel for the respondents, however, submits that this enquiry is not necessary in view of the nature of the decree passed in favour of the plaintiffs. In all the cases on which reliance is placed by him, except in 'AIR 1925 All 623 '(C), it was held that if a joint decree for possession is passed and during the pendency of the appeal therefrom one of the plaintiffs-respondents dies, the appeal abates as a whole, the decree being indivisible. The proposition appears to be somewhat widely stated. An exception appears to have been made in 'AIR 1925 All 623 (C)' in the case of plaintiffs who were members of a joint Hindu family.

(6) It is necessary in the first instance to ascertain whether the plaintiff No. 1 died in a state of jointness with plaintiff No. 2, and if so ,who were the surviving members of the coparcenary including the personal heirs of the deceased. 'Legal representative' ordinarily means a person who in law represents the estate of a deceased person. If, as contended by the learned Counsel for the respondents, plaintiff No. 1 died in a state of jointness, plaintiff No. 2 as a surviving member of the coparcenary and manager of the family may adequately represent all the other members including the widow of plaintiff No. 1, if any, though she is entitled to a share under the Hindu Women's Rights to Property Act. See — 'Radha Raman v. Jang Bahadur', AIR 1945 Oudh 196 (V), which was approved in 'AIR 1951 Nag 434 (Q).

(7) The principles underlying the decisions relied on by the learned Counsel for the appellant are:

(a) If a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned, without interfering with the interests of others, then the suit or appeal can continue. If not, it abates as a whole.

(b) The Court must see that it does not pass a decree which it may find itself incapable of executing owing to the circumstances that the lower Court's decree in favour of the deceased respondent has become final in consequence of partial abatement of the appeal against him.

In 'AIR 1938 Nag 42 (M)' and 'AIR 1952 Nag 238 (P)' the appeals abated against a co-mortgagee-respondent. 'AIR 1949 Nag 91 (O)' and — 'Ramnath v. Ramgopal', (Q) (supra) were appeals in a partition suit and 'AIR 1943 Nag 13 (N)' was an appeal in a case for dissolution of partnership. A suit for partition or dissolution of partnership is incompetent unless all the partners or all the members of a coparcenary or all the co-owners are parties to the suit. Each party is a plaintiff and defendant in such suits. No effective decree can be passed in the absence of any one of them. In such cases the suit or appeal must abate as a whole. One of the joint promisees cannot maintain a suit to enforce the promise without impleading the co-promisees. A decree obtained by the mortgagees on a mortgage cannot therefore be varied or reversed in the absence of any one of them. Consequently, the appeal must abate as a whole, if the legal representatives of one of them is not brought on record. See 'AIR 1936 Nag 292 (L)'. But if the co-promisee on record can adequately represent the interest of the deceased co-promisee there cannot be even a partial abatement. In such cases the appeal does not abate.

(8) In 'AIR 1928 Lah 572 (J)' a reversioner instituted a suit for a declaration that a sale in favour of four persons did not affect his reversionary right. During the pendency of his appeal against the dismissal of the suit one of the vendees died and his legal representatives were not brought on record. The question arose whether on the abatement of the appeal against the deceased respondent the appeal abated in its entirety. There was a recital in the sale deed that the property had been sold to the vendees in equal shares. It was therefore held that the appeal abated only against the deceased respondent and must continue against the others.

To attract this principle it is really not necessary to specify in the decree the interest of the several plaintiffs. It is enough if such interests were in fact separable on the date of the death or, at best, on the date of the decree.

(9) 'AIR 1931 Nag 184 (K)' was a case of Muhammedan co-owners. That was a suit for establishing one Jumman Khan's title to the property in dispute. On his death his several sons were brought on record as legal representatives and a decree was passed in their favour. During the pendency of appeal one of the sons died and his heirs were not brought on record. At the hearing it was contended that the appeal was incompetent and could not proceed in the absence of the legal representatives of the deceased respondent.

This contention was overruled. It was held that "the plaintiffs cannot be said to have a joint and inseparable interest. Each one of the plaintiffs has got an ascertained share distinct from the others. Consequently, it was quite open to the appellants to abandon their claim in respect of the share owned by any of them. Their right to prosecute their appeal against other co-sharers would not be prejudiced."

(10) It is thus clear that if the three plaintiffs had separable and distinct interests at the death of Krishnaji, the appeal would not abate except to the extent of Krishnaji's interest in the property. If Krishnaji died as a member of the coparcenary, the appeal may not abate at all if plaintiff No. 2 could represent the interests of the surviving members of the coparcenary. The existence of the widow of the deceased, if any, may not make a difference. Under these circumstances, it is necessary to ascertain the following facts:

(a) whether the plaintiff No. 1 died as a member of an undivided Hindu family?

(b) if so, who were the surviving members of the coparcenary?

(c) who were personal heirs of the deceased at his death?

(d) are they all still alive?

(e) who was the manager of the family before and after the death of Krishnaji?

On ascertaining these facts the question of the effect of non-joinder of the personal heirs of Krishnaji, if any, as legal representatives will have to be considered.

(11) Parties are therefore directed to make the necessary statements on these points. The respondents will file their statements, supported by an affidavit of respondent No. 3, within three weeks. The appellants will submit their reply, supported by an affidavit, within two weeks thereafter. The case be fixed for further hearing in the second week of March, 1952.

ORDER OF REFERENCE (22-7-1952)

(12) Parties have filed their statements supported by affidavits. They do not want to adduce any further evidence. It is admitted that Krishnaji and Sheshrao continued to manage the joint Hindu family after the partition of 1937 and that the field in suit was kept joint. The joint family continued till the death of Krishnaji with Sheshrao as the 'de facto' manager who used to consult Krishnaji in all important matters. Krishnaji died as a member of the coparcenary whose surviving members were Sheshrao and his two sons Narayan and Kashinath. The latter was taken in adoption by Krishnaji and is his only personal heir. All these coparceners are still alive. Sheshrao is the 'karta' of the family and is assisted in the management by Kashinath.

(13) Assuming that the plaintiffs' story is correct that this field was kept joint and they are entitled to succeed in this litigation, the coparcenary will have three-fourths share and Fakiraji one-fourth share in the field.

(14) The question for decision therefore is whether on the death of Krishnaji as a member of the coparcenary, survived by his personal heir

Kashinath the 'de facto' manager who later on becomes the 'karta' of the coparcenary, and who is already on record as respondent and another coparcener, the appeal abates as a whole, or to the extent of three-fourths share of the coparcenary, or to any extent.

(15) In view of the conflict of authorities already noticed, I am of opinion that this important question of some difficulty should be decided by a Division Bench of two or more Judges as the Chief Justice may think proper. The papers be laid before his Lordships for orders under R. 9 of Chapter 1 of the Rules of this Court.

(16) JUDGMENT: This appeal has come up before us upon reference by Deo J.

(17) The questions which fall for consideration are whether the appeal abates or not and, if it abates, whether it abates wholly or in part.

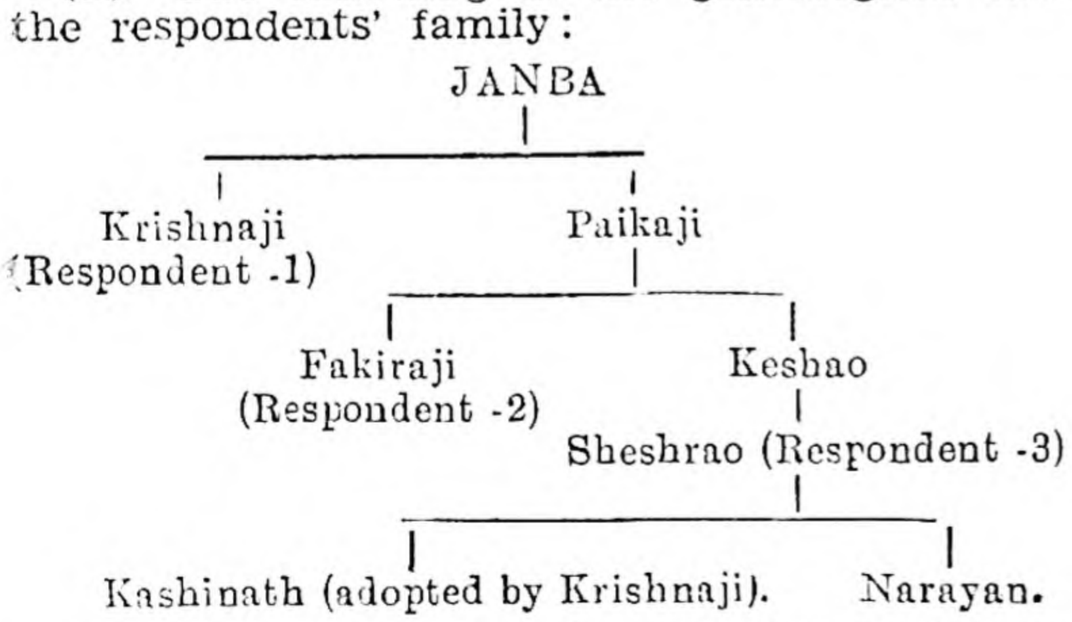
(18) The appeal arises out of a suit for ejectment instituted by the respondents 2 and 3 and one Krishnaji who died during the pendency of the appeal. His legal representatives have not been brought on record. According to the respondents, the appeal abates in toto.

(19) In order to appreciate the contentions of the parties it is necessary to refer to certain facts. The property in suit is Survey No. 9/1-A of mouza Sirasgaon. According to the respondents, the whole of Survey No. 9 originally belonged to their family & out of this field they sold 22 acres 5 gunthas to the appellant No. 1 on or about 9-4-1926. The appellant No. 1 sold this land to Bisesardasji Daga on 10-4-1934 who in his turn sold it to one Mangilal on 2-11-1943. Mangilal sold that land to the respondent No. 4 Surajmal on 20-12-1943.

After the sale by the respondents' family of 22 acres 5 gunthas out of Survey No. 9 to the appellant No. 1, this land was formed into a sub-division and was given No. 9/1. The land remaining in the possession of the respondents, which was about 4 acres, was also formed into another subdivision and was given No. 9/2.

The respondents alleged that the appellant No. 1, who is the owner of Survey No. 14, which adjoins Survey No. 9, encroached upon Survey No. 9/2 and obtained wrongful possession of 2 acres 2 gunthas of land out of this field. It is for the possession of this encroached land that the respondents filed the suit out of which this appeal arises.

(20) The following is the genealogical table of the respondents' family:



(21) It would be clear by reference to this genealogy that the three plaintiffs in suit, Krishnaji, Fakiraji and Sheshrao, were the eldest members of the three branches of the family. The trial Court decreed the claim of the plaintiffs-respondents 1 to 3 and ordered the defendants to put the plaintiffs in possession of the encroached land. The decree of the trial Court was upheld by the lower appellate Court. It is contended on behalf of the respondents that since it is a joint decree it entitled any one of the plaintiffs-respondents to execute it under Order 21, Rule 15, Civil P. C. It is further contended that the decree can also be executed by the legal representatives of the deceased plaintiff-respondent against whom this appeal has abated.

Then it is pointed out that the legal representative of Krishnaji was not brought on record during the period allowed by law, that the appeal has therefore abated against him and that, consequently, the legal representative Kashinath can now execute the entire decree. It is further said that if the appeal is held to have only abated partially, the appeal is heard and decided on merits and a decision is given against the respondent, there will come into existence two conflicting decrees. Since there is such a possibility, it is urged that the appeal must be held to have abated in toto.

(22) On behalf of the appellants it is urged that the family property was partitioned in the year 1937 at which Fakiraji alone separated and was allotted a half share in Survey No. 9/2 along with some other property and that the other half in that survey number along with some other property fell to the share of Krishnaji and Sheshrao, who remained joint, that thereafter Krishnaji became the 'de jure' manager of the family whereas Sheshrao became 'de facto' manager of the family and that after Krishnaji's death, Sheshrao became also the 'de jure' manager of the family. It is therefore contended that the appeal does not abate at all as he is already on record. Alternatively, it is said that Fakiraji's share in the field having been separated and delineated at the partition, the appeal cannot abate in so far as his share is concerned.

(23) There is no allegation in the plaint that Krishnaji sued as the manager of the family. On the other hand, from the plaint it would be clear that the three plaintiffs represented three branches of the family. In such a case, therefore, the death of one of the plaintiffs during the pendency of an appeal would lead to the abatement of the entire appeal unless his legal representative was duly brought on record within the time allowed by law.

(24) In support of this contention we would rely upon the decisions of this Court in 'AIR 1938 Nag 42 (M)' and — 'Ganpat v. Shri Maruti Deosthan Tandulwadi', AIR 1952 Nag 181 (W). In the first case, it was held that the whole appeal abates if one of the mortgagee-respondents dies during the pendency of the appeal from the preliminary mortgage decree and his legal representatives are not brought on record under the Civil P. C. No doubt, in that case the suit out of which the appeal arose was based on a mortgage but the principles upon which the decision of the learned Judges is based would also apply here.

In that case the learned Judges laid down the following two principles:

"(1) If a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of others then the suit or the appeal can continue; if not ,it abates as a whole.

(2) The Court must see that it does not pass a decree, which it may find itself incapable of executing owing to the circumstances that the lower Court's decree in favour of the deceased respondent has become final in consequence of the partial abatement of the appeal against him."

The view taken by the learned Judges in this case has been approved in 'AIR 1949 Nag 91 (O)' and 'AIR 1952 Nag 238 (P)' to which one of us (Mudholkar J.) was a party.

(25) It was, however, contended on the authority of the decision in 'AIR 1928 Lah 572 (FB) (J) that where the interest of the deceased respondent in the subject-matter of the appeal was separate from the interests of the surviving respondents, it cannot be said that the decree of the appellate Court, if in favour of the appellant, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal 'qua' the deceased, and that therefore the appeal did not abate in its entirety but could proceed against the surviving respondents.

(26) In the first place, we would point out that here the interest of Krishnaji was joint with the other members of the family excepting Fakiraji and that therefore it cannot be said that his interest was separate from the interest of the surviving respondents. Secondly, we would like to point out that the question as to what interest each of the plaintiffs had or sought to enforce in the suit must be ascertained by reference to the plaint and not by reference to any extraneous matters. In this connection we rely on the following observations of Bose J. in — 'Anand Rao v. Anandibai,' First Appeal No. 83 of 1943 D/- 26-1-1948 (Nag) (X):

"8. An attempt was made to get us to examine the defendants' title. It was said that they claimed under a will and being legatees took as tenants-in-common, and so their interests were severable. Reliance was placed on — 'Buchibai v. Nagpur University', AIR 1946 Nag 377 at pp. 382-383 (Y) and — 'Jogeswar Narain Deo v. Ramchandra Dutt', 23 Cal 670 (PC) (Z). But we do not intend to look into these questions because what we have to see is the claim put forward by the 'plaintiff' he being the appellant. We have to see what 'he' has claimed and whether on the case put up by him now he can now sever the interests of the defendants, he not having made any attempt to do so in the plaint or in the lower Court and the decree not having severed their interests. On the plaint as it stands it would, in our opinion, be impossible to give a decree against any one or more of the defendants apart from the others because we do not know the extent of their shares or whether they are distinct. The plaintiff's case is that they are all equally trespassers and that they are all in possession. Before we could give a decree in favour of the plaintiff against one or more of the defendants for some particular share in the estate, amendment of the plaint would be necessary, and that could not be allowed now because it would seriously affect the interests which the second respondent has obtained under the decree. As we have pointed out, his rights under the decree are to retain possession of the whole of the estate along with the other defendants as against the plaintiff."

These observations have our respectful concurrence.

(27) The view which we have taken in this case is supported, apart from the decisions of this Court, by the decisions of other High Courts. Thus, for instance we may refer to the following: —AIR 1922 Pat 606 (B)—'Lilo Sonar v. Jhagru Sahu', AIR 1925 Pat 123 (Z1 & 2),—'Basist Narayan Singh v. Modnath Das', AIR 1928 Pat 250 (Z3); — 'Sriram Chandra v. Hridhoy Nath', AIR 1919 Cal 200 (2) (Z4); — 'AIR 1926 Cal 893 (E); and — 'Chuni Lal Tulsi Ram v. Amin Chand', AIR 1933 Lah 356 (2) (Z5).

(28) Finally, there is the decision of their Lordships of the Judicial Committee in 'AIR 1928 PC 58 (A)'. In that case their Lordships have laid down that where a joint decree is passed in favour of the plaintiffs and if one of them dies pending an appeal, the appeal abates as a whole if his legal representatives are not substituted in his place. No doubt, that was a suit for pre-emption but the principle upon which their Lordships proceeded will also apply equally to this case.

(29) The learned counsel for the appellants relied upon — 'Hari Charan v. Kalipada Chakravarti', AIR 1929 Cal 519 (Z6). In that case three plaintiffs who had filed a suit for ejectment had preferred an appeal from the decision of the trial Court dismissing their claim and then one of the plaintiffs died during the pendency of the appeal and the other two failed to have the legal representatives of the deceased plaintiff added as parties appellants to the appeal. The appeal was dismissed by the lower appellate Court in its entirety on the ground that the appeal was not properly constituted.

The learned Judges before whom a second appeal was taken held that inasmuch as joint possession could have been given as a remedy, the failure to bring the legal representatives of one of the appellants was not such a defect as to make the entire appeal incompetent. In that case, however, the learned Judges followed an unusual course of allowing the plaintiffs to amend the plaint. In the present case there can be no question of asking the plaintiffs to amend the plaint because they are not appellants before this Court but are respondents. Since no relief can possibly be given to the appellants unless the plaint is amended, and since the plaintiffs-respondents cannot be forced to amend the plaint, the decision on which reliance is placed cannot apply here.

(30) The other decisions on which the learned counsel for the appellants relied were: — 'Atma Ram v. Banku Mal', AIR 1930 Lah 561 (Z7) and — 'Sankru Mahto v. Bhoju Mahato', AIR 1936 Pat 548 (Z8).

In the first of these two cases, it has to be borne in mind that the suit was brought by the father in his capacity as manager for enforcement of a contract on behalf of a joint Hindu family. He died during the pendency of the appeal and his successor in the managership was substituted for him on the record but the other co-parceners were not impleaded. It was held that the appeal did not abate. This decision is clearly distinguishable from the present case because here, as we have pointed out, the suit was not instituted by a manager of a joint Hindu family for enforcing the rights of the family.

The other case is also distinguishable because there it was found that the legal representatives of the deceased party were already on record and that therefore nothing remained to be done.

(31) We are, therefore, clear that by reason of the failure of the appellants to bring on record the legal representative of Krishnaji there is the abatement and the abatement is not partial but total.

(32) Upon this view, we dismiss the appeal with costs.

(33) Second Appeal No. 253 of 1946 was also placed before us and it was agreed that if this appeal is dismissed, that appeal will also be dismissed. We therefore dismiss with costs Second Appeal No. 253 of 1946 also.

A/R.G.D. Appeal dismissed.

*A.I.R. 1954 NAGPUR 284 (Vol. 41, C.N. 102)

SINHA C. J. AND BHUTT J. (29-12-1953)

Mst. Manabai, Defendant-Appellant v. Mst. Chandanbai, Plaintiff-Respondent.

Second Appeal No. 680 of 1953, from order of Addl. Dist. J., Durg, D/- 9-9-1953.

*†(a) **Hindu Widows' Re-marriage Act (1856), S. 2 — Re-marriage under custom — (Hindu Law — Re-marriage).**

Both under the Act and otherwise under the Hindu Law a widow on re-marriage forfeits her right to her deceased husband's property, even though the customary law of the caste to which she belongs sanctioned such a re-marriage. Case law discussed. (Para 16)

Anno: Hindu Widows' Re-marriage Act, S. 2 N. 2.

(b) **Hindu Women's Rights to Property Act (1937), Ss. 2 and 3 — Re-marriage by widow — Right to deceased husband's property — (Hindu Widows' Re-marriage Act (1856), S. 2).**

The 'non obstante' clause of S. 2 of the Act of 1937 applies only to such provisions of the Hindu Law as are dealt with by S. 3 of the Act. There is no conflict between the provisions of the Act of 1937 and that of 1856, and therefore there is no occasion for praying in aid of a widow who has re-married the provisions of the 'non obstante' clause. The Act of 1937 consequently does not operate to preserve her rights in her deceased husband's property. (Para 17)

Anno: Hindu Widows' Re-marriage Act, S. 2 N. 2.

CASES REFERRED: Paras

(A) ('96) 9 CPLR 47 6
(B) ('67-68) 4 Bom HCRAC 25 6
(C) ('76-78) 1 Mad 226 6, 9
(D) ('89) 11 All 330: 1889 All WN 77 6, 13, 14
(E) ('87) 11 Bom 119 6
(F) ('92) 19 Cal 289 6, 8
(G) ('03) 16 CPLR 99 7
(H) ('10) 6 Nag LR 103: 7 Ind Cas 543 7
(I) ('12) 3 Nag LR 123: 17 Ind Cas 133 7
(J) (V2) AIR 1915 Nag 57 (1): 11 Nag LR 86 7
(K) (V2) AIR 1915 Nag 109: 11 Nag LR 116 7
(L) ('95) 22 Cal 589 8
(M) ('11) 38 Cal 862: 10 Ind Cas 69 8
(N) (V5) AIR 1918 Cal 609: 21 Cal WN 906 8
(O) (V11) AIR 1924 Cal 98: 50 Cal 727 8
(P) (V6) AIR 1919 Mad 854: 41 Mad 1078 (FB) 9
(Q) (V16) AIR 1929 Mad 765: 57 Mad LJ 253 9
(R) ('98) 22 Bom 321 (FB) 10
(S) ('98) 20 All 476: 1898 All WN 121 14
(T) ('89) 1889 All WN 78 14
(U) ('07) 29 All 122: 3 All LJ 729 14
(V) ('09) 31 All 161: 1 Ind Cas 761 14
(W) ('10) 32 All 489: 6 Ind Cas 116 14
(X) (V19) AIR 1932 All 617: 55 All 24 (FB) 15

K. G. Chendke, for Appellant; M. Adhikari, for Respondent.

JUDGMENT: The only question for determination in this second appeal is whether the appellant's re-marriage after her former husband's death entailed a forfeiture of her interest in the property left by her former husband, either under the Hindu Widows' Re-marriage Act (15 of 1856) or otherwise under the Hindu Law. This case was referred to a Division Bench in view of the importance of the question involved, though there were a number of Single Bench decisions of the Judicial Commissioner's Court on this point.

(2) In order to appreciate the question arising for decision in this appeal it is necessary to state the following facts. Kushal and Munesar were two brothers who had been separate in estate for about 50 years back. Kushal's son Dowva died some time in or about the year 1944, leaving him surviving his father Kushal, his two widows Gayabai and Manabai (defendant-appellant), as also his sister Chandanbai, who is the plaintiff-respondent in this Court. The first widow re-married soon after the death of her husband and no more need be said about her.

Mst. Manabai married in 1950 Tope Singh, Munesar's son, that is to say, her husband's first cousin, a marriage which is countenanced by the caste to which they belong. Thereafter, Kushal died in October 1951. The plaintiff-respondent's case was that after the re-marriage of Manabai she began to live with her new husband Tope Singh, and the plaintiff with her husband came and resided with her father and managed his properties. On her father's death she claimed to be the next heir and in that right claimed to have been in possession of the properties left by him.

Her cause of action for the present suit was an attempt to interfere with her possession at the instance of the defendant-appellant. She therefore prayed for a perpetual injunction restraining the defendant from interfering with her possession and enjoyment of the property as her father's immediate heir. The suit proceeds on the basis that the two widows of Dowva on their re-marriage after Dowva's death in 1944 forfeited whatever interests they could have obtained under the Hindu Women's Rights to Property Act (18 of 1937).

(3) A number of defences were raised on behalf of the defendant, but the Courts below have found that as a matter of fact the defendant married Tope Singh in 1950 and got a daughter by him, that the plaintiff has been in possession of the properties in question since after the death of her father and that the defendant had forfeited whatever rights she had in the interest which her deceased husband had in the joint family properties. Hence, the only question that properly arises for determination is whether the defendant's marriage with Tope Singh has deprived her of the interest which she had on her husband's death in the family properties.

(4) It has been contended on behalf of the appellant-defendant that it should be held on the authority of certain Allahabad decisions to be noticed presently that as there was a custom of re-marriage of widows in the caste to which the parties in this case belonged there was no forfeiture for two reasons, (1) because the Hindu Widows' Re-marriage Act would not apply to her and (2) because in any case the provisions of S. 3 of the Hindu Women's Rights to Property Act would override those of the Hindu Widows' Re-marriage Act, even assuming that the Act applied to the instant case.

(5) Adverting to the first ground, it is undisputed that there has been a good deal of divergence of judicial opinion on the question whether the Hindu Widows' Re-marriage Act applies to parties amongst whom the custom of re-marriage prevails. The view of the Allahabad High Court in a long series of decisions, as also of the Oudh Chief Court, has been that the Act would not apply, and operate to deprive the widow of

her husband's interest after re-marriage. On the other hand, the High Courts of Bombay, Calcutta, Madras, and Patna, and the Judicial Commissioner's Court in this State have consistently taken the view that the widow would be deprived of her interest in her former husband's property on her re-marriage.

(6) The leading case of the Judicial Commissioner's Court is — 'Mt. Rupa v. Mohanlal', 9 CPLR 47 (A). It was laid down in that case that independently of the provisions of the Hindu Widows' Re-marriage Act a woman remarrying forfeits her right to any property inherited by her from her deceased husband, and that the burden of proof lies on the party which sets up a custom at variance with the law, that is to say, if it is contended that even after remarriage the widow retains the former husband's property. The following excerpt from that decision sets out the legal position as then understood:

"There is I think sufficient authority for holding that independently of Act 15 of 1856 the remarriage of a widow has always entailed a forfeiture of her late husband's estate. In his Law and Custom of Hindu Castes (Page 169) Mr. Steele writes:

> 'On a woman's forming 'Pat' she gives up all her property and jewels to her former husband's relations except what had been given her by her own parents'.

Such a custom naturally follows from Manu's text. 'A widow who from a wish to bear children, slights her deceased husband by marrying again brings disgrace on herself here below, and 'shall be excluded from the seat of her lord'.'

In — 'Parvati v. Bhiku', 4 Bom HCRAC 25 (B), it was remarked: 'By re-marriage a widow forfeits her right to her deceased husband's property. This is 'so as well by Hindu law' as also by Act 15 of 1856'. So in — 'Murgayi v. Viramakali', 1 Mad 226 (C), it is said: 'The principle on which a widow takes the life-interest of her deceased husband when there is no male heir is that she is a surviving portion of her husband; and where the rule as to re-marriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the re-married widow retaining the property in the absence of all basis for the continuance of the fiction upon which the right to enjoyment is founded.'

The same rule of law is enunciated in Mitra's Law relating to the Hindu widow (page 215) and Banerjee's Law of Marriage and Stridhan (Page 269). In — 'Har Saran Das v. Nandi', 11 All 330 (D), no custom was put forward and in — 'Parekh Ranchor v. Rai Vakhat', 11 Bom 119 (E), the case was expressly remanded for a finding as to the custom.

In — 'Matungini Gupta v. Ram Rutton Roy', 19 Cal 289 (F), Mr. Justice Banerjee remarked: 'The widow takes her husband's estate not because of past relationship, not because she was the wife of the deceased, but because of the continuing relationship, because she is still the 'patni' of the deceased. If that is so, it follows as a necessary consequence that the estate of a Hindu widow can last only so long as she continues to be the wife and half the body of her deceased husband'."

(7) In the next reported decision brought to our notice, — 'Sadhu Gour v. Mt. Patango', 16 CPLR 99 (G), the then Judicial Commissioner held that the Hindu Widows' Re-marriage Act (15 of 1856) applied to all widows including those who by virtue of a special custom sanctioning the marriage of a widow are entitled to re-marry without taking the aid of the Act. After referring to the conflict of opinion between the Allahabad High Court on the one side and the C. P. Court and the Bombay, Calcutta, and Madras High Courts on the other, the learned Judicial Commissioner preferred to follow the view which was accepted by the majority of the High Courts in India.

Four later decisions of the Judicial Commissioner's Court in — 'Laxman v. Gundaji', 6 Nag LR 103 (H); — 'Sitaram v. Laxman', 8 Nag LR 128 (I); — 'Nathu v. Mt. Nai Bahu', AIR 1915 Nag 57 (1) (J) and — 'Kashirao v. Ukarda', AIR 1915 Nag 109 (K), have consistently held that both under the Hindu Widows' Re-marriage Act and otherwise under the Hindu Law a widow in the position of the appellant in the instant case forfeits her right to her former husband's property on re-marriage.

We were informed that there were other unreported decisions of the Judicial Commissioner's Court to the same effect. That must be taken to be the view which prevailed in the Judicial Commissioner's Court without any dissentient judgment, because no such dissenting view has been brought to our notice. There is no reported decision of this High Court on this point. It must therefore follow that this must be treated to be the 'cursus curiae' in this State.

(8) The Calcutta High Court in a series of decisions, viz., — '19 Cal 289 (F)'; — 'Rasul Jehan Begum v. Ram Surun Singh', 22 Cal 589 (L); — 'Ganga Pershad Sahu v. Jhalo', 38 Cal 862 (M); — 'Mahammad Umar v. Mt. Man Koer', AIR 1918 Cal 609 (N) and — 'Santala Bewa v. Badaswari Dasi', AIR 1924 Cal 98 (O), has consistently taken the view that the Act applies to a widow who re-marries according to the custom of her caste, and thus operates to deprive her of her former husband's property; in other words, by virtue of the provisions of the Act the widow is given a choice between her deceased husband's property and a new husband, that is to say, she cannot have both.

(9) The Madras High Court is also inclined to the same view: See — '1 Mad 226 (C)'; 'Tayaramma v. Sivayya', AIR 1919 Mad 854 (FB) (P) and — 'Gajapathi Naidu v. Jeevammal', AIR 1929 Mad 765 (Q).

(10) A Full Bench of the Bombay High Court in — 'Vithu v. Govinda', 22 Bom 321 (R), has examined the conflicting views of the different High Courts and come to the conclusion that under S. 2 of the Hindu Widows' Re-marriage Act of 1856 a Hindu widow belonging to a caste in which re-marriage has always been allowed forfeits by re-marriage her interest in property which she has inherited from her son. Thus, that High Court has extended further the application of the Act, a question which does not arise for determination in the instant case.

(11) The Patna High Court has also fallen in line with the Calcutta and Madras views referred to above.

(12) So far it is manifest that the weight of judicial authority is in favour of the view which has been the 'cursus curiae' in this Court.

(13) On the other hand, the Allahabad High Court has been equally emphatic and consistent in the view taken in the leading case of — '11

All 330 (D)'. In that case the learned Judges held that the Hindu Widows' Re-marriage Act (15 of 1856) was not intended to place under a disability persons who could marry a second time before the Act was passed and that the Act was only intended to enable such widows who could not previously have done so, to re-marry.

It is remarkable that, at least so far as it appears from the report, there was no pleading that by virtue of the custom not only re-marriage was allowed in that caste but also that such a re-marriage did not incur forfeiture of the right of the widow so re-marrying to her deceased husband's property. The learned Judges only considered whether the Act operated to deprive the widow of such property; they did not consider the further question whether the custom pleaded further carried with it the right to continue her interest in her deceased husband's property.

The learned Judges appear to have assumed in that case that if the Act did not operate to deprive her of her deceased husband's property the widow on re-marriage would continue to hold such property. They did not consider the effect of the Hindu Law upon such re-marriage whether she did or did not forfeit her rights in her former husband's property.

(14) The next reported decision of the Allahabad High Court which has been brought to our notice is the case of — 'Ranjit v. Radha Rani', 20 All 476 (S). That decision merely follows two earlier decisions of the same Court, viz., — '11 All 330 (D)' and — 'Dharam Das v. Nand Lal Singh', 1889 All WN 78 (T). The learned Judges proceeded on the view that that was the 'cursus curiae' of that Court. They further remarked by the way that it had not been proved that there was a custom to the effect that such a widow re-marrying thereby lost the right to her deceased husband's property.

Their Lordships in that case would thus seem to have assumed that it was for the party alleging the forfeiture upon re-marriage to plead and prove that, and not that the widow re-marrying should prove that the custom also carried with it the right to hold her previous husband's property. The decision in — 'Khuddo v. Durga Prasad', 29 All 122 (U), merely follows the previous decisions of that Court without any detailed examination of the legal position. But soon followed two decisions of that Court in — 'Gajadhar v. Kaunsilla', 31 All 161 (V) and — 'Mula v. Partab', 32 All 489 (W), where the learned Judges have expressed doubt about the correctness of the previous decisions but preferred to follow the 'cursus curiae' of that Court.

(15) The latest decision of the Allahabad High Court which was brought to our notice is the Full Bench decision in — 'Bhola Umar v. Mt. Kausilla', AIR 1932 All 617 (X), where the learned Judges have examined the question and have reiterated the view taken in that Court in preference to the views of the other High Courts. Sulaiman C. J. has laid particular stress on the rule that where a long series of decisions has taken one view in that Court and people have acted upon the belief that that was the settled law, at least so far as that Court was concerned, the Court should not depart from the rule of 'stare decisis' so long as the Legislature did not intervene or that decision was not overruled by the Highest Court in the land.

(16) Following the well-established rule of 'stare decisis' so far as this Court is concerned we would hold that both under the Act and otherwise under the Hindu Law a widow on re-marriage forfeits her right to her deceased husband's property, even though the customary law of the caste to which she belongs sanctioned such a re-marriage.

(17) On the finding that the Hindu Widows' Re-marriage Act would apply to the appellant in the instant case in spite of the custom allowing her to re-marry it becomes necessary to determine the next point urged in support of the appeal, viz., that the Hindu Women's Rights to Property Act of 1937 operates to preserve her rights in her deceased husband's property because S. 2 provides:

> "Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of S. 3 shall apply....."

It is argued that S. 2 has the effect of nullifying the provisions of the Hindu Widows' Re-marriage Act. But in our opinion the 'non obstante' clause quoted above applies only to such provisions of the Hindu law as are dealt with by S. 3 of the Act. Section 3 does not nullify all the provisions of the Hindu Law relating to a Hindu widow's interest in her husband's property. But for the provisions of S. 3 of the Hindu Women's Rights to Property Act of 1937 the appellant in the instant case would have no interest in her deceased husband's property.

On her husband's death in 1944 she acquired by virtue of that section the same interest as her husband had in the joint family property; but on her re-marriage in 1950 she was divested of that interest by virtue of the provisions of S. 2 of the Act of 1856. Therefore, there is no conflict between the provisions of the two Acts, and therefore there is no occasion for praying in aid of the appellant the provisions of the 'non obstante' clause of S. 2 of the Act of 1937. It must therefore be held that there is no substance in this contention either.

(18) As the only grounds urged in support of the appeal fail it must be dismissed with costs.

A/V.R.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 286 (Vol. 41, C.N. 103)

SINHA C. J. AND BHUTT J. (7-12-1953)

Gulabchand Sheonarayan Rathi, Applicant v. Durga Bank Ltd., Chhindwara and another, Non-applicants.

Civil Revn. No. 112 of 1953, from order of Dist. J., Chhindwara, D - 17-1-1953.

Provincial Insolvency Act (1920), S. 6 (e) — Sale subsequently set aisde — Misc. A. 219 of 1938, dissented from.

The sale of the debtor's property, even though it was subsequently set aside, is an act of insolvency within the meaning of cl. (e) of S. 6: AIR 1942 Mad 306, Rel. on; Case law discussed. (Paras 2, 6, 7, 8, 10, 13)

Anno: P. I. Act. S. 6 N. 6.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Mad 306: 199 Ind Cas 793 — 3, 13

(B) ('49) Misc. Appeal No. 219 of 1938, D - 18-12-1949 (Nag) — 4, 7

(C) (V25) AIR 1938 Lah 819: 179 Ind Cas 367 — 5, 10

(D) (V20) AIR 1933 Cal 564: 145 Ind Cas 429 — 6, 10

(E) (1787) 2 Term Rep 141: 100 ER 77 — 7, 8

(F) (1861) 31 LJ Ex 113: 7 H & N 520 — 7, 9

(G) (1883) 24 Ch D 339: 53 LJ Ch 106 7, 9
(H) (1874) 9 Ch A 432: 30 LT 348 7, 9

A. V. Khare, for Applicant; Y. S. Tambe, for Respondent No. 1.

ORDER : This revision is directed against the appellate order of the District Judge, Chhindwara, confirming the adjudication of the applicant as an insolvent.

(2) The applicant was indebted to Seth Shyamlal of Chhindwara on a decree for money, in execution of which his cinema house was sold by the Court on 22-6-1951. Non-applicant No. 1, namely the Durga Bank Ltd., of Chhindwara, thereon filed, in its capacity as a judgment-creditor, a petition on 14-7-1951 under S. 9 of the Provincial Insolvency Act, 1920, for adjudging the applicant as an insolvent. During the pendency of the proceedings, the applicant satisfied the decree of Seth Shyamlal, whereupon the sale held by the executing Court was set aside. The lower Courts, however, held that the sale of the property, even though it was set aside, was an act of insolvency within the meaning of Cl. (e) of S. 6, Provincial Insolvency Act. The short question which arises for decision is whether this view is correct.

(3) The authority in support of the view of the lower Courts is to be found in — 'Venkatakrishnaya v. Malakondayya', AIR 1942 Mad 306 (A), where the question mooted was whether a Court sale which is not confirmed and is set aside is an act of insolvency. On a review of the various decisions, their Lordships were of the opinion that there was no authority directly bearing on the point.

They, however, observed :

"The enumeration of the various acts of insolvency in S. 6 seems to contemplate those acts which in the public eye shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. The man may actually be solvent, but may still commit an act of insolvency by suffering something to be done which shakes his apparent credit, as when he disappears from his normal dwelling house or hides himself from his creditors or under the corresponding provision of the Presidency Towns Insolvency Act, suffers some attachment of his property in execution of a decree to subsist for 21 days. All these are outward and visible signs that a man's credit has been shaken and they are circumstances which are likely to cause a panic amongst his creditors. Consequently they justify any creditor in asking the Court to step in and see that there is a fair distribution of the debtor's assets."

This decision was relied on by the lower appellate Court.

(4) On the other hand, the learned counsel for the applicant relied on an unreported decision of a Division Bench of this Court in — 'Pandit Radhelal v. Sitaram', Misc. Appeal No. 219 of 1938 D/- 18-12-1940 (Nag) (B). In that case the debtor's two annas village share was knocked down by the Collector on 13-6-1933 but the sale was set aside on 8-11-1933. Later his eight annas village share was sold on 23-3-1934 and the sale was confirmed on 17-5-1934. Initially the creditor made an application on 13-9-1933 for adjudication of the debtor as an insolvent, treating the first sale as an act of insolvency. This application was dismissed on 11-11-1933 three days after the sale was set aside. It was, however, restored to file on 22-12-1933. On 16-6-1934 an additional application was made on the basis of the second sale. Thereafter the debtor was adjudged an insolvent on 29-9-1934. The question for decision in the case was whether the adjudication related back to 22-12-1933 so as to be anterior in time to the second sale with the result that the eight annas village share became available as the debtor's assets.

(5) On the above question their Lordships observed as follows :

"The learned Judge when he adjudicated this judgment-debtor on 29-9-1934, adjudicated either rightly or wrongly, based his order upon the additional grounds contained in the additional application of 16-6-1934. We think that it had the effect of relating back to the date when the act of insolvency was completed, and we think that the date is 17-5-1934. We have been referred to — 'Lal Chand v. Bhoga Ram', AIR 1938 Lah 819 (C), which suggests that even in cases of involuntary acts such as the present the critical date is the date when the sale takes place, that is to say, when the property is auctioned. With respect we doubt whether this is the correct date.

We would prefer, as at present advised, to relate the act of insolvency to the date of confirmation. That however is a point which does not really arise here because even assuming that the critical date is the date of sale it must be the date of effective sale and cannot, in our opinion, be the date when the property was merely put up for sale and resulted in an abortive sale owing to the bid not being confirmed. In this view the critical date would be 23-3-1934. That again would result in the -/3/- share being outside the assets of the insolvent."

It will be observed from the above extract that the matter was really considered on the basis of the second sale with respect to which the question did not arise as to whether the relevant date was the date of sale or was the date on which the sale was confirmed, as in either case the property could not be available to the creditors. The point in issue, therefore, remained undecided in that case and the observations in regard to the first sale were only in the nature of 'obiter dicta'.

(6) In the above case their Lordships quoted the following passage from Tagore Lectures by Sir Dinshah Mulla on the Law of Insolvency (pages 92-93) :

"where the act of insolvency is the debtor's own act, it dates from the time when it is begun; where the act of insolvency is not the act of the insolvent, it dates from the moment after the completion of the act."

However, as observed in — 'Kanai Lal v. Tinkari De', AIR 1933 Cal 564 (D), this does not mean that the date of confirmation of an involuntary sale is the date of completion of the sale and not the date when it is held. This question has, therefore, to be pursued.

(7) The change in the Bankruptcy Law of England consequent on the Legislature altering the word "completed" to the word "committed" has been considered by Williams on Bankruptcy, 15th Edn., at page 229, (16th Edn., page 245) where the learned author has observed :

"Under some of the earlier Acts, it was held that where the act of bankruptcy, even though involuntary, was inchoate, but was afterwards completed, the relation, upon completion, was to the time when the act commenced, and not to that of completion. (— 'King v. Leith', (1787) 2 Term Rep 141 (E) and —'Edwards v. Gabriel', (1861) 31 LJ Ex 113 (F)).

But although in the present Act, the word 'committed' has been substituted for 'completed', it is submitted that the above-mentioned distinction between voluntary and involuntary acts of bankruptcy will still be recognised, and that the principle of — 'Lewis, In re', (1787) 2 Term Rep 141 (E), will not be adopted. Thus in — 'Lewis, In re; Ex parte Helder', (1833) 24 Ch D 339 (G), it was held that an agent who had paid away money according to his principal's directions, and who, before the payment, knew that it would constitute an act of bankruptcy by the principal, was not liable to repay the money to the trustee in bankruptcy of the principal, because the money did not become the trustee's until completion of the act of bankruptcy, i.e., not until after the money had left the agent's hands."

With utmost respect to the learned Judges who decided — 'Misc. Appeal No. 219 of 1938 (Nag) (B), we think that neither the above quotation or the decisions referred to therein, nor 'ex parte Villars', (1874) 9 Ch A 432 (H), on which reliance was placed by their Lordships, support the view that the date of completion of the act of insolvency in a case of an involuntary sale is the date on which the sale is confirmed and not the date on which it is held.

(8) In — 'King v. Leith, (E), (supra)', Langman was arrested at the suit of the plaintiff and had lain in prison for a period of two months which was the statutory period for completion of the act of bankruptcy. A month after his arrest the plaintiff's attorney gave notice to the defendant, who was employed by Langman as a broker to sell his effects, not to hold the sale as he had committed an act of insolvency.

Apart from the question whether an action in the nature of trover or assumpsit was appropriate in the case for recovery of the sale proceeds, it was observed by Ashhurst J.:

"The only distinction attempted to be taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themselves, whereas this is a complicated matter, and is inchoate till the party has lain in prison for two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference; for as soon as the two months are expired, it relates back to the time of the first arrest, and then operates as if the arrest were a complete act of bankruptcy in itself."

Although this was a case in which the act of bankruptcy was completed by the two months' period of lying in prison it would appear that the act of bankruptcy would relate back to the date when the action commenced and not to the date when it was completed. This does not support the proposition that in a case of an involuntary sale, the date of confirmation of sale is the relevant date for purposes of the Insolvency Law.

(9) In the case of — 'Edwards v. Gabriel, (F), (supra)', it was held that an execution in which the creditor had notice of a prior act of bankruptcy was not protected as a 'bona fide' execution as contemplated by S. 133 of the Statute 12 and 13, Vict. c. 106. In — 'Ex parte Villars, (H), (supra)', it was held that an execution creditor was entitled to the proceeds of the sale which was held by him without notice of a supervening bankruptcy. It is evident that both these decisions have no bearing on the instant case. The facts of — 'Ex parte Helder, (G), (supra)', are given in Williams on Bankruptcy. That case relates to a voluntary act of bankruptcy and is not applicable to the question in hand.

(10) In —'Kanai Lal v. Tinkari De, (D), (supra)', and — 'Lal Chand Chaudhri v. Bogha Ram, (C), (supra)', it was held that an act of insolvency occurs when the property is sold in execution and not when the sale is confirmed. Doubtless, in these cases, the sales were ultimately confirmed. The reasons for the decision, however, apply even to a case where the sale has been set aside. Clause (e) of S. 6 of the Provincial Insolvency Act relates to a sale "in execution of the decree of any Court for the payment of money". We have, therefore, to turn to the provisions of the Civil P. C., 1908, in order to understand the import of the sale under the Insolvency Law.

(11) In the case of sale of moveable property, the sale becomes absolute as soon as the purchase-money is paid. The purchase-money is required to be paid at the time of sale or as soon after as the officer holding the sale directs. If the money is not paid, the property has to be re-sold forthwith and the sale becomes absolute immediately on payment of the purchase-money: (O. 21, R. 77, Civil P. C.). In the case of sale of moveable property, therefore, there is no stage of confirmation of sale as soon as the purchase-money is paid. No irregularity in publishing or conducting the sale vitiates the sale itself and the person injured has only a right of action for compensation against the person guilty of the wrong: (O. 21, R. 78, Civil P. C.). The question of confirmation arises only in the case of sale of immoveable property.

(12) The provisions dealing with the case of sale of immoveable property are contained in Rr. 84 to 87 and 89 to 92 of O. 21, Civil P. C. Rule 84 provides for payment of twenty-five per cent. of the purchase-money and re-sale of the property on default. Rule 85 prescribes the time limit for payment of the balance of the purchase-money. Rule 86 provides for re-sale in case of default of payment of the balance and for forfeiture of the amount in deposit at the discretion of the Court. Rule 87 deals with the procedure of re-sale. Rule 89 provides for setting aside the sale on deposit, by the judgment-debtor, of the decretal amount and incidental charges. Rule 90 empowers the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. Rule 91 empowers the purchaser to apply for setting aside the sale on the ground that the judgment-debtor had no saleable interest.

Rule 92 deals with confirmation of the sale and is reproduced below:

"92. (1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

(13) It will be seen from the resume of the above provisions:

(i) that even when the property is ordered to be re-sold, the sale that was held does not

wipe out the entire liability of the purchaser, meaning that it is not a nullity, and

(ii) that the sale is valid unless set aside, and its confirmation is automatic where no application for setting it aside under R. 89, R. 90 or R. 91, is made, or, if made, is disallowed.

It is, therefore, clear that except in cases where the sale may be void 'ab initio' and would not, in consequence, be at all a sale in the eye of law, an execution sale is not absolutely without validity, even though it may be liable to be avoided if certain conditions exist or are fulfilled. We, therefore, find ourselves in respectful agreement with the following observations of Wadsworth J. in — 'Venkatakrishnayya v. Malakondayya, (A), (supra)' :

"Under S. 6(e), Provincial Insolvency Act, a debtor commits an act of bankruptcy if any of his property has been sold in execution of the decree of any Court for payment of money. Under O. 21, Civil P. C., we find both in R. 89 and in R. 90 the words 'where any immovable property has been sold in execution of a decree' used to indicate a sale which has been held and awaits confirmation and one which is liable to be set aside either as a result of a deposit or as a result of an objection to the procedure. That is to say, the words 'property has been sold in execution of a decree', when used in O. 21, Civil P. C., refer not to an indefeasible sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. It seems to us that there is no apparent necessity for giving greater weight to the words in S. 6, Provincial Insolvency Act, than they carry in the relevant rules of O. 21 to which Cl. (e) of S. 6, Provincial Insolvency Act, naturally has reference."

(14) The result is that the revision fails and is dismissed with costs. Counsel's fee Rs. 75/-.

B/D.H.Z. Revision dismissed.

A.I.R. 1954 NAGPUR 289 (Vol. 41, C.N. 104)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (17-4-1953)

Sheodatt Lonkaran and another, Appellants v. "Prakash Distributors" and others, Respondents.

Misc. First Appeal No. 52 of 1951, from Order of 1st Addl. Dist. Judge, Nagpur, D/- 28-2-1951.

(a) Arbitration Act (1940), S. 34 — Stay — Jurisdiction of Court — Part of claim laid in suit beyond jurisdiction of arbitration.

Where the parties have preferred a private tribunal to the Court to decide the dispute between them, unless there be a good reason it is but right that the Court should refer the parties to the tribunal which they have chosen. Therefore where a suit is commenced in respect of a matter about which there is agreement to refer to arbitration, it is incumbent upon the plaintiff to make out a sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement. Where, however, the legal proceedings are not in respect of a matter which the parties have agreed to refer to arbitration, the Court is bound to refuse stay. AIR 1953 SC 182, Relied on. (Para 10)

For the purpose of the decision of the stay application, Courts have not to examine the merits of the claim as laid in the plaint. AIR 1953 SC 182, Relied on. (Para 12)

Where in the suit a part of the controversy as raised by the plaintiff is not covered by the agreement to refer to arbitration and there is no averment in the application for stay that the plaintiff's case in Court was a frivolous and vexatious, to stay the suit and permit arbitration would result in splitting up of the action. That may be a ground for refusing stay. But where only a small portion of the relief claimed is not within the scope of the arbitration clause, it is not a sufficient reason for refusing to stay proceedings where the main subject of the action is within the arbitration clause. Where the granting of the stay would result in allowing the case of the plaintiff & some of the defendants to be determined by arbitration leaving the case of the rest of the defendants to be decided by the Court and the portion of the claim that cannot be dealt with in arbitration is not by any means small or insignificant there is sufficient ground for refusing stay. (1890) 43 Ch D 150; (1894) 2 Ch D 478, Ref. (Paras 11, 13, 16)

Anno: Arbi. Act, S. 34 N. 8.

(b) Arbitration Act (1940), S. 35 — Reference pending — Notice to arbitrator not to proceed with arbitration — Award given — No stay granted — Court will not be influenced by the award.

Under S. 35(1) all further proceedings in a pending reference shall, unless a stay of proceedings is granted under S. 34, be invalid. The Court cannot allow its decision on the question of stay to be influenced by what the arbitrator has decided. Where the arbitrator has raced to a decision in spite of a notice given to him and has found the defendants and not the plaintiff to be entitled to damages, the Court has not to consider the question before it in the light of the award which itself is precarious unless the Court decides in favour of stay. For the Court to so consider the question would be to permit the ouster of its own jurisdiction, "in a most ignominious way". (1912) 3 KB 257 (269), Ref. (Para 15)

Anno: Arbi. Act S. 35 N. 1.

(c) Contempt of Courts Act (1952), S. 1 — Arbitration after filing suit.

Obiter:— It is open to question whether the conduct of a party in invoking the arbitration clause and appointing an arbitrator after the filing of the application for stay amounts to contempt of Court. (1912) 3 KB 257, Ref. (Para 17)

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 182: 1953 SCR 572 (SC) 10, 12
(B) (1915) 1915-3 KB 167: 84 LJKB 1091 12
(C) (1912) 1912-3 KB 257: 81 LJKB 1092 15, 17
(D) (1890) 43 Ch D 150: 62 LT 209 16
(E) (1894) 1894-2 Ch 478: 63 LJ Ch 521 16

M. R. Bobde, K. G. Chendke and N. A. Athaley, for Appellants; R. S. Dabir and G. R. Mudholkar, for Respondents (1 & 2 respectively).

JUDGMENT: This appeal is by Sheodatt and Ujjain Trading Company through Sheodatt (defendants 2 and 3 respectively) in a suit instituted by respondent 1, 'Prakash Distributors', a firm of film distributors for refund of Rs. 2,00,000 and damages Rs. 36,000. The appeal is against the decision of the Additional District Judge refusing an application made by the appellants under S. 34, Arbitration Act, for stay of the suit. In the plaint there were two other defendants Seth Gopaldas

Mohta (defendant No. 1) and Messrs. Shree Ganesh Films Exchange, Bombay (defendant No. 4).

(2) The plaintiff alleges that defendant 2 is not a man of substance but is an employee of defendant 1 with full powers of representation; that Ujjain Trading Company (defendant 3) does not exist and is really an alias for defendant 1, represented by defendant 2; that Shree Ganesh Films Exchange (defendant 4) is entirely owned by defendant 1 and that for reasons of his own defendant 1 does business under the name of Shree Ganesh Films Exchange.

It is further alleged that the partners in Shree Ganesh Films Exchange are men of little substance who do not own the business but are 'benamidars' for their employer, defendant 1.

The suit was based on an agreement dated 19-3-1945. According to the plaintiff, defendant 2 purporting to represent defendant 3 but in reality representing defendants 1 and 4 and holding himself out as so acting entered into a contract with the plaintiff for the sale of the world rights of exploitation, distribution and exhibition of the film 'Arti' which was to be produced by defendant 4 Shree Ganesh Films Exchange.

(3) The plaintiff alleges that he paid Rs. 2 laks in part performance of the said contract to defendant 2 acting and claiming to act for and on behalf of defendants 1 and 4 as the real owner of defendant 3 firm. According to the plaintiff, the vendor did not deliver the publicity materials as per terms of the agreement and in consequence the contract failed and the plaintiff is entitled to the return of the amount of Rs. 2 lakhs and also damages.

(4) The suit was instituted on 21-6-1948. Defendant 4 questioned the jurisdiction of the Court to try the suit and asked that he be discharged from the suit on that ground. Defendant 1 denied his connection with defendant 4. Defendant 1 also denied that defendant 2 was his 'munim' and had any power to represent him in his business; that the other defendants were 'benamidars' or persons of no substance or that defendant 4 did not exist.

(5) On 8-11-1948 defendants 2 and 3 applied under S. 34, Arbitration Act, for the stay of the suit on the ground that the agreement on which the suit was based provided in clause 14 as under:

> "All matters in difference in relation to this agreement shall be referred to arbitration at Bombay of two persons one to be appointed by each party in accordance with & subject to the provisions of the Arbitration Act or statutory modifications thereof for the time being in force."

According to defendant 2, defendant 3 was a proprietary concern of defendant 2 alone and none else was interested therein.

(6) Preliminary issues were framed on 29-7-1949 and the case was fixed for hearing arguments on 24-9-1949.

Meanwhile on 19-8-1949 defendant 3 served the plaintiff with a notice claiming Rs. 1,58,500 as damages after giving credit for the amounts received alleging default by the plaintiff in taking delivery of the prints and publicity material. By the same notice defendant 3 called upon the plaintiff to name the arbitrator on its behalf within 15 days and intimated that they had already appointed one Shri Chimanlal Bhogilal Desai as arbitrator on their part. They warned the plaintiff that if it failed to appoint its arbitrator, Shri Desai would act as the sole arbitrator.

(7) On 10-12-1949 the arbitrator sent an intimation to the plaintiff that he intended to proceed with the arbitration on 19-12-1949. To this the plaintiff replied on 28-12-1949 that it had already instituted the suit and that the application made by defendant 3 to refer the matter to arbitration was pending. The plaintiff urged that as the matter was 'sub judice', the action taken by defendant 3 and the action proposed to be taken by the arbitrator would amount to contempt of Court.

In view of the short notice given by Shri Desai the plaintiff inferred that the arbitrator wanted to hustle the matter or to proceed 'ex parte' and declared that he could have no faith in Shri Desai and that any award given by him would not be binding on the plaintiff. The arbitrator was requested not to proceed with the arbitration but to withdraw from the same.

(8) A second letter to the same effect was sent on 5-1-1950 by the plaintiff to the arbitrator. The arbitrator however proceeded 'ex parte' and gave his award on 1-2-1950. The award directed the plaintiff to pay to defendant 3 Rs. 1,58,500 with interest thereon. The award was filed in the Bombay High Court but the plaintiff applied to that Court for setting aside the award. That application is pending.

(9) On 26-2-1951 the learned Additional District Judge refused to stay the suit. According to the Judge, one of the main issues in the suit is whether defendants 2 and 3 are 'benamidars' of defendants 1 and 4 with respect to the contract in question. As this issue cannot obviously be enquired into and decided by the arbitrators under the arbitration agreement, the whole of the matter in dispute cannot be decided by arbitration.

In the view of the learned Judge, the claim outside the authority of the arbitration was substantial and not small; the conduct of defendants 2 and 3 in resorting to arbitration while the question of the stay of the suit was 'sub-judice' was undesirable, and thus there were sufficient and strong grounds for refusing the stay.

(10) The question is whether the suit should be stayed. The jurisdiction of the Court is not ousted because the plaintiff in the suit was a party to an agreement to refer the matter in dispute to arbitration. As the parties have preferred a private tribunal to the Court to decide the dispute between them, unless there be a good reason it is but right that the Court should refer the parties to the tribunal which they have chosen.

Therefore where a suit is commenced in respect of a matter about which there is agreement to refer to arbitration, it is incumbent upon the plaintiff to make out a sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement. Where, however, the legal proceedings are not in respect of a matter which the parties have agreed to refer to arbitration, the Court is bound to refuse stay. Such was the case before the Supreme Court in — 'Gaya Electric Supply Co. v. State of Bihar', AIR 1953 SC 182 (A).

(11) In the present case, the rights and liabilities of the plaintiff and defendants 2 and 3 arising out of the contract are within the ambit of the agreement to refer to arbitration.

Clause 14 speaks of "all matters in difference in relation to this agreement". But the suit as laid is concerned with much more than a difference in relation to the agreement. According to the plaintiff, all the other defendants are benamidars of

defendant 1, defendant 3 is non-existent and defendant 2 and the partners in defendant 4 are not men of substance.

Further, according to the plaintiff, the two lakhs of rupees paid to him were appropriated to the use and benefit of defendant 1 (vide paragraph 27 of the plaint). The plaintiff claims to get back the sum of Rs. 2 lakhs irrespective of the question as to which party has committed a breach of the contract (vide paragraph 22 of the plaint). A part of the controversy as raised by the plaintiff is thus not covered by the agreement to refer to arbitration. The plaintiff even asserted that it is defendant 1 who has engineered the defence of defendants 2 and 4 in this suit and is financing them (vide paragraph 5 of the application dated 11-7-1949). The plaintiff seeks to establish this by reference to the account-books of all the defendants.

(12) For the purpose of the decision of the stay application, we have not to examine the merits of the claim as laid in the plaint.

As observed by Mahajan J. — 'Gaya Electric Supply Co. v. State of Bihar (A)' (supra),

> "The validity of the plaintiff's contention in the suit cannot be gone into by that Court exercising jurisdiction under this section as its function is a very limited one. The only point in such cases to be decided is whether the claim which is brought—whether it is good, bad or indifferent —comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes L. J. in — 'Monro v. Bognor Urban Council', (1915) 3 KB 167 (B), are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint."

(13) There is no averment in the application for stay that the plaintiff's case in Court was a frivolous and vexatious one.

The learned counsel for the appellants argues that a party to an arbitration agreement cannot be permitted to defeat it by taking the matter in dispute to Court and impleading in his suit persons who were not parties to the agreement and claiming relief against them. There is no plea that the impleading of defendant 1 in the suit or the making of the allegations about the other defendants being mere benamidars was only for the purpose of escaping from the arbitration agreement. In the absence of such a plea, the argument has no force.

Nor do the circumstances of the case warrant the inference suggested by the argument. It may not be out of place to point out that the plaintiff has not put forward his case against defendant 1 for the first time in the plaint on 21-6-1948. As far back as 20-2-1947 (vide letter of the plaintiff to defendant 1) the plaintiff asserted that the real party was defendant 1, that he is liable under the agreement and that he should refund the sum paid under the agreement. True, the assertion was denied by defendant 1.

(14) The learned counsel for the appellants submits that the mere fact that a portion of the suit concerning defendant 1 is outside the scope of the reference to arbitration is no ground for refusing to stay the suit.

According to the learned counsel, if in fact it is his clients who are entitled to damages from the plaintiff as counter-claimed before the arbitrator and as is now found by him, there can be no claim of the plaintiff against defendant 1 for trial by the Court. If, on the other hand, the learned counsel argues, defendant 2 is a benamidar of defendant 1 and the plaintiff has a valid claim against defendant 2, the decision given by the arbitrator against defendants 2 and 3 would be binding upon defendant 1. The contention of the learned counsel cannot be accepted on either of the positions suggested by him.

(15) Notice was given to the arbitrator of the commencement of the legal proceedings (vide plaintiff's letter dated 28-12-1949). Under S. 35(1), Arbitration Act, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under S. 34, be invalid. This Court cannot allow its decision on the question of stay to be influenced by what the arbitrator has decided. Because the arbitrator has raced to a decision in spite of a notice given to him and has found the defendants and not the plaintiff to be entitled to damages, the Court has not to consider the question before it in the light of the award which itself is precarious unless the Court decides in favour of stay. For the Court to so consider the question would be to permit the ouster of its own jurisdiction, to quote the words of Lord Justice Fletcher Moulton, "in a most ignominious way." See — 'Doleman & Sons v. Ossett Corporation', 1912-3 KB 257 at p. 269 (C).

(16) Whichever of the two positions suggested by the learned counsel may ultimately be found to be true, the fact remains that whereas the whole of the claim as laid in the plaint cannot be dealt with in arbitration, the claim of the plaintiff as well as the counter-claim of the defendants can be considered in the civil Court. To stay the suit and permit arbitration would, in this case, result in splitting up of the action. That may be a ground for refusing stay. See — 'Turnock v. Sartoris', (1890) 43 Ch D 150 (D). But where only a small portion of the relief claimed is not within the scope of the arbitration clause, it is not a sufficient reason for refusing to stay proceedings where the main subject of the action is within the arbitration clause. See — 'Ives & Barker v. Willans', (1894) 2 Ch D 478 (E).

In the present case, the granting of the stay would result in allowing the case of the plaintiff and defendants 2 and 3 to be determined by arbitration leaving the case of the rest of the defendants to be decided by the Court. The portion of the claim that cannot be dealt with in arbitration is not by any means small or insignificant. On the allegations that the other defendants are mere benamidars and not persons of substance and defendant 1 is in any case liable to return the sum appropriated and used by him, the portion of the claim that cannot be dealt with in arbitration must be held to be substantial. We therefore consider that the plaintiff has made out a sufficient reason for refusing stay. This is enough to affirm the decision of the learned trial Judge and not to interfere with the discretion exercised by him.

(17) It is open to question whether the conduct of the appellants in invoking the arbitration clause and appointing an arbitrator after the filing of the application for stay amounts to contempt of Court. See — 'Doleman & Sons v. Ossett Corporation (C)' (supra). In the absence of any material before us that the appellants improperly procured the award from the arbitrator, we do not

think it right to take that conduct into account in support of the conclusion we have reached.

(18) The appeal is dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1954 NAGPUR 292 (Vol. 41, C.N. 105)

SINHA C. J. & HIDAYATULLAH J. (19-2-1954)

Rochaldas Tikamchand, Appellant v. Ratanchand Baghmal, Respondent.

Letters Patent Appeal No. 29 of 1952, from appellate decree of Mudholkar J. in S. A. No. 473 of 1951, D/- 3-12-1952.

Transfer of Property Act (1882), S. 106 — Notice to quit — Rules of construction — Liberal construction to be put.

Section 106 does not require that the exact date of the termination of the tenancy should be specified in the notice. Hence, if the tenancy is to expire at the end of a month according to the English calendar it is enough if the landlord says in the notice that the tenant should vacate at the end of the month, without mentioning any particular date. (Para 5)

The English rule of construction to give such a sense to ambiguous words as will effectuate the intention of the parties is based on sound common sense and is applicable to India also. The only difference between the English law and the law in India may be that S. 106 insists on the notice being in writing signed by or on behalf of the person giving it. The notice has not to be given with all the particularity of a pleading. Naturally, therefore, it is not subject to strict interpretation. A liberal construction has to be put upon the notice so as to find out the true intention of the party giving the notice and whether the party served with the notice could understand it in the sense meant by the giver of the notice. Courts should give such construction as would not work a hardship on the tenant and would not strain the language too much against the landlord. AIR 1931 Mad 352; AIR 1949 All 173; AIR 1921 Pat 307, Rel. on. (Para 5)

In addition to the requirement of a reasonable notice the law has placed further restrictions by emergency legislation (Rent Control Laws) on the right of the landlord to evict his tenant. The necessity for a proceeding before the revenue authorities to obtain permission to serve notice on the tenant is itself a lengthy process and sometimes has been known to take years. The Courts, therefore, should not be too strict to forge another fetter against the landlord in the exercise of his lawful rights to eject his tenant. (Para 6)

Anno: T. P. Act, S. 106 N. 19.

CASES REFERRED: Paras

(A) (V5) AIR 1918 PC 102: 45 Ind App 222 (PC) 4

(B) (1824) 4 Dowl & Ry 248: 44 RR 878 4

(C) (V18) AIR 1931 Mad 352: 131 Ind Cas 621 5

(D) (V36) AIR 1949 All 173: ILR (1949) All 414 5

(E) (V8) AIR 1921 Pat 307: 61 Ind Cas 976 5

T. P. Naik, for Appellant; A. L. Halve and G. B. Badkas, for Respondent.

JUDGMENT: The only question that arises for determination in this appeal by the defendant is the question of the validity of the notice admittedly served on him. Mudholkar J., who dealt with the second appeal (S. A. No. 473 of 1951) held that the notice given was sufficient in law to terminate the tenancy. This appeal was brought on leave from the learned Single Judge of this Court.

(2) The relevant portion of the notice in question is in these terms:

"Please take notice that you are to quit and vacate the said premises of which you are now in possession immediately after the Baisakh Badi 15 m/, (Baisakh Amavashya) St. 2006. If however as you stated before Rent Control Officer, Raipur, that you had sent money order for the rent for the period 25-10-1946 to 24-11-47 you might unnecessarily contest that the tenancy month commenced from 25th day of English calendar month. But this is not a fact; the tenancy month as per agreement ends on Amavashya and you had paid rent up to Kartik Badi 15 (Amavashya) St. 2003 (i.e. up to 24-10-1946) and rent after Kartik Sudi 1 St. 2003 was in arrears. If however you still persist that your tenancy month ends on 24th of English calendar month then with a view to avoid unnecessary pleadings I hereby notice you to quit and vacate the said premises immediately after 24th day of April 1949 when the current month will be deemed to end according to your theory. This alternative is given only if you say and insist that your tenancy month ends on the 24th day of English calendar month, otherwise the agreed tenancy month ends with the Amavashya of Hindi calendar month and you are noticed to vacate the premises immediately after Baisakh Badi 15 (Amavashya) St. 2006, Hindi (Marwari) calendar."

(3) In the Courts below the defendant has been playing the game of hide and seek. Before the Rent Control Authorities the landlord had contended that the tenancy was according to the Marwadi calendar. But the Court below has found on a consideration of the evidence and the pleadings that the tenancy was not according to the Marwadi calendar but according to the English dates, that is to say, the tenancy was to end on the 24th of an English month. That finding was given mainly because the defendant did not challenge that statement of the alternative case in the plaint. Hence, the Court below came to the conclusion that the notice given was sufficient either according to the Marwadi calendar, as alleged by the plaintiff, or according to the English calendar as was admitted by the defendant in his pleadings impliedly, though the defendant did not allege any definite case of his own about the commencement of the tenancy.

(4) It was argued before us by the learned counsel for the defendant-appellant that the decision in appeal of the learned Single Judge of this Court is not correct because the notice was not precise and did not state definitely as to the date on which the tenant should vacate the premises. In our opinion, there is no substance in this contention. This case is entirely covered by the leading judgment of their Lordships of the Privy Council in — 'Harihar Banerji v. Ramsashi Roy', AIR 1918 PC 102 (A). The following observations of their Lordships at p. 107 are fully applicable to the facts and circumstances of the instant case:

"If this were a case arising in England, the English authorities would therefore be applicable. It has not been suggested, and could not, their Lordships think, be successfully contended,

that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants, presumably conversant with all those facts and circumstances; and, further that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed 'ut res magis valeat quam pereat'."

In the course of their judgment their Lordships refer to the case of — 'Doe v. Culliford', (1824) 4 Dowl & Ry 248 (B). In that case the notice asked the tenant to quit the premises 'at Lady Day next or at the end of your current year'. Abbott C. J. delivering the judgment of the Court is quoted as having said:

"There is one rule of construction in cases of this nature, which is no less sound than ancient, namely, to give such a sense to ambiguous words as will effectuate the intention of the parties."

(5) Section 106, Transfer of Property Act, only requires that where the lease is from month to month 15 days' notice expiring with the end of a month on either side is sufficient to terminate the tenancy. The section does not require that the exact date of the termination of the tenancy should be specified in the notice. Hence, if the tenancy is to expire at the end of a month according to the English calendar it is enough if the landlord says in the notice given in the first fortnight that the tenant should vacate at the end of the month, without mentioning any particular date.

As pointed out by their Lordships of the Judicial Committee in the case cited above the English rule is based on sound common sense and is applicable to India also. The only difference between the English law and the law in India may be that S. 106 insists on the notice being in writing signed by or on behalf of the person giving it.

The requirement of the notice naturally is based on the necessity of the parties to the contract knowing a reasonable time beforehand that the tenancy is going to be terminated, so that if the landlord has served a notice the tenant may find another residence for himself, or if the notice has been given by the tenant, the landlord may find another tenant. The notice has not to be given with all the particularity of a pleading. Naturally, therefore, it is not subject to strict interpretation. A liberal construction has to be put upon the notice so as to find out the true intention of the party giving the notice and whether the party served with the notice could understand it in the sense meant by the giver of the notice. Applying that test Courts in India have given such construction as would not work a hardship on the tenant and would not strain the language too much against the landlord.

For example, in — 'Gnanaprakasam Pillai v. F. S. Vaz', AIR 1931 Mad 352 (C), a Single Judge of the Madras High Court held that a notice terminating a tenancy not on the last day of the tenancy but on the forenoon of the next day was a good notice, though strictly speaking defective. Similarly, a Single Judge of the Allahabad High Court in circumstances not dissimilar to those of the instant case held in — 'Ganga Prasad v. Prem Kumar Kohli', AIR 1949 All 173 (D), repelling the tenant's contention that the notice was vague, that it was not invalid. The notice in that case required the tenant to vacate the premises 'on 18-5-1944 or on such date as your then current month of tenancy will end'. In that case reference was made to a decision of the Patna High Court in — 'Sanker Ram v. Tulsi Bhagat', AIR 1921 Pat 307 (E).

(6) The law laid down in the Transfer of Property Act has been considerably changed, at least for the time being, by the emergency legislation contained in the Rent Control Order. In addition to the requirement of a reasonable notice the law has placed further restrictions on the right of the landlord to evict his tenant. The necessity for a proceeding before the revenue authorities to obtain permission to serve notice on the tenant is itself a lengthy process and sometimes has been known to take years. The Courts, therefore, should not be too strict to forge another fetter against the landlord in the exercise of his lawful rights to eject his tenant.

The instant case is illustrative of the obstructive tactics taken recourse to by tenants to thwart the landlord in the lawful exercise of his rights. The tenant never disclosed what was the term of his tenancy. He was only interested in denying what the landlord alleged. In such circumstances the landlord could do no better than leave the tenant to decide for himself on which day of the month his tenancy would terminate, because in the case of a monthly tenancy he can delay the process at the utmost by 31 days.

(7) In view of these considerations, in our opinion, there is no substance in this appeal. It is accordingly dismissed with costs. Hearing fee Rs. 50/-.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 NAGPUR 293 (Vol. 41, C.N. 106)

SINHA C. J. AND BHUTT J. (30-11-1953)

Amraoti Electric Supply Co., Ltd., Amraoti, Appellant v. R. S. Chandak and others, Respondents.

Letters Patent Appeal No. 16 of 1944, from order of Niyogi J., in M. F. A. No. 304 of 1942, D/- 9-11-1944.

(a) Letters Patent (Nag), Cl. 10 — Judgment — Meaning of.

Where the order of the Single Judge has conclusively determined, so far as the High Court is concerned, some question between the parties, which forms an integral part of the process leading to the final decision of the 'lis', the order will be a 'judgment' within the meaning of Cl. 10 of the Letters Patent and an appeal therefrom would be competent. AIR 1952 Nag 357 (FB), Rel. on. (Para 4)

Held, on a proper construction of the order in question, that it constituted a judgment within the meaning of Cl. 10. (Para 5)

Anno: Civil P. C., App. II; L. P. (Cal), Cl. 15 N. 2.

(b) Companies Act (1913), Ss. 34 and 38 — Effect of transfer of shares.

Until a transfer of shares is registered the transferor continues to be the legal owner of the shares and after his death the same right inheres in his heirs who would be competent to obtain letters of administration in respect

of the shares. Hence, where after filing an application for a duplicate share certificate the member who has subsequently transferred his shares dies, the Company would be entitled to demand letters of administration from the heirs when the Articles of Association of the Company authorise it to do so. Consequently, the demand of the Company for production of letters of administration cannot be a ground of attack in the proceedings started by the transferee under S. 38, Companies Act. This conclusion is not affected by the fact that the heirs do not claim any interest in the shares in question, for the Company is entitled to claim immunity not only from them but also from the rest of the world.

(Paras 6, 8)

(c) Companies Act (1913), S. 34 (3) — Transfer of shares — Necessary formalities — Refusal to transfer — (Stamp Act (1899), Ss. 35, proviso (a) and 36).

Section 34 (3), Companies Act, contemplates that the following conditions must be fulfilled before the Company can lawfully register a transfer, viz., that

(i) the instrument of transfer is duly stamped;

(ii) the instrument is executed by the transferor and the transferee; and

(iii) the instrument is delivered to the company along with the scrip. (Para 9)

It is immaterial in this connection that the company does not demand a proper stamp. The condition, creating as it does a statutory liability, cannot be waived and its breach would debar the company from registering the transfer. Nor does the fact that the instrument could be validated under the proviso (a) of S. 35, Stamp Act, 1899, make it enforceable until the necessary stamp duty and penalty are paid. Section 36, Stamp Act, has no application to such a case as the proceedings before the company are not of a judicial character such as is contemplated therein.

(Para 9)

Anno: Companies Act, S. 34 N. 2, 4.

(d) Companies Act (1913), S. 34 (4) and (5) — Refusal to transfer.

Application for registering transfer of shares returned by company within one month of the date of its presentation — This is tantamount to an intimation of the refusal to register transfer of shares — Moreover, under sub-s. (5) a breach of sub-s. (4) only entails a penalty and does not entitle transferee to an automatic rectification of the register. (Para 10)

Anno: Companies Act, S. 34 N. 4.

CASES REFERRED: Paras

(A) ('72) 17 WR 364: 8 Beng LR 433 4

(B) (V12) AIR 1925 PC 155: 87 Ind Cas 313 (PC) 4

(C) (V39) AIR 1952 Nag 357: ILR (1952) Nag 471 (FB) 4

(D) (V26) AIR 1939 Nag 122: ILR (1939) Nag 124 4

(E) (V40) AIR 1953 SC 385: 1954 SCR 117 (SC) 6

(F) (V23) AIR 1936 Rang 52: 162 Ind Cas 127 8

Fida Hussain with M. R. Bobde, for Appellant; G. R. Mudholkar and M. W. Puranik, for Respondent No. 1.

JUDGMENT: This Letters Patent Appeal is directed against the order of Niyogi J. in an appeal from the order of the District Judge, East Berar, Amraoti, in a proceeding under S. 38, Companies Act, 1913.

(2) One Jairam, since deceased, was the holder of 25 shares Nos. 2956 to 2980 (both inclusive) of the appellant Company under a share certificate No. 435. On 27-11-1940 he made an application to the Company for grant of a duplicate certificate on the ground that the original was lost. He deposited the requisite fee and also furnished a security bond. On 5-4-1941 he transferred the shares to R. S. Chandak, respondent No. 1, and executed an instrument of transfer which was not stamped but was duly signed by both the parties in accordance with Article 46 of the Articles of Association of the Company. On the same day R. S. Chandak made an application to the Company for registering his name as the holder of the shares. As, however, the application was not accompanied by a share certificate, it was returned to R. S. Chandak on 26-4-1941. In the meantime Jairam died and the Company asked his heirs, who are respondents Nos. 2 to 4 before us, for production of letters of administration for grant of the duplicate share certificate.

(3) As there was delay in the disposal of the matter R. S. Chandak applied to the District Judge under S. 38, Companies Act for rectification of the register of members. The District Judge held that letters of administration demanded by the Company from Jairam's heirs were not necessary and directed rectification of the register subject to R. S. Chandak furnishing an indemnity bond for Rs. 1500/- with two sureties to the satisfaction of the Court. The Company preferred an appeal to this Court. It was heard by Niyogi J. who passed the following order:

"The proper order in this case would, in my opinion, be—

(1) to direct the transferee to furnish, unless he had already furnished, an indemnity bond for Rs. 1500/- with two sureties to the satisfaction of the lower Court within one month from the date that this record is received in the lower Court,

(2) to direct the transferee to take back the instrument of transfer and to present it duly stamped at the office of the Company.

The indemnity bond after it is executed in Court will be delivered to the Company and the Company shall issue the duplicates of the lost certificates and deliver them to the transferee so that he might produce them for registration as required by Article 52 of the Articles of Association."

The validity of this order is contested in this appeal.

(4) A preliminary objection was taken by the learned counsel for respondent No. 1 that this appeal is not maintainable as the order of Niyogi J. is not a 'judgment' within the meaning of Cl. 10 of the Nagpur Letters Patent. The definition of the term 'judgment' given by Couch C. J. in the leading case of — 'Justices of the Peace for the Town of Calcutta v. Oriental Gas Co.', 17 WR 364 (A), although not exhaustive, has become classical. According to him, a judgment is

"a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary

or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

This is a restrictive definition and as it confines a 'judgment' to the determination of a legal right or liability, in effect it makes a 'judgment' coextensive with a 'decree' as defined in S. 2(2), Civil P. C., 1908. This was also the interpretation that was given in this Court to the dictum of their Lordships of the Privy Council in — 'Sevak Jeranchod Bhogilal v. Dakore Temple Committee', A. I. R. 1925 P. C. 155 (B), and was the accepted view of the Court until it was reversed by the Full Bench decision in — 'Manohar v. Baliram', AIR 1952 Nag 357 (C), which has given an extended meaning to the term 'judgment' in Cl. 10 of the Letters Patent. The case of — 'Secy. of State v. Mst. Geeta', AIR 1939 Nag 122 (D), related to a case of an award under the Workmen's Compensation Act and is distinguishable from the instant case. So also the other rulings brought to our notice, including the decisions of their Lordships of the Privy Council, which deal with an award under the Land Acquisition Act are not relevant in this connection.

The question in the instant case turns upon the interpretation of the order and if it has conclusively determined, so far as concerns this Court, some question between the parties, which forms an integral part of the process leading to the final decision of the lis, the order will be a 'judgment' within the meaning of Cl. 10 of the Letters Patent and an appeal therefrom would be competent.

(5) As we read the order of Niyogi J., it has finally determined one question involved in the lis, viz., the right of the heirs of Jairam to obtain a duplicate share certificate without production of the letters of administration. Since the application for registering a transfer of the shares is required under law to be accompanied by a scrip, the order in question has, in effect, decided the question of its maintainability, which is not merely a procedural or an ancillary matter. In our opinion, therefore the order constitutes a judgment within the meaning of Cl. 10 of the Letters Patent and the present appeal is competent.

(6) The order of Niyogi J. proceeds on the basis that after transfer of the shares, no title or right remained vested in Jairam and, therefore, the demand of the Company for production of letters of administration or a succession certificate by his heirs was not justified. This, in our opinion, is not a correct view of law. The law on the subject has been stated in Halsbury's Laws of England, Vol. 5, 1949 Edn., para 496, p. 289 thus:

"Until the instrument of transfer is registered the transfer is not complete; the transferor is the legal owner of the shares, and, if they are not fully paid, is liable to pay all the calls made thereon, while his name remains on the register of members. But a transferee who has accepted the transfer, though he has not executed it, is liable to indemnify the transferor as from its date.

x x x x

The transferee is the proper person to apply for registration; but the transferor may also apply. On the application of the transferor of any share, the company must enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee; but this does not affect the transferee's duty to obtain registration. The transferor may enforce the registration by obtaining an order for rectification of the register."

That until the transfer is registered, the transferor is a trustee who holds the shares for the benefit of the transferee has also been recognised by their Lordships of the Supreme Court in — 'Mathalone v. Bombay Life Assurance Co.', AIR 1953 SC 385 (E). Jairam, therefore, continued to be the legal owner of the shares, and after his death the same right inheres in his heirs. It cannot consequently be urged that respondents Nos. 2 to 4 were not competent, after the transfer, to obtain letters of administration. The deamnd of the Company in that behalf, therefore, cannot, on that account, be held to be invalid.

(7) The relevant Articles of the Articles of Association of the Company, in this connection, are 49 and 50 which are reproduced below:

"49. The executors or administrators of a deceased member (whether European, Hindu, Mahomedan, Parsi or otherwise, not being one of two or more joint-holders) shall be the only persons recognised by the Company as having any title to the shares registered in the name of such member, but the Company shall not be bound to recognize such executors or administrators unless such executors or administrators shall have first obtained Probate or Letters of Administration, as the case may be, from a duly constituted Court in British India; provided that, in any case where the Directors in their absolute discretion think fit, the Directors may dispense with production of Probate or Letters of Administration, and, under the next Article, register the name of any person who claims to be absolutely entitled to the shares standing in the name of a deceased member, as a member.

50. Any person becoming entitled to shares in consequence of death, lunacy, bankruptcy or insolvency of any member, or the marriage of any female member, or by any lawful means other than by a transfer in accordance with these presents, may, with the consent of the Board (which they shall not be under any obligation to give) upon producing such evidence that he sustains the character in respect of which he proposes to act under this Article, or of his title, as the Directors think sufficient, either be registered himself as the holder of the shares or elct to have some person nominated by him and approvd by the Directors registered as such holder; provided, nevertheless, that if such person shall elect to have his nominee registered, he shall testify the election by executing to his nominee an instrument of transfer in accordance with the provisions herein contained, and, until he does so, he shall not be freed from any liability in respect of the shares."

(8) These Articles entitled the Company to demand letters of administration from the heirs of the deceased member, although the Directors may dispense with their production under Article 50. In — 'Kasiviswanathan v. Indo-Burma Petroleum Co., AIR 1936 Rang 52 (F), it was doubtless observed by Braund J. that such clauses while appropriate to

"a system such as that prevailing in England under which a legal title from a deceased person can only be traced either through probate or letters of administration, are hardly appropriate to a system under which a legal title by devolution may be obtained, apart

altogether from and without either probate or letters of administration."

However, he also held that if the demand of the Company is not tainted by fraud, it cannot be a ground of challenge under S. 38, Companies Act.

In this connection, he observes:

"The question is whether the company insists upon its present view with or without 'sufficient cause'. It is I think axiomatic and needs no authority to establish or support the proposition that a member of the company and those claiming through him are bound by the Company's Articles of Association. It forms contract between them and, speaking generally, I do not think that in any case in which the company and its Directors literally and 'bona fide' carry out the provisions of the Company's Articles of Association it or they can ever be said to be acting 'without sufficient cause'. It is, I think, a misreading of those words in S. 38, Companies Act, to suppose that they confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable.

What they mean, I think, is that they catch all cases, other than that of fraud, in which the name of the person entitled to be entered in the register is kept off the register by the Directors for a reason which cannot be justified by the Articles. The right of transfer and the phenomenon of transmission of share are (subject to the Articles and in the case of a private company to certain statutory provisions) inherent. But where by the contract of membership restrictions and conditions have been imposed in the Articles themselves and those restrictions and conditions are insisted upon by the company, I do not think that the company can in insisting upon them be held to act 'without sufficient cause' within the meaning of S. 38, Indian Companies Act."

The instant case is governed by these principles, and consequently the demand of the Company for production of letters of administration could not be a ground of attack in the proceedings under S. 38, Companies Act. This conclusion is not affected by the fact that the heirs of Jairam do not claim any interest in the shares in question, for the Company is entitled to claim immunity not only from them but also from the rest of the world.

(9) Section 34 (3), Companies Act, is relevant in this connection and is reproduced below:

"It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip.

x x x x"

It is thus contemplated by the Companies Act that the following conditions must be fulfilled before the Company can lawfully register a transfer, viz., that

(i) the instrument of transfer is duly stamped;

(ii) the instrument is executed by the transferor and the transferee; and

(iii) the instrument is delivered to the company along with the scrip.

In the instant case conditions (i) and (iii) were not fulfilled and consequently the Company was not legally competent to register the transfer. It is immaterial in this connection that the Company did not demand a proper stamp. The condition, creating as it does a statutory liability, cannot be waived and its breach would debar the Company from registering the transfer. Nor does the fact that the instrument could be validated under the proviso (a) of S. 35, Stamp Act, 1899, make it enforceable until the necessary stamp duty and penalty were paid. Section 36, Stamp Act has no application to the instant case as the proceedings before the Company were not of a judicial character such as is contemplated therein.

(10) It was, however, contended that as a default was made in intimating the refusal to register the transfer in excess of the period specified in sub-s. (4) of S. 34, Companies Act, the Company was bound to register the transfer. In this connection it may be noted that the application for registering the transfer was returned by the company within one month of the date of its presentation. This was tantamount to an intimation of the refusal to register the transfer of the shares. It is also clear from sub-s. (5) that a breach of sub-s. (4) only entails a penalty and does not entitle the transferee to an automatic rectification of the register.

(11) In the view that we have taken, the appeal is allowed and the application of respondent No. 1 under S. 38, Companies Act, is dismissed with costs throughout. Counsel's fee Rs. 50/-.

B/K.S.B. Appeal allowed.

A.I.R. 1954 NAGPUR 296 (Vol. 41, C.N. 107)

MUDHOLKAR AND CHOUDHURI JJ. (25-1-1954)

Mathuradas, Applicant v. The State.

Criminal Revn. Appln. No. 70 of 1953, from order of S. J., Nagpur, D/- 8-12-1952.

(a) General Clauses Act (1897), S. 3(29) — Government notification is not "law".

It is not right to deduce the meaning of the term "law" from the definition of the term "Indian law" in S. 3(29). However, even if the definition of "Indian law" in the General Clauses Act is accepted as the definition of "law" in force in the territory of India a notification cannot be said to be included within it. (Para 3)

(b) Evidence Act (1872), Ss. 57 and 78 — Government notification published in Government Gazette — Proof of.

In a revision application the applicant raised the contention that the retail price of yarn with regard to which the applicant was said to have committed an offence, fixed by the Textile Commissioner, Madhya Pradesh, had not been proved. It was contended on behalf of the State that this price was specified in Notification No. 745-G-STYC (M. P.), dated 4-2-1950, published in the Madhya Pradesh Gazette, dated 10-2-1950 and that the Court should take judicial notice of that notification.

Held that in the circumstances a Court is not, under S. 57, Evidence Act, entitled to take judicial notice of a notification published in the Gazette and that the fact of the publication of the notification has to be proved in the manner provided for in S. 78, Evidence Act. AIR 1928 All 355; AIR 1949 Mad 459, Rel. on. (Para 4)

Anno: Evid. Act, S. 57, N. 1; S. 78 N. 2.

CASES REFERRED: Paras
(A) (V15) AIR 1928 All 355: 107 Ind Cas 578 3
(B) (V36) AIR 1949 Mad 459: 50 Cri LJ 641 3

M. R. Bobde and A. S. Bobde, for Applicant; W. B. Pendharkar, Govt. Pleader, for the State.

ORDER: This case has been referred to a Division Bench by one of us (Mudholkar J.) for consideration of the question as to whether a Court is entitled to take judicial notice of a notification fixing the retail price of yarn under the Cotton Textiles (Control) Order, 1948, published in the Madhya Pradesh Gazette.

(2) It is argued on behalf of the State that a notification published in a Gazette is a part of the law of the land and that under S. 57(1), Evidence Act, a Court is bound to take judicial notice thereof.

(3) The term "law" has been defined thus in Art. 13(1)(a) of the Constitution:

> "'law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

but that definition is only for the purpose of Art. 13(1)(a) of the Constitution. Again the term "existing law" has been defined thus in Art. 366(10) of the Constitution:

> "'existing law' means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such law, Ordinance, order, bye-law, rule or regulation."

but that definition is for the purpose of the Constitution only. The term "Indian law" is defined thus in S. 3(29), General Clauses Act, 10 of 1897:

> "'Indian law' shall mean any Act, Ordinance, Regulation, rule, order or bye-law, which before the commencement of the Constitution had the force of law in any Province of India or part thereof, and thereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act."

It would not be right to deduce the meaning of the term "law" from this term. However, one thing is clear that even if the definition of "Indian law" in the General Clauses Act is accepted as the definition of "law" in force in the territory of India a notification cannot be said to be included within it. We are in respectful agreement with the view taken by Sulaiman J. in — 'Collector of Cawnpore v. Jugal Kishore', AIR 1928 All 355 (A) to the effect that judicial notice of a Government notification cannot be taken by the Court under S. 57, Evidence Act, but the production of the Gazette printed under the authority of the Government will be sufficient proof of the notification under S. 78, Evidence Act. The same matter has been considered though from a slightly different angle by Subba Rao J. in — 'Public Prosecutor v. Thippayya', AIR 1949 Mad 459 (B). The learned Judge in that case observed as follows:

> "Though a Court should take judicial notice of the facts mentioned in S. 57, it could only take such notice if unimpeachable books or documents are put before it or otherwise accessible for its reference. Under the last paragraph of the section, the Court is given the discretion to refuse to take judicial notice of any fact unless such person calling upon the Court to take any judicial notice of such fact produces any such book or document as it may be necessary to enable it to do so."

Thus, according to the learned Judge, even where a Court is required to take judicial notice it can refuse to do so unless the document essential for taking notice thereof is produced. That is to say, in a case like this, the State Gazette.

(4) In the circumstances, therefore, we are of opinion that a Court is not entitled to take judicial notice of a notification published in the Gazette and that the fact of the publication of the notification has to be proved in the manner provided for in S. 78, Evidence Act.

B/V.S.B. Answer accordingly.

A.I.R. 1954 NAGPUR 297 (Vol. 41, C.N. 108)

SINHA C. J. AND HIDAYATULLAH J. (8-3-1954)

Anjan Tatha, Plaintiff-Appellant v. Pyareram Janak Ram and others, Defendants-Respondents.

Second Appeal No. 112 of 1948, from appellate decree of Civil J., Sarangarh, D/- 26-5-1944.

†**C. P. States (Administration) Order (1947) — Validity of Order and of notification No. 112-IB D/- 23-12-1947 — (Extra-Provincial Jurisdiction Act (1947), S. 7(2)) — (Letters Patent (Nagpur), Cl. 11).**

The notification No. 112-IB, which was issued under the Extra-Provincial Jurisdiction Act and by virtue of which the C. P. States (Administration) Order was enacted, was perfectly valid and consequently the said Order was validly passed. The validity of the Order cannot be questioned either on the ground of want of prior sanction of the Central Government or on the ground that C. P. Government arrogated to itself the functions of the Governor General when it extended the jurisdiction of the High Court to the C. P. States. (Paras 12, 16, 17, 18, 24)

CASES REFERRED: Paras
(A) ('53) Cri. Revn. No. 541 of 1952, D/- 14-5-1953 (Nag) 15
(B) (V38) AIR 1951 SC 253: 1951 SCR 474 (SC) 17

L. P. Verma, for Appellant; A. P. Sen for Respondents; T. P. Naik, Addl. Govt. Pleader, for the State.

ORDER OF REFERENCE

CHOUDHURY J.: (15-1-54)

This appeal is directed against the judgment of the District Judge Sarangarh, which was delivered on 26-5-1944. On that date, the Court of the District Judge, Sarangarh, was not subject to the appellate jurisdiction of the Nagpur High Court. An appeal was filed on 31-8-1944 before the High Court Judge of the State of Sarangarh. At the material time when the Sarangarh State acceded, the appeal was pending before the Union High Court at Raigarh. It was apparently transferred to this High Court under Cl. 9(2) of the Central Provinces States (Administration) Order, 1947.

(2) A preliminary objection has been raised by the learned counsel for the respondent that the Central Provinces States (Administration) Order, 1947, was unconstitutional, because the notification under S. 4 of the Extra-Provincial Jurisdiction

Act was ultra vires the Central Government as it was issued before the Act itself came into force, and also that the Central Provinces Government could not extend the appellate jurisdiction of this High Court.

Such jurisdiction could have been extended by the Governor-General alone under S. 230, Government of India Act. In the absence of such an order the High Court should have refused to exercise its appellate jurisdiction in relation to and over the Courts situate in the Acceding States in respect of cases between the date of accession, i.e., 1-1-1948 and the date of merger, i.e., 1-8-1949. The present appeal was sent to this High Court from the Union High Court on 6-2-1948.

(3) The High Court of Judicature at Nagpur did not have appellate jurisdiction over the Courts of the ex-Feudatory State of Sarangarh till the State merged on 1-8-1949. (See the States Merger (Governors' Provinces) Order, 1949). This Order was made in exercise of the powers conferred on the Governor-General by the amended S. 290A, Government of India Act.

(4) These States were subject to the suzerainty of the Crown before the Indian Independence Act of 1947 came into force on 15-8-1947. This Independence Act was enacted for the setting up in India of two independent Dominions. The territories of the two Dominions were defined by S. 2 of the Act. Under S. 7 of the Act, the suzerainty of His Majesty over the States lapsed and with it all treaties and agreements in force. As a result, the ex-Feudatory State of Sarangarh became an area out of the Dominion of India. In other words, the State of Sarangarh became a sovereign independent country by itself, but a provision was made in the Act under S. 2(4) for accession of the Indian States to either of the two Dominions.

(5) The Ruling chief executed an instrument of accession on 14-12-1947 in the form set out as Appendix XI to the White Paper on the Indian States issued by the Government of India. As a result of this accession the governance of the State was transferred to the Dominion of India.

(6) Section 9, Indian Independence Act, conferred power on the Governor-General to make adaptations of the Government of India Act, 1935, and make other consequential orders varying the constitution, powers and jurisdiction of the Legislatures, Courts and other authorities and create new Legislatures, new Courts and other new authorities. In exercise of the powers conferred on him, the Governor-General issued the India (Provisional Constitution) Order, 1947, on 14-8-1947 whereby the Government of India Act, 1935, was adapted and modified to meet the exigencies of the situation created on account of the setting up of the two Dominions.

(7) Under S. 224 (2), Government of India Act, the High Court had no jurisdiction to question any judgment of any inferior Court which was not otherwise subject to its appellate and revisional jurisdiction. Section 219(3), Government of India Act, excluded the States from the jurisdiction of the High Courts in India. Section 223 of the Act continued the Letters Patent and the existing jurisdiction of the High Courts and the respective powers of the Judges were continued.

The Nagpur High Court, under Cl. 11 of the Letters Patent, has appellate jurisdiction over the territory comprised within the Central Provinces. This jurisdiction continued by the Governor-General's Order. Thus the Governor-General was alone competent to extend the jurisdiction of the High Court for the acceding States under powers conferred by S. 9(1)(i) of the Indian Independence Act. The appellate jurisdiction could be extended to the areas comprised within the acceding States by an Order of the Governor-General under S. 230 of the Act.

(8) The Central Provinces Government in making the Central Provinces States (Administration) Order, 1947, arrogated to themselves the functions which were expressly reserved to the Governor-General. In support of my view, I would refer to the Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948, which extended the jurisdiction of the Madras High Court to the Chief Commissioner's Province of Coorg. This Order was passed by the Governor-General under the above power.

(9) No doubt, the Central Government could under S. 3(2), Extra-Provincial Jurisdiction Act, (Act No. 47 of 1947) delegate extra-provincial jurisdiction to the Provincial Government, but by the proviso (i) to the notification dated 23-12-1947 issued under S. 4 'ibid' the Central Government made an express reservation that the exercise of the power delegated to the Provincial Government shall be subject to the control of the Central Government. The Provincial Government was, therefore, bound to take the approval of the Central Government before issuing the Central Provinces States (Administration) Order, 1947, under which they extended the jurisdiction of the Nagpur High Court to the States.

(10) There is another flaw in the notification under S. 4 of the Extra-Provincial Jurisdiction Act, 1947, by which the Central Provinces Government purports to have derived its authority in issuing the Central Provinces States (Administration) Order, 1947. The parent Act received the assent of the Governor-General and became law on 24-12-1947, but the notification was issued on 23-12-1947. The notification was, therefore, invalid. Consequently, no powers could have been validly delegated to the Provincial Government, and as such, the latter was not competent to make the Central Provinces States (Administration) Order, 1947, on 31-12-1947.

Under the circumstances, it is doubtful if the Nagpur High Court could have exercised its appellate jurisdiction in relation to and over Courts situate in Sarangarh and other States from 1-1-1948 which was the date of accession till 1-8-1949, the date of merger. As it involves an important question of the exercise of its appellate jurisdiction by the Nagpur High Court over the Courts situate in the acceding States during the period mentioned above, I refer the case to the Honourable the Chief Justice with a recommendation that it be placed before a Bench of two Judges.

JUDGMENT

HIDAYATULLAH J.:

(11) This second appeal is before a Divisional Bench on a reference by Choudhuri J. It was filed on 31-8-1944 in the High Court, Sarangarh State, against the judgment and decree of the District Judge, Sarangarh. It was pending in the Union High Court, Raigarh, when it was transferred to this High Court on 6-2-1948 under Cl. 9(2) of the Central Provinces States (Administration) Order, 1947. That Order came into force on 1-1-1948.

(12) In the opinion of the learned single Judge, the notification No. 112-IB, which was issued under the Extra-Provincial Jurisdiction Act, 1947 (47 of 1947) and by virtue of which the said Administration Order was enacted, was defective in so much that it was dated 23-12-1947, when the Act

itself came into force on 24th 'idem'. The learned Judge was also of the view that the Central Provinces Government arrogated to itself the functions of the Governor-General when it extended the jurisdiction of this High Court to the Sarangarh State, by the Administration Order, and that it should at least have obtained the sanction of the Governor-General as contemplated by the notification (proviso (i)). The learned Judge pointed out that the correct procedure was to pass an Order like the Madras High Court (Extension to Coorg) Order, 1948.

(13) After considering the matter very carefully, I am of opinion that, with all due respect, these conclusions cannot be supported.

(14) The first point presents hardly any difficulty. Prior to the Extra-Provincial Jurisdiction Act, 1947, there was the Extra-Provincial Jurisdiction Ordinance (15 of 1947) which was repealed by S. 7 of the Act. That section itself solves the difficulty. It reads:

"7(1) The Extra-Provincial Jurisdiction Ordinance, 1947, is hereby repealed.

(2) Any order made, anything done or any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 27th day of August 1947."

(15) The Central Government issued the notification not only in exercise of the powers derived from the Act but also of "all other powers enabling it in this behalf". These words were considered by me in — 'Hirasa v. The State', Cri. Revn. No. 541 of 1952, D/- .14-5-1953 (Nag) (A) to be wide enough to enable the notification to be issued under powers derived from many sources. This is what I said:

"It was next contended that the price of Rs. 3/8/- was fixed by a notification issued on 23-12-1950 which was issued under the Supply and Price of Goods Ordinance, 1950 (26 of 1950). That Ordinance ceased to be law on the midnight between the 22nd and 23rd December as the Act came into force from the first moment of 23-12-1950. The notification mentions the Ordinance but goes on to say:

'and of all other powers enabling it in this behalf'

This is sufficiently wide to make it a notification under the Act."

(16) In the present case, the notification was prepared on the 23rd when the Ordinance was in force but was issued on the 24th when the Act was in force. The words "all other powers enabling it in this behalf" taken with sub-s. (2) of S. 7 of the Act quoted above enabled the notification to be prepared in advance. They were put in to bring the notification into force simultaneously with the Act and the same purpose was in view in sub-s. (2) of section 7. Otherwise the notification would have been delayed. The subsection removed any hiatus in the powers of the Central Government and their exercise. The power existed uninterrupted and the exercise of the power would, under S. 7(2) of the Act, be referable to the Act even though a part of the action in exercise of it fell in a period of time prior to the Act.

(17) Shri A. P. Sen referred us to the observation of Das J. in — 'State of Seraikella v. Union of India', AIR 1951 SC 253 at p. 268 (B), where his Lordship observed about this notification as follows:

"On 23-12-1947, the Central Government issued a notification purporting to delegate its extra-provincial jurisdiction with respect to the plaintiff States under the Extra-Provincial Jurisdiction Act, 1947 (No. 47 of 1947) to the Government of Orissa which at once began to exercise extra-provincial jurisdiction over the seven States. It is not quite clear how there could be a delegation of jurisdiction before the Act came into force.

Be that as it may, on 18-5-1948, another notification was issued by the Central Government under Ss. 3 and 4 of the Extra-Provincial Jurisdiction Act, 1947, cancelling the previous notification with respect only to the State of Seraikella and the State of Kharsawan and delegating its jurisdiction in or in relation to those two States to the Government of Bihar and on the same date the Government of Bihar after promulgating the Seraikella and Kharsawan States Order assumed jurisdiction over them."

Shri Sen contends that these remarks conclude the matter. I do not agree. These remarks were not shared by the other Judges of the Bench and were not a final decision even by Das J. In my judgment, the notification was perfectly valid.

(18) The Administration Order cannot be questioned on the ground of want of prior sanction of the Central Government. The need for sanction, it is suggested, arises under proviso (i) in the notification. The first proviso in the notification speaks of 'control' and not 'prior sanction'. The Administration Order cannot be questioned on the ground that there was no prior sanction as none was contemplated. The word 'control' has the same meaning here as it had in S. 314 (1) of the Constitution Act, 1935. The Central Government could intervene and undo but there was no need for sanction at every stage. The Central Provinces States (Administration) Order was one of several others which follow a pattern and it cannot be suggested that the Central Government was to be consulted for every action by all the State Governments.

(19) This brings me to the second question whether the Central Provinces Government could extend the appellate jurisdiction of this High Court to Sarangarh State. No doubt, under the Constitution Act, 1935, the jurisdiction of the High Court could only be extended by the Governor-General (See S. 230 as adapted by the India (Provisional Constitution) Order, 1947). The extra-provincial jurisdiction in that section, however, contemplated extension of the jurisdiction to an area 'in India' not forming part of that Province. India for the purpose of S. 230 as also the whole of Chapter II, Part IX, did not include the Acceding States. Sub-section (3) of S. 219 provided a definition clause which reads:

"In this Chapter, "India" means the territories comprised in the Governors' Provinces and Chief Commissioners' Provinces, and does not include any Acceding State."

The Constitution Act, 1935, made no provision in the chapter on the High Court for the Acceding States and consequently S. 230 'ibid' did not apply to the extension of the jurisdiction of the High Courts to the Acceding States.

(20) The Indian Independence Act, 1947 (10 and 11 Geo. 6, Ch. 30) provided (S. 2(4)) that the States could accede to either of the two Dominions created by the Act. The appointed date in

the Act was 15-8-1947. From that date the suzerainty of His Majesty over the Indian States lapsed and all treaties, agreements, etc., also came to an end.

(21) Prior, however, to the lapse of paramountcy, negotiations with the States had resulted in their agreement to accede to the Indian Dominion and all the States barring three had acceded to the Dominion by 15-8-1947. The Rulers executed Standstill Agreements and Instruments of Accession. Section 6 of the Government of India Act, 1935, cleared the way for such accession.

(22) The Extra-Provincial Jurisdiction Ordinance and later the Act provided for the transitional period between accession and integration. Before the merger of the States, the Rulers had by their agreements transferred to the Government of India jurisdiction. power and authority in their States. The Dominion Government was empowered by the Extra-Provincial Jurisdiction Ordinance as well as the Act to exercise these functions and also to delegate its functions to the Provincial Governments. It was after this delegation that the Administration Order was passed.

Clause 9 of that Order created the jurisdiction of this High Court in the States. That was subject only to the Instruments of Accession which conceded the power subject to the Ruler's consent. It is not contended that the Instruments of Accession were not followed in creating the new jurisdiction nor is there anything to show this. There is also a presumption which I draw. Later, however, the Government of India Act, 1935, was amended to introduce Ss. 290A and 290B. These made way for integration and empowered the Government of India to take over the complete governance of the territories of the States which had merged by signing of the Instruments of Merger on 14-12-1947.

Consequent thereon, the States Merger (Governors' Provinces) Order, 1949, was issued and applied from 1-8-1949 to these States. Till the complete merger and integration took place, the Government of India Act, 1935, Part IX Chapter II, did not apply to the Acceding States. The cases of Rampur which was first integrated in a Chief Commissioner's Province and of Cooch Bihar which integrated later are on a different footing. It was only after the States Merger (Governors' Provinces) Order, 1949, was passed that it was provided that:

> "As from the appointed day, the States specified in each of the Schedules shall be administered in all respects as if they formed part of the Province specified in the heading of that Schedule; and accordingly, any reference to an Acceding State in the Government of India Act, 1935, or in any Act or Ordinance made on or after the appointed day shall be construed as not including a reference to any of the merged States, and any reference in any such Act or Ordinance as aforesaid to a Province specified in a Schedule to this Order shall be construed as including the territories of all the States specified in that Schedule."

The orders passed under the Extra-Provincial Jurisdiction Act, 1947, were continued in force by Cl. 4 of the Order but no order was to be made thereafter.

(23) The analogy of the Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948, is not apt in view of the history of Coorg for which there was a special provision in S. 97 of the Constitution Act, 1935. Coorg became a part of India in 1834. The Courts there were established under Regulation II of 1881 and it was being administered as a Scheduled District. Coorg was practically a Chief Commissioner's Province with the Resident of Mysore as the Ex-officio Chief Commissioner. The order of the Governor-General was necessary there as it was necessary for Lahore, East Punjab, etc. The analogy does not hold good in respect of Acceding States which were 'outside' India.

(24) It would thus appear that the notification dated 23-12-1947 was perfectly valid, and consequently the Central Provinces States (Administration) Order, 1947, was validly passed. It would also appear that the provisions of Chapter II, Part IX, of the Government of India Act, 1935, in general and of S. 230 'ibid' did not apply to the Acceding States between accession and 1-8-1949, when the States Merger (Governors' Provinces) Order, 1949, was applied. The appeal was thus rightly transferred to this Court on 6-2-1948 under Cl. 9(2) of the Central Provinces States (Administration) Order, 1947. In any event, there is no bar 'now' in the way of this Court from hearing the appeal. The preliminary objection of Shri A. P. Sen must, therefore, fail.

(25) As regards merits, there are none. The plaintiff as co-sharer claims his share of profits of the surrendered 'bhogra' lands. This he cannot do in view of the clear provisions of clause 13 of the Wazib-ul-arz of the Sarangarh State. Indeed, the learned counsel for the appellant had nothing to urge about this.

(26) The appeal fails and is dismissed but in view of the futile preliminary objection there shall be no order about costs.

(27) SINHA C. J.: I agree.

A/V.R.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 300 (Vol. 41, C.N. 109)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (28-9-1953)

Basant Kumar Mishra and others, Defendants-Appellants v. Roshanlal Shrivastava, Plaintiff-Respondent.

Second Appeal No. 641 of 1944 from appellate decree of Addl. Dist. J., Jabalpur, D/- 30-6-1944.

(a) Contract Act (1872), S. 213 — Suit for accounts by agent against principal — Maintainability — (Accounts — Suit for, by agent against principal) — (Principal and agent).

As the right of a principal to have an account from his agent is founded on the statute, i.e., S. 213, Contract Act, such a suit would always lie. But that does not warrant the unqualified proposition that a suit by an agent for an account against his principal can never lie. (Para 17)

Thus where A worked as an agent for B, a book-seller, on commission basis, canvassing in certain area for the sale of B's books and did not know how many books were sold through his efforts as he could not keep any accounts of the transactions entitling him to the commission, and those accounts were admittedly kept by B:

Held that in these circumstances A could maintain an action for accounts against his principal B. (Para 18)

(2) that there was no justification in such cases for insisting on a suit for a definite sum

by recourse to the procedure for interrogatories and discovery instead of a straightforward action for an account. Case law referred. (Para 18)

Anno: Con. Act, S. 213 N. 4.

(b) Limitation Act (1908), Arts. 120, 115 and 64 — Suit for accounts by agent against principal.

While there is a specific article for a suit by a principal against his agent, there is no such article for the converse case. But a suit for accounts not covered by any specific article falls under Art. 120 and hence a suit for accounts by an agent against his principal would be governed by Art. 120. 19 Mad 425 and 19 All 244, Ref. (Para 21)

When a plaintiff is claiming commission to which he would be entitled on an account being taken and not compensation in lieu of what he was entitled to under the contract, it is a suit for an account and not a suit for compensation for breach of contract. So Art. 115 has no application to the case. AIR 1923 Cal 507 and AIR 1931 Mad 185 (2), Rel. on. (Para 20)

Anno: Lim. Act, Art. 115 N. 1, 3; Art. 120 N. 15; Art. 64 N. 7.

(c) Limitation Act (1908), S. 19 — Acknowledgment — What amounts to.

In an answer to the request made by A for payment of what was due to him, B wrote "You should kindly send your claim to the Karyalaya immediately, so that it may be examined and the amount may be sent":

Held that the reply meant that B admitted his liability to A and was willing to pay the amount on examining the claim and it was thus a clear and absolute acknowledgment. (1877) 36 LT 98, Ref. (Para 21)

Anno: Lim. Act, S. 19 N. 18.

(d) Civil P. C. (1908), S. 34 — Suit for accounts by agent against principal — (Accounts — Suit for, by agent against principal).

There is no warrant for the proposition that in a suit for accounts interest prior to the ascertainment of the account cannot be given. An agent is liable to pay interest on failure to pay the money over at the request of the principal. Similarly, there is no excuse for the principal who, being in possession of accounts, could have struck the account when the demand was made by the agent and hence, in a suit against him by the agent for accounts, the award of interest from the date of demand till the institution of the suit is proper. (Paras 22, 23)

The award of interest, thereafter, pendente lite and subsequent to the decree till realization is, however, a matter of discretion for the Court under S. 34. The proper stage for the exercise of that discretion is while passing the final decree. (Para 23)

Anno: C. P. C., S. 34 N. 3, 4.

CASES REFERRED: Paras

(A) (V3) AIR 1916 Nag 70: 12 Nag LR 174 7
(B) ('99) 60 Pun Re 1899: 6 Pun LR 1900 7
(C) (V12) AIR 1925 Lah 100: 78 Ind Cas 959 7
(D) (V14) AIR 1927 Lah 701: 104 Ind Cas 339 7
(E) (V24) AIR 1937 Cal 359: ILR (1937) 2 Cal 259 7
(F) (V27) AIR 1940 Mad 504: ILR (1940) Mad 296 7
(G) (V33) AIR 1946 All 489: 224 Ind Cas 273 7, 18
(H) (V20) AIR 1933 Lah 483: 144 Ind Cas 505 8
(I) (V24) AIR 1937 Sind 51: 30 Sind LR 371 9
(J) (V25) AIR 1938 Mad 707: 177 Ind Cas 631 9
(K) (1852) 68 ER 664: 9 Hare 627 11
(L) (1862) 66 ER 681: 4 Giff 208 11
(M) (1819) 56 ER 742: 4 Madd 373 12, 15
(N) (1863) 46 ER 274: 2 De G J & S 1 13
(O) (1827) 4 ER 888: 1 Bligh N S 312 13
(P) (1807) 33 ER 297: 13 Ves Jun 276 13
(Q) (1872) 27 LT 330 14
(R) (1865) 34 LJ Ch 396: 13 WR 566 15
(S) (1852) 68 ER 596: 9 Hare 471 15
(T) (1862) 54 ER 1137: 31 Beav 258 15
(U) (1863) 66 ER 785: 4 Giff 456 15
(V) (1877) 4 Ch D 750: 46 LJ Ch 121 16
(W) (1884) 50 LT 590 16
(X) (V10) AIR 1923 Cal 507: 73 Ind Cas 17 19
(Y) (V18) AIR 1931 Mad 185 (2): 54 Mad 654 20
(Z) ('96) 19 Mad 425 21
(Z1) ('97) 19 All 244: 1897 All WN 43 21
(Z2) (1877) 36 LT 98: 2 Ex D 314 21
(Z3) ('53) F. A. No. 10 of 1950, D/- 18-9-1953 (Nag) 22
(Z4) ('70-72) 14 Moo Ind App 209 (PC) 22
(Z5) ('91) 18 Cal 616: 6 Sar 49 (PC) 22
(Z6) (1915) 85 LJKB 115: 112 LT 1134 23
(Z7) (1870) 10 Eq 393: 18 WR 821 23

M. R. Bobde, V. K. Sanghi and N. P. Dwiwedi, for Appellants; M. Adhikari and A. P. Sen, for Respondent.

ORDER OF REFERENCE

MANGALMURTI J.: (1-10-1952)

This second appeal involves the question of agent's right to sue the principal for accounts. The learned counsel for the appellants contends that even in those exceptional cases wherein it was held that the principal was liable to render accounts to the agent, the position of the former was that of an agent of the latter. He says this is an important question of law and he would request for permission to file a Letters Patent Appeal in case the decision goes against his clients because of the importance of the question.

Shri Adhikari agrees with Shri Bobde that it is an important question of law and that he would also request for permission to file a Letters Patent Appeal in case the decision goes against his client. In view of the importance of the question of law involved in this appeal and in order to save time, I refer this appeal to my Lord the Chief Justice with a recommendation that it be placed before a Bench of two Judges under sub-r. (1) of R. 9, Chapter I, Part I of the Rules of the High Court of Judicature at Nagpur.

JUDGMENT: This second appeal is referred to the Division Bench by Mangalmurti J. on the ground that it involves an important question of law, namely, whether an agent can institute a suit against the principal for accounts.

(2) The facts giving rise to the question may now be briefly stated. The suit was instituted by the respondent-plaintiff against the appellant-defendants on the following allegations. The defendants are the proprietors of Mishra Bandhu Karyalaya, a publishing concern of Jabalpur. In October 1934, the defendants appointed the plaintiff as their sole agent for the sale of their books and articles in the Narsimhapur sub-division. The plaintiff was to get commission on all books and articles sold in the said area from the above Karyalaya through any agency and in whatsoever

manner. The rates of the commission were as detailed in para. 2(c) of the plaint.

Later in 1935, according to the plaintiff, it was agreed between the parties that the plaintiff should get the cost of a signboard, the rent of the book depot where the books were exhibited for sale and the price of wooden shelves to the extent of Rs. 15, Rs. 8 per month and Rs. 10 respectively. The plaintiff worked as the sole agent of the defendants from October 1934 to August 1937 and spent Rs. 178 on the book depot. The plaintiff alleged that the defendants had with them the accounts of the sales in the Narsimhapur area in their possession and they were accordingly liable to render account. The plaintiff asked the defendants several times to settle the accounts but the defendants failed to do so. The suit out of which this appeal arises was accordingly instituted.

(3) The defendants admitted that the accounts of sales in the area were in their possession. They, however, denied that they appointed the plaintiff as their sole agent. They denied that the book depot opened at Kandeli had any concern with their Karayalaya. They asserted that it was the exclusive shop of the plaintiff opened by him with their help as he was then out of employment. They further pleaded that the plaintiff closed the shop after 8-8-1935 and asked the defendants to supply books to one Gajrajsingh. Books were supplied to the said Gajrajsingh from 8-8-1935 to 4-7-1936 on the plaintiff's standing surety for the regular payment of the price of books supplied to him. The plaintiff transferred the stock of books with him to the said Gajrajsingh and promised to realize the price from Gajrajsingh and pay it to the defendants. Gajrajsingh however did not pay the price of books supplied to him and therefore the defendants demanded the same from the plaintiff. In answer to that demand, the plaintiff took up the position that he was an agent entitled to commission. The defendants denied that there was any agreement to pay the plaintiff the price of signboard, the rent of the book depot and the price of an almirah. Finally, they pleaded that the plaintiff's claim if any, was barred by limitation.

(4) The plaintiff succeeded in both the Courts. The decree is that the defendants should render account to the plaintiff for the period 15-10-1934 to 15-7-1937 and it orders the appointment of a commissioner to take account of the same. The plaintiff's claim for Rs. 178 on account of rent of shop, signboard, etc., is also decreed. The lower appellate Court has awarded interest to the plaintiff on the amount found due at the rate of 6 per cent. per annum from 17-5-1937 to the date of the final decree.

(5) The defendants have come up in appeal and urge:

(i) that the Courts erred in holding that the plaintiff was an agent and in rejecting the defence put forward by them;

(ii) that the suit by the plaintiff being one by an agent against the principal was not maintainable;

(iii) that the suit was barred by limitation under Art. 115, Limitation Act; and

(iv) that the lower appellate Court erred in awarding interest to the plaintiff from the date of the demand.

(6) The first contention of the appellants really raises a question of fact. Both the Courts substantially disbelieved the defence set up by the appellants, and accepted the version of the respondent. According to both the Courts, the respondent was the sole agent for the sale of the appellants' books in the Narsimhapur sub-division, and the Courts also found that it was mainly due to his efforts that the books of the appellants got introduced in the schools in the Narsimhapur area. The two Courts also found that the shop at Narsimhapur, though it might have been called Krishna Book Depot and later Pustak Bhandar, was in fact a branch of the Mishra Bandhu Karayalaya opened for advertising the books of the appellants.

The lower appellate Court definitely rejected the plea of the appellants that the respondent was the book-seller and the exclusive owner of the shop. It was found that the respondent was an agent who under the agreement was to canvass for commission for the sale of the books of the appellants and worked in that capacity till 15-7-1937. These are essentially findings of fact. There is no adequate reason for interfering with them in second appeal. So the appeal must be considered on the footing that the respondent was an agent entitled to a commission from the appellants on the sales effected in the Narsimhapur area.

(7) The next question is whether the suit was not maintainable because it was instituted by an agent against his principal. On this point there is a divergence of opinion. In — 'Gopikisan v. Padmraj', AIR 1946 Nag 70 at p. 71 (A) Mittra A. J. C. observed that an agent cannot bring a suit for accounts against his principal but only for the balance due upon an account. According to the learned Additional Judicial Commissioner, the agent alone is liable to render accounts and the principal is not. To the same effect are the decisions or dicta in — 'Jowahar Singh v. Haria Mal', 60 Pun Re 1899 (B); — 'Gulam Qutab-ud-din Khan v. Faiz Bakhsh', AIR 1925 Lah 100 (C); — 'Hanuman Baksh v. Balmukand', AIR 1927 Lah 701 (D); — 'Narmada Chandra v. Maharaja Bahadur Singh Dugar', AIR 1937 Cal 359 (E); — 'Mahadevi v. Sankara Menon', AIR 1940 Mad 504 (F) and — 'Mirza Najm Effindi v. Kohinoor Footwear Co.', AIR 1946 All 489 (G).

(8) On the other hand, in — 'Ram Lal Kapur & Sons v. Asian Commercial Assurance Co., Ltd.', AIR 1933 Lah 483 (H) the plaintiffs who were insurance agents were to be remunerated by commission calculated on the premia paid on all policies effected or introduced through them. It was held that they were entitled to call on the defendants for rendition of accounts as that was the only relief which would enable the plaintiff satisfactorily to assert their rights. The ground of the decision was that while no doubt the plaintiffs were aware of all policies effected or introduced through them, they could not certainly know which of those policies had lapsed, matured or had been forfeited. As it was not possible for them to calculate what commission would be payable to them on policies effected through or introduced by them as agents of the Insurance Co., the suit was held maintainable.

(9) According to the decision in — 'Gulabrai Dayaram v. India Equitable Insurance Co., Ltd', AIR 1937 Sind 51 (I), though an agent has no statutory right to have an account from his principal, nevertheless there may be circumstances rendering it equitable that the principal should account to the agent. Such a case may arise where all the accounts are in the possession of the principal and the agent does not possess accounts to enable him to determine his claim for commission against his principal. The observa-

tions in — 'Ramchandra Madhavadoss Co. v. Moidunkutti Birankutti & Bros', AIR 1938 Mad 707 (J) seem to imply that a suit for account does lie at the instance of an agent where the extent of dealings are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into.

(10) The statement of law in Halsbury is that an agent has a right to have an account taken, and where the accounts are of a simple nature they can be taken in an ordinary action in the Queen's Bench Division. (See Vol. 1, para 454). According to Bowstead, where the accounts between the principal and agent are of so complicated a nature that they cannot be satisfactorily dealt with in an action of law, the agent has a right to have an account taken in equity. See Article 79, Bowstead's Digest of the Law of Agency, 11th Edn. The learned author of the 14th Edn. of Story's Equity Jurisprudence after saying that an agent is not generally entitled to accounting by his principal makes himself responsible for the following statement:

> "There are usually exceptions to all rules, and where the principal has kept the accounts between him and his agent and the matters and things transacted in the course of the agency are within his own peculiar knowledge, the agent may ask for accounting." (Vol. II, p. 31, section 617).

(11) In 1852 it was held that it by no means followed that because a principal was entitled to have an account taken in equity as against his agent, the agent had a similar right against his principal. See — 'Padwick v. Stanley', (1852) 68 ER 664 (K). Notwithstanding this pronouncement, 11 years later a suit by an agent against his principal for accounts was entertained by the Vice-Chancellor in — 'Shepard v. Brown', (1862) 66 ER 681 (L).

(12) In the last ruling the plaintiff's case was that he was employed by the defendants to obtain orders for goods manufactured by them and that he was to be allowed remuneration in the shape of commission upon the amount of all goods sold under orders which were obtained through his exertions. The plaintiff sought an account of all orders received and executed by the defendants through his exertions and to have it ascertained how much was coming to him for commission in respect of the goods so sold. Overruling the demurrer that the plaintiff might recover in an action the whole amount of that commission which he was seeking to recover by account in the Equity Court, the Vice-Chancellor observed:

> "Where the case of the plaintiff is one in which he seeks an account of transactions and dealings with the defendants, the evidence of which transactions must remain principally, if not entirely, in the hands of the defendants, it is extremely difficult to say that, upon a bill seeking an account of that kind upon a case so stated, this Court has no jurisdiction to entertain it."

Reference was made to the decision in — 'Mackenzie v. Johnston', (1819) 56 ER 742 (M). In that case a bill was filed by the principal against an agent who was employed to sell goods for him. It was held that the plaintiff could only learn from the discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence. The same principle was made applicable to a suit by an agent against the principal.

(13) The very next year the Appeal Court in Chancery ruled that a bill for an account in equity by an agent against his principal for his commission on orders obtained by the agent was demurrable. It was held that the fact that the agent may be ignorant of the orders did not entitle him to file a bill for an account of what was due to him for commission, but that his remedy was at law. According to Lord Justice Turner, in the absence of an allegation as to complication of accounts, the bill could not be entertained in equity. See — 'Smith v. Leveaux', (1863) 46 ER 274 (N). The remedy at law was not however doubted, though that remedy as is well known was not as efficacious as the equitable remedy in matters of account. See what was stated by Lord Redesdale in — 'Attorney-General v. Mayor of Dublin', (1827) 4 ER 888 at p. 898 (O) about the old action of account and by Lord Chancellor Erskine in — 'Corporation of Carlisle v. Wilson', (1807) 33 ER 297 at p. 298 (P) about how the Court of equity assumed a concurrent jurisdiction in cases of account.

(14) Finally, reference is necessary to a decision in 1872: — 'Blyth v. Whiffin', (1872) 27 LT 330 (Q). There the Vice-Chancellor observed:

> "With regard to that question, whether an agent can maintain a bill against his principal for an account, it is not necessary to go further than to say I entertain no doubt on the subject. x x x x if there are complicated accounts it is just as much open to the suit of the agent against the principal as on the part of the principal against the agent; but in neither case is it to be permitted unless there be a complicated account." (p. 334).

(15) It is not to the purpose of the present appeal to consider whether there was any limitation in the Court of Equity on the right of a principal to have an account against his agent or whether the fiduciary character between the two was not itself sufficient for the maintenance of such a claim. See — 'Makepeace v. Rogers', (1865) 34 LJ Ch 396 (R). But it may not be out of place to mention that the right of a principal to file in equity a bill for account against his agent was itself sustained on varying grounds at different times: — '(1819) 56 ER 742 (M)'; — 'Phillips v. Phillips', (1852) 68 ER 596 (S); — 'Barry v. Stevens', (1862) 54 ER 1137 (T) and — 'Hemings v. Pugh', (1863) 66 ER 785 (U). In — 'Barry v. Stevens (T)' (supra) the bare relationship of principal and agent was not regarded as entitling the principal to come into equity for an account.

(16) The old practice of bandying a suitor from Court to Court was brought to an end by the Judicature Acts. So the question whether in a particular case the suitor can claim account by a bill in equity or by an action at law has lost its old importance. The position now is that an action for an account can be maintained in any case in which equity or common law had jurisdiction formerly to order an account. As observed by Lord Justice James:

> "A man may now bring in the Chancery Division almost any variety of action which might have been brought in the Common Law Courts." (See — 'Warner v. Murdoch', (1877) 4 Ch D 750 at pp. 752-753 (V)).

It is no doubt provided for convenience that actions for the taking of partnership and other accounts shall be commenced in the Chancery Division: (vide section 56, 15 & 16 Geo. V, c. 49). But the King's Bench Division has power to order an account to be taken and exercises such power

where the account is one of a simple character: See sections 18, 36, 43 and 59, 15 and 16 Geo. V., c. 49; O. XV, R. 1, Rules of the Supreme Court (England) and — 'Leslie v. Clifford', (1884) 50 LT 590 (W). That the right of an agent to claim an account against his principal for the commission due to him on orders received by his principal from the customers introduced by the agent, of which the plaintiff is not aware, is recognized, is evident from Bullen & Leake's Precedents of Pleadings in Actions in the King's Bench Division, 10th Edn., pp. 59-61.

(17) It is true that in India the right of a principal to have an account from his agent is founded on the statute—S. 213 of the Contract Act. Such a suit would always lie. But that does not warrant the unqualified proposition that a suit by an agent for an account against his principal can never lie. The Indian decisions to the contrary, which are referred to above, cannot, if we may say with due respect, be regarded as laying down a complete or an accurate statement of the law on the point.

(18) In present case, it is not disputed that the plaintiff canvassed throughout the Narsimhapur area. The agent's function was not to sell the books directly himself but to canvass for effecting the sales of the principal's books. The agent does not know how many orders were placed with the principal and how many books were actually sold as a result of the agent's efforts. In such circumstances, the agent could not have with him any account of the transactions entitling him to the commission. Those accounts have admittedly been maintained by the principal. That in this type of a case the agent can maintain against his principal an action for an account is clear from the authorities already referred to. See also Pleadings by Sir Gilbert Stone, pp. 352-353 & 376-377. So there is no justification for insistence in this class of cases on a suit for a definite sum arrived at by recourse to the circuitous and comparatively dilatory procedure of interrogatories and discovery as suggested by Mathur J. in — 'Mirza Najm Effindi v. Kohinoor Footwear Co. (G)' (supra) instead of a straightforward action for an account.

(19) Coming to the question of limitation. we are of the view that Art. 115 has no application to the case because the present suit cannot be regarded as one for compensation for the breach of a contract as provided for in that article. As observed by Mookerjee J. in — 'Md. Mozaharal Ahmad v. Md. Azimaddin Bhuinya', AIR 1923 Cal 507 at pp. 511, 512 (X):

> "The term 'compensation' etymologically suggests the image of balancing one thing against another, its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent."

(20) What the plaintiff is claiming in this suit is the commission to which he would be entitled on an account being taken not compensation in lieu of what he was entitled to under the contract. As observed by Reilly J. in — 'Annu Avathanigal v. Somasundara Avathanigal', AIR 1931 Mad 185 (2) at p. 188 (Y), a suit for an account is not a suit for compensation for breach of contract. So Art. 115 has no application to this case.

(21) While there is a specific article for a suit by a principal against his agent, there is no such article for the converse case. But it has been ruled that a suit for accounts not covered by any specific article falls under Art. 120: — 'Cursetjee Pestonjee v. Dadabhai Eduljee', 19 Mad 425 (Z) and — 'Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj', 19 All 244 (Z1). If the case is governed by Art. 120, as we hold it is, the suit cannot be said to have been barred by time. The learned appellate Judge considered the claim for Rs. 178 as distinct and separate claim. Even on that footing we agree with the learned appellate Judge that the claim was not barred by time because of an acknowledgment of liability by the defendants within the period of limitation. The acknowledgment is to be found in the letter dated 9-10-1937 (Exhibit P-7). This letter is in answer to the requests made by the plaintiff for the payment of what was due to him (Exhibits P-3 and P-6). The defendant replied as under:

> "You should kindly send your claim to the Karyalaya immediately, so that it may be examined and the amount may be sent."

The reply in our view means that the defendants admitted their liability to the plaintiff and were willing to pay the amount on examining the claim. Reference may be made to the decision in — 'Skeet v. Lindsay', (1877) 36 LT 98 (Z2). There the debtor said:

> "If you send me the particulars of your account, I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim."

It was held that there was a clear and absolute acknowledgment sufficient to take the case out of the statute of limitation. We are therefore of the view that the suit was not barred by time.

(22) The question of interest remains. There is no warrant for the proposition contended for by the appellants that in a suit for accounts interest prior to the ascertainment of the account cannot be given. See — 'Eknath v. Godhaji', F. A. No. 10 of 1950, D/- 18-9-1953 (Nag) (Z3). Two instances may be cited where in a suit for accounts interest prior to the suit was allowed: — 'Miller v. Barlow', 14 Moo Ind App. 209 (PC) (Z4) and — 'Mutia Chetti v. Sobramaniem Chetti', 18 Cal 616 (PC) (Z5).

(23) It has been held that an agent is liable to pay interest on failure to pay the money over at the request of the principal. See — 'Barclay v. Harris and Cross', (1915) 85 LJKB 115 (Z6). In a similar case by a manager who sued for arrears of wages due to him, the amount of which was to be ascertained by taking a percentage of the profits appearing from the books which were to be kept by the defendant, the Court of Equity made the defendant liable to interest from the date of the demand. See — 'Rishton v. Grissell', (1870) 10 Eq 393 (Z7).

There was no excuse for the appellants, being in possession of the accounts, not to have struck the account when the demand was made. We are accordingly of the view that the award of interest from the date of demand till the institution of the suit is proper and is maintained. But the award of interest thereafter, 'pendente lite' and subsequent to the decree till realization, is a matter of discretion for the Court under S. 34, Civil P. C. In our view, the proper stage in this case for the exercise of that discretion is while passing the final decree. The direction regarding interest in the decree of the Court below shall be suitably modified in conformity with this judgment.

(24) But for this modification, the appeal fails and the decree of the Court below is affirmed. The appellants shall bear the costs of the respondent.

B/D.R.R. Order accordingly.

A.I.R. 1954 NAGPUR 305 (Vol. 41, C.N. 110)

SINHA C. J. AND BHUTT J. (3-11-1953)

Mehromal and another, Petitioners v. T. N. Behel, I. A. S. Deputy Commissioner and others, Respondents.

Misc. Petn. No. 163 of 1953, against order of Deputy Commissioner Bilaspur, D/- 26-12-1952.

(a) Houses and Rents—C. P. and Berar Letting of Houses and Rent Control Order (1949), Cls. 12A, 13(3) (iii), 2(5), 24A and 28 — Premises sub-let by tenant without permission of landlord — Tenant vacating premises — Rent Controller can allot premises to other persons and take action to remove sub-tenant.

The term 'sub-tenant' used in definition of tenant in Cl. 2(5) means a person who has taken the sub-tenancy with the written permission of the landlord. (Para 5)

The effect of the sub-letting of a house without the written permission of the landlord is that it is invalid for all purposes under the Rent Control Order, 1949. Clause 13(3) (iii) in this connection, gives power to the landlord to evict the tenant subject to his obtaining the permission of the Rent Controller. This does not mean that unless the original tenancy itself is determined, the occupation of the premises by the sub-tenants without lawful authority has to be recognised by the Rent Control Authorities. (Para 5)

If a tenant leaves the premises without placing the landlord in possession thereof, that may entitle the landlord to claim rents or profits from him if he proposes to exercise his rights under the lease, but in a case where he acquiesces in the act of the tenant even though he has not been placed in physical possession of the tenement, it cannot be said that the tenancy is still subsisting. In such a case the house becomes vacant within the meaning of Cls. 24 and 24-A, when the tenant leaves the premises. (Para 6)

The fact that the petitioners, to whom the tenant had leased the premises, subsequent to the passing of the Rent Control Order, without the permission of the landlord, are in possession of the premises does not debar him from exercising his powers under Cl. 23 as their occupation is not lawful. He is entitled to make the allotment and has also the power to use such force or cause such force to be used as is necessary to place the allottee in possession. (Para 7)

(b) T. P. Act (1882), S. 108 (q) — Subject to contract to contrary.

Provisions of S. 108 (q) regarding physical delivery of possession to landlord upon termination of tenancy is subject to contract to contrary, between tenant and landlord. (Para 6)

Anno: T. P. Act, S. 108 (q) N. 1.

CASE REFERRED: Para

(A) (V19) AIR 1932 Oudh 79: 7 Luck 425 6

B. R. Mandlekar, for Applicant; S. P. Kotwal and M. W. Puranik, (for No. 2) and N. S. Nandedkar (for No. 3), for Respondents.

ORDER: This petition under Art. 226 of the Constitution is directed against the order dated 27-12-1952 by which the Deputy Commissioner, Bilaspur, allotted the premises in question to respondent No. 2 Gokuldas.

(2) Respondent No. 3 is the landlord of the house which was let out to one Bhagwandas who is a Government servant. He left the house some time in the beginning of 1952 when respondent No. 2 Gokuldas made an application to the Rent Controller for allotment of the premises. The Rent Controller by an order dated 4-6-1952 directed the proceedings to be filed because on inspecting the spot he found the house to be occupied by the petitioners and some others.

Thereafter on 27-12-1952 the Deputy Commissioner allotted the house to respondent No. 2 and subsequently, on 23-5-1953, he dismissed the application for review which was made by the petitioners. The Deputy Commissioner also sent a notice dated 27-5-1953 directing the petitioners to hand over possession of the house to respondent No. 2 failing which, it was stated, they would be evicted with the help of the police force.

(3) The application for review of the order of allotment was made by the petitioners on the ground that they were occupying the premises as sub-tenants having taken them on rent from Bhagwandas at a time anterior to the passing of the Rent Control Order, 1949. It was urged that under the law, as it then stood, there was no prohibition to the creation of a sub-tenancy without the written permission of the landlord as is the law now under Cl. 12-A of the Rent Control Order, 1949.

The petitioners accordingly contended that since they were lawfully in possession of the premises since before the passing of the Rent Control Order, 1949, there could be no order for allotment under Chapter III of the Order. The Deputy Commissioner found on enquiry that the petitioners came into possession of the premises some time in April 1950 and that as they did so without the written permission of the landlord, their occupation of the premises was illegal and they were liable to be evicted under the Rent Control Order.

In this view he held that the order of allotment was valid and dismissed the application for review.

(4) It is contended before us that even though the sub-tenancy created in favour of the petitioners by Bhagwandas be illegal under Cl. 12-A of the Rent Control Order, still they cannot be evicted because the landlord failed to take action under Cl. 13 (3) (iii) to terminate the tenancy, and unless the tenancy was lawfully determined under this clause, the Deputy Commissioner could not allot the premises either under Cl. 24 or Cl. 24-A of the Order.

It is also contended that the term 'vacant', used in these clauses, means that the house must be physically available for occupation, and in a case where the house is occupied by persons who may even be trespassers, the Deputy Commissioner cannot proceed to let the premises to a tenant.

(5) The effect of the sub-letting of a house without the written permission of the landlord is that it is invalid for all purposes under the Rent Control Order, 1949. Clause 13 (3) (iii), in this connection, gives power to the landlord to evict the tenant subject to his obtaining the permission of the Rent Controller. This does not mean that unless the original tenancy itself is determined, the occupation of the premises by the sub-tenants without lawful authority has to be recognised by the Rent Control Authorities.

As regards the definition of 'tenant' in Cl. 2(5) it may be observed that the term 'sub-tenant' used therein means a person who has taken the sub-tenancy with the written permission of the landlord. It cannot, therefore, be contended that

as the petitioners had entered into the premises in pursuance of a lease from the tenant, they should be deemed to be tenants within the meaning of the Rent Control Order, even if their occupation was unlawful.

(6) This being the case, the question whether the house became vacant within the meaning of Cl. 24 or Cl. 24-A has to be determined only with reference to the tenant or the sub-tenant who occupied the premises under lawful authority.

It was, however, urged that because the tenant Bhagwandas has not delivered possession of the premises to the landlord his tenancy was not determined or relinquished under law, and, therefore, the premises in question cannot be deemed to have become vacant within the meaning of the Rent Control Order. In this connection, our attention was invited to — 'Amar Nath Singh v. Har Prasad Singh', AIR 1932 Oudh 79 (A) and S. 108 (q) of the Transfer of Property Act, 1882.

This question arises only between landlord and tenant and is subject to a contract to the contrary. If a tenant leaves the premises without placing the landlord in possession thereof, that may entitle the landlord to claim rents or profits from him if he proposes to exercise his rights under the lease, but in a case where he acquiesces in the act of the tenant even though he has not been placed in physical possession of the tenement, it cannot be said that the tenancy is still subsisting.

In this particular case, the landlord obviously acquiesced in what Bhagwandas had done. Therefore, we are not inclined to accept the contention that the house did not become vacant within the meaning of Cls. 24 and 24A of the Rent Control Order after Bhagwandas left the premises.

(7) Under Cl. 28 of the Rent Control Order, the Deputy Commissioner is entitled to take such steps or cause them to be taken as may, in his opinion, be reasonably necessary for the purpose of securing compliance of his order. The fact that the petitioners were in possession of the premises did not, therefore, debar him from exercising his powers under Cl. 28 as their occupation was not lawful. Consequently he was entitled to make the allotment and has also the power to use such force or cause such force to be used as was necessary to place the tenant in possession.

(8) In the above view, the petition is dismissed with costs. Counsel's fee will, however, be given only to respondent No. 2 Gokuldas, which is fixed at Rs. 50/-, and may be paid out of the security amount in deposit. The balance of the security amount be returned to the petitioners.

R.G.D. Petition dismissed.

A.I.R. 1954 NAGPUR 306 (Vol. 41, C.N. 111)

HIDAYATULLAH AND

R. KAUSHALENDRA RAO JJ. (31-12-1953)

Haji Habib Haji Pir Mohamad, Plaintiff-Appellant v. Bhikamchand Jankilal shop and others, Defendants-Respondents.

Misc. First Appeal No. 146 of 1950, from order, Addl. Dist. J., Khandwa, D/- 29-7-1950.

(a) Arbitration Act (1940), Ss. 13, 16, 21 — "Any matter in difference" — Matter left undecided.

The parties had by their application agreed to refer "all the matters in dispute" to the arbitrator. The Court in making the reference felt that in view of the admission of the defendants, arbitration was needed only about the difference between the claim and the sum admitted. The Court accordingly ordered that this matter in difference between the parties should be referred to the arbitrator:

Held that though the parties desired that all the matters in dispute in the suit should be decided by the arbitrator including the plea about the legality of the contract of agency, the Court understood the parties to mean that the decision of the arbitrator was required only about the difference between the sum claimed by the plaintiff and the sum admitted by the defendants. The first award did not, therefore, decide the entire dispute. It is true that where though the dispute is on many points, the decision of the arbitrator is given on the whole dispute the arbitrator need not give his decision point by point. Where however the defendants raised a specific issue about the legality of the contract of agency between the parties that issue was one of the matters in dispute and the parties desired that it should also be referred to the arbitrator but the Judge, however, misunderstood the position and did not refer it to him, the power to refer that portion of the dispute remained so long as the parties intended that it be so referred.

The parties agreed once again to refer it to the arbitrator and the action of the Court in acceding to their request could not be said to be wrong. Thus, apart from S. 16(1), the reference to the arbitrator of the issues on which there was no decision either expressly or by implication was not improper. If the Court lacked the power there was consensual jurisdiction in view of the agreement of the parties. The remittance of the award for a second consideration was with jurisdiction. It also follows that the second award was not a nullity. (Paras 21, 23, 24)

Anno: Arbitration Act, S. 13 N. 1; S. 16 N. 2; S. 21 N. 15; S. 23 N. 3.

(b) Arbitration Act (1940), Ss. 16, 30 — Objection to legality of award apparent on its face.

A Court can interfere if there is some illegality in the award appearing on its face. A distinction is made between a question of law specifically referred to the arbitrator for his decision and a question of law which is not specifically referred but is material in the decision of matters which have been referred to him. In the former case the Court cannot interfere. On the other hand, where a question of law has not specifically been referred to the arbitrator but is material in the decision of matters which have been referred to him, and he makes a mistake in law apparent on the face of the award, the award can be set aside.

The Court had already framed the issues in the case and issues No. 10 (a) and (b) were specific issues of law. The parties intended that the whole dispute including the issues of law be referred to the arbitrator. The arbitrator did not decide the dispute according to the issues to begin with and gave his award on the difference between the parties as set out in the order of reference, but when that award was before the Court, the omission to decide the tenth issue 'inter alia' was seen and the parties agreed once again to refer that question to the arbitrator:

Held, that since the two awards must be read together, it could not be said that the

specific question of law was not referred by the parties or that they did not agree to abide by the decision of the arbitrator. The parties chose a domestic tribunal and agreed to abide by its decision not only on fact but also on law and the Court could not set aside or remit the award even if the Courts were to reach a conclusion in law different from that reached by the arbitrator:

Held further that the error in law, if any, involved in the arbitrator's award was not apparent on the face of the award. Case law discussed. (Paras 28, 31, 32, 33, 35 and 56)

Anno: Arbitration Act, S. 16 N. 5; S. 30 N. 9.

(c) Contract Act (1872), Ss. 23, 213 — Illegal contracts — Duty of agent towards principal — Costs of appeal — (Civil P. C. (1908), S. 35, O. 41, R. 35).

Per Hidayatullah, J. (Obiter): The contract Act makes illegal contracts unenforceable. The rule is bottomed on the maxims 'ex turpi causa non oritur actio' and 'in pari delicto potior est conditio dependentis'. Though the distinction between 'mala in se' and 'mala prohibita' has long ago disappeared, the law does recognize certain exceptions to the rule contained in the two maxims. If an agent receives money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment: Case law discussed. (1944) 2 All ER 579, Foll. (Paras 36, 39, 51, 55)

Per Kaushalendra Rao J. (Contra): In all cases of illegality, if the question were one of merely doing justice as between the parties to the action no Court would permit the defendant to dishonestly enrich himself by recourse to a plea of illegality. But the Court has over and above the duty of doing justice between the parties to the action the duty of enforcing the law by not countenancing anything forbidden by law or permitting anything which would defeat the provisions of any law. That paramount duty the Court has to perform irrespective of the question whether it results in the dishonest enrichment of one of the parties or not. Indeed the duty of the Court to decline assistance to a party, implicated in illegality, if the illegality of the transaction comes to the notice of the Court, is not dependent on a plea being raised by the defendant. The Court acts 'suo motu' for reasons unconnected with the parties to the action. The Court cannot permit a principal to call his agent to account in respect of dealings into which the former could not in law enter through the agency of the latter. The Court cannot subscribe to a doctrine which makes it imperative on the Court to enforce the claim of a principal based on a public wrong and encourage the defeat of a provision made in the public interest. Case law discussed. (1944) 2 All ER 579, Distinguished. (Paras 74, 75, 84)

Per Hidayatullah J.: Though in '(1940) 2 KB 890, Harry Parker's case' the Court of Appeal did observe that there should be no order about costs, to apply the decision in this way would leave no exception or 'supposed exception' to the rule of 'turpis causa' which is not the law. In meeting an appeal the respondent-agent did not rely upon an illegality to which he was a party. The costs of this appeal had to be borne by the appellant. (Para 62)

Per Kaushalendra Rao J.: The respondent, who succeeded on a defence founded on S. 23, Contract Act, was entitled to his costs in the appeal. In the circumstances there was no justification for depriving the respondent of his costs in the appeal. (Para 87)

Anno: Contract Act, S. 23 N. 32, 33; S. 213 N. 1; Civil P. C., S. 35 N. 5, 7, O. 41, R. 35 N. 7, 9.

(d) Arbitration Act (1940), S. 2(a) — Illegal transaction.

(Obiter): Per Kaushalendra Rao J.: A dispute arising from and founded on an illegal transaction cannot be referred to arbitration. (Para 85)

Anno: Arbitration Act, S. 2(a) N. 9.

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T. L. Sheode, for Appellant; D. T. Mangalmurti, H. L. Khaskalam, P. S. Pultambkar and R. M. Hajarnavis, for Respondents.

HIDAYATULLAH J.:

This appeal is by the plaintiff who is challenging before us the validity of an award given by a sole arbitrator and the judgment of the dismissal of the suit based upon that award. The facts, according to the plaintiff, were as follows.

(2) The plaintiff entered into an agreement with the defendants who deal in foodgrains and act as common agents as well as 'adatiyas' and commission agents for the purchase and sale of certain foodgrains. The plaintiff carries on his business at Akola, while the defendants, who style themselves as "Bhikamchand Jankilal", carry on their business at Khandwa. In or about October 1946 the plaintiff purchased 1250 bags of 'urid' through the defendants. These bags were lying with the defendants on or about 21-1-1947 at Harsud and Bir in the Khandwa district. These were removed to Khandwa at the instance of the plaintiff and later the balance in the hands of the defendants amounted to 850 bags. The defendants were to store these bags for the plaintiff charging him rent, fire insurance and other subsidiary charges as common agents of the plaintiff. These bags were held by the defendants at the order of the plaintiff and were to be disposed of as and when the plaintiff ordered them to do so.

(3) The defendants wrote to the plaintiff in February 1947 that the goods had been received from Harsud and were being held in the godowns of the defendants at Khandwa for and on behalf of the plaintiff, but that if the defendants were required to deliver the goods to Government under the procurement scheme, they would deliver the bags to Government at the procurement price. The plaintiff then sent a telegram to the defendants on 25-2-1947 asking them not to deliver the stock to Government without his permission. The defendants replied that they were holding the stock for the plaintiff but that they would hand over the commodity to Government if demanded. They also asked the plaintiff to take charge of the above bags within two days of the receipt of the letter. The plaintiff thereupon made arrangements to remove the goods either to Akola or to hold them at another suitable place until it was found necessary to remove them.

(4) The defendants, however, informed the plaintiff that the bags were attached by the Deputy Commissioner, Khandwa. The plaintiff believed this and allowed the goods to remain with the defendants until the freezing order of the Government was lifted. The defendants kept him under this impression for a long time. Ultimately on or about 14-11-1947 the plaintiff's Munim ordered the defendants to send the goods by railway to Allepy in Madras Presidency on the plaintiff's account and to send the railway receipt to the plaintiff at Akola. Though this order was received by the defendants and though the export to places outside the province was open, the defendants put off the plaintiff with a false and evasive reply alleging that there were no goods with them as the stock was already sold and the price adjusted.

(5) I need not go into the further details of these pleadings, which will be noticed later, because the sum total of the plaintiff's claim was that the 'urid' which had been left with the defendants was valued at Rs. 17/- per maund together with -/12/- per bag. According to the plaintiff, the price of this 'urid' was — Rs. 40,366/8/- and the plaintiff was entitled to receive this amount from the defendants less charges for godown rent, insurance etc. The plaintiff claimed, therefore, delivery of 850 bags of 'urid' belonging to him and alternatively Rs. 40,366/8/- by way of damages or price and claimed interest at 6 per cent per annum on the above amount from 1-12-1947.

(6) The defendants in reply admitted that they had on hand 850 bags of the plaintiff in their godowns. They, however, alleged that the Government under the procurement scheme froze 390 bags of 'urid' on 1-2-1947 at Harsud and 64 bags at Khandwa on 2-2-1947. They stated that the plaintiff was entitled for 454 bags the price at the rate at which Government had procured the 'urid', namely, Rs. 9/7/- and Rs. 9/8/- per maund. They alleged that 390 bags at Harsud were procured between 22-3-1947 and 13-4-1947 and the 64 bags at Khandwa on 8-7-1947. On 17-8-1947 the defendants did not possess any bags at Harsud either belonging to the plaintiff or to anybody else. The defendants filed a schedule showing the manner in which 1250 bags purchased by the plaintiff were dealt with. The defendants admitted that after the control was removed in November 1947, the plaintiff ordered the defendants to send the goods to Alleppy, but the defendants replied that they did not hold any goods on account of the plaintiff.

The defendants averred that they had informed the Munim of the plaintiff about the procurement of 'urid' by the district authorities and also that a part of it had already been procured by Government at the rate of Rs. 9/7/- to Rs. 9/8/- per maund and the balance was also to be procured at the same rate. They stated that they had made it clear to the plaintiff that the delivery of the balance stock of 'urid' was beyond their control and that the plaintiff realising that there was no prospect of the 'urid' being released, asked the defendants to account for all the stock of the plaintiff at the rate at which a part of the 'urid' had been procured by Government. Thereupon the parties settled the whole account and after calculating the price at Rs. 9/7/- for 490 and at Rs. 9/8/- for 360 bags, the plaintiff was found entitled to recover from the defendants a sum of Rs. 19,151/15/3 after deducting all legitimate expenses. Accordingly, a Bijak was prepared and handed over to the Munim of the plaintiff on 17-8-1947 and the matter was finally settled and adjusted.

(7) The defendants then entered into a denial of some of the allegations made by the plaintiff, into which I need not go, and in paragraph 10 of the written statement they stated that the plaintiff's claim to the extent of Rs. 19,151/15/3 was admitted. They also stated that the defendants were not liable to pay any interest or any costs as they were always ready and willing to pay this amount to the plaintiff and averred that the amount remained unpaid through the fault of the plaintiff.

(8) The defendants, however, by way of additional pleas, pleaded as follows:

"11. The alleged contract between the parties is forbidden by law, i. e., by Foodgrains Control Order read with Essential Supplies (Temporary Powers) Act as the plaintiff does not hold a licence for dealing in foodgrains in the Nimar district where it was made and where it was to be performed.

"12. The plaintiff's claim as laid is denied in toto together with all other adverse allegations not expressly admitted herein."

(9) In answer to the last plea, the plaintiff by way of refutation stated as follows:

"4(b). No licence in this district is necessary for the plaintiff to enter into the transaction in question. The plaintiff, however, holds a licence in Akola and Amraoti districts and this is suffi-

cient to enable the plaintiff to enter into the transaction in question."

(10) The trial Court on these pleadings framed twelve issues. Since the award first rendered by the arbitrator was remitted to him for reconsideration because he had not decided some of these issues, it is convenient to quote those issues 'in extenso' here. They are:

"1(a) Is Haji Umar plaintiff's agent and had he authority to sign the plaint on behalf of the plaintiff?

1(b) Was the plaint signed by Haji Umar under circumstances mentioned by the plaintiff in the plaint?

1(c) Is the plaint properly signed?

X X X X X

6(a) Did the plaintiff's agent agree to accept from the defendants the price of 490 bags at the rate of Rs. 9/7/- per maund and of 360 bags at the rate of Rs. 9/8/- per maund?

6(b) Was Rs. 19,151/15/3 found due from defendants after setting off the amount due to them and did plaintiff's agent agree to accept this amount from the defendants as the full price of plaintiff's udid and gunny bags?

X X X X X
X X X X X

10(a) Did the plaintiff hold a licence for dealing in Udid in the Nimar district?

10(b) How does the finding on issue No. 10 (a) affect the rights of the parties?

X X X X X

(11) During the trial of this suit an application was made by the parties under Section 21, Indian Arbitration Act, on 18-8-1949. The application is brief and may well be quoted in extenso:

"1. That the parties to the suit have agreed to refer all the matters in dispute in this suit to the arbitration of Shri Lalsingh Kampta Prashad Chaturvedi, Khandwa.

2. That the parties further agree that they will abide by the decision of the aforesaid arbitrator through the intervention of the Court. He should take evidence which the parties adduce and hear them and decide the matter in dispute.

They therefore pray that the Court be pleased to appoint the said Shri Lalsingh Kampta Prashad Chaturvedi of Khandwa as the sole arbitrator in this case and all the matters in difference in this suit be referred to him."

This application was signed by the plaintiff's agent and by Punamchand Gupta for the defendants. It was also signed by two counsel for the plaintiff and two counsel for the defendants.

(12) On this application the Court passed an order the same day referring the matter to the arbitration of Shri Lalsingh Kampta Prashad Chaturvedi. Some portion of this order of submission by the Court is interpreted differently by the parties, and since the order itself is brief, I quote the relevant portions of it:

"1. X X X X X
X X X X X

2. It is needless for me to set out in this order the full pleadings made by the parties. The defendants admitted the claim to the extent of Rs. 19,151/15/3 and denied the claim for the balance. The plaintiff's claim for the balance is the matter in difference between the parties.

3. The parties have applied for reference of the matter in difference between them to arbitration. They want Shri Lalsingh son of Kamtaprasad Chaturvedi to be appointed a sole arbitrator. Shri Lalsingh appeared in this Court and expressed his willingness to act as a sole arbitrator in this case. I accept the application made by the parties and appoint Shri Lalsingh as the sole arbitrator to decide "the matter in difference between the parties" which is hereby referred to him for decision. The arbitrator shall make his award within 1½ months from today and submit the award and all other papers to this Court on or before 4-10-1949."

The learned Judge also directed the parties to supply to the arbitrator copies of their pleadings and a copy of the issues framed by him in the case and also ordered that the documents filed by the parties in the case be handed over to the arbitrator.

(13) The arbitrator delivered his award on 4-10-1949. By that award the arbitrator held that the plaintiff was entitled to get from the defendants Rs. 21,308/3/3. The arbitrator also awarded interest at six per cent from the date of the making of the demand by the plaintiff. This award was sent to the Court. On 3-11-1949 the defendants objected to the award on the ground that the arbitrator had not given his award on issues 1 (a), (b), (c), 6 (a), (b) and 10 (a), (b). They also alleged that the arbitrator had awarded interest from 5-3-1947, whereas the plaintiff himself had claimed interest from 1-12-1947. They also objected to the grant of interest at 6 per cent per annum because the maximum rate of interest allowable was only 4 per cent per annum.

(14) It is not clear whether the plaintiff objected to any portion of the award, but the further proceedings in the Court appear from an order-sheet dated 23-12-1949. It reads:

"Plaintiff by Shri Subbarao Advocate. Defendants by Shri Bedekar pleader. Plaintiff's counsel agrees that the award must be remitted to the arbitrator for reconsideration. I find that the arbitrator has not taken into consideration the issues 1 a, b, c, 6 a, b and 10 a and b. He has left undetermined the above issues. The award will be remitted to him for reconsideration and in the light of his findings on the above issues.

It also appears that he has given an award which is partly beyond the scope of the reference in that he has awarded interest from 5-3-1947, though the plaintiff himself claimed it from 1-12-1947."

The Court then remitted the award to the arbitrator for reconsideration and for a fresh award to be submitted within 1½ months.

(15) The arbitrator gave his second award. He made it clear that he was a layman and that the parties should not have gone to arbitration if they wanted decisions on intricate points of law. He stated that the first award was based upon the ordinary rules of business followed in such transactions. He, however, stated that after hearing counsel for both sides and after considering the rulings cited by the counsel for the defendants and taking into account that the plaintiff's counsel had not cited any, he came to the conclusion that the plaintiff 'had made an illegal 'sauda'. He, therefore, dismissed the plaintiff's suit but without costs as the defendants had co-operated in the illegal transaction.

(16) When this award came before the Court, objection was taken to it on behalf of the plaintiff. The plaintiff averred that the decision of the arbitrator that the contract was void or hit by Section 23, Contract Act, was illegal and per-

verse. He alleged that the defendants were merely the agents of the plaintiff and were holding the goods as trustees for the plaintiff and the matter did not come within the Foodgrains Control Order. He, therefore, claimed that the second award should be quashed and the defendants having admitted the claim of the plaintiff to the extent of Rs. 19,151/15/3 a decree for that sum should be passed.

(17) The defendants filed a detailed reply to this objection. Later the plaintiff filed a petition for the amendment of his objection. He contended that the whole dispute involved in the suit was referred to arbitration by both the parties and the arbitrator submitted his award on 4-10-1949 by which he allowed the plaintiff's claim to the extent of Rs. 21,308/3/3; that the Court remitted the award for reconsideration but the arbitrator could not order the dismissal of the suit, including the dismissal of the claim admitted by the defendants. He also submitted that the order of remittance was illegal and without jurisdiction and consequently all the subsequent proceedings leading up to the second award were null and void. The plaintiff, therefore, claimed a decree on the basis of the first award because the second award was a nullity. He stated that the above was a pure question of law apparent on the face of the record and going to the root of the case and that the amendment should therefore be allowed.

(18) The trial Judge considered all the submissions of the plaintiff and in the end gave his decision that the second award was not a nullity and could not be questioned. The learned Judge, acting on the second award, ordered the dismissal of the plaintiff's suit but without costs to the defendants.

(19) The decision of the learned Additional District Judge, as also the second award, are questioned in this appeal. Broadly stated, the points that arise are as follows:

I. What was the difference or the dispute which the parties desired the Court to refer to the arbitrator for decision?

II. What was the dispute which the Court submitted to the arbitrator for his decision?

III. Did the first award dispose of the entire dispute?

IV. Was the remittance of the award to the arbitrator for reconsideration proper and with jurisdiction in the circumstances of this case?

V. Is the second award a nullity because the first award could not be remitted for reconsideration? and

VI. If the second award is not a nullity, can it be questioned on the ground of an error in law apparent on the face of the award because the arbitrator held the contract to be illegal and therefore held the claim of the plaintiff to be unenforceable?

(20) The first three points may be dealt with together. The parties had by their application agreed to refer "all the matters in dispute" to the arbitrator. The learned Judge in making the reference felt that in view of the admission of the defendants, arbitration was needed only about the difference between the claim and the sum admitted. According to the learned Judge, the plaintiff's claim for the balance was the matter in difference between the parties and that the arbitrator had to decide. He accordingly ordered that this matter in difference between the parties should be referred to the arbitrator. Parties did not too critically examine the order and though copies of the issues and the pleadings were supplied to the arbitrator, this was apparently done to enable the arbitrator to decide the matter in difference between the parties on the issues as were framed.

(21) It is thus abundantly clear that though the parties desired that all the matters in dispute in the suit should be decided by the arbitrator including the plea about the legality of the contract of agency, the Court understood the parties to mean that the decision of the arbitrator was required only about the difference between the sum claimed by the plaintiff and the sum admitted by the defendants. The first award did not, therefore, decide the entire dispute, and the arbitrator very correctly went by the order of reference and not by the application of the parties which perhaps was not before him.

(22) When the first award was received, the defendants pointed out the omission. The conduct of the plaintiff thereafter is significant. The plaintiff had agreed to refer all the matters in dispute in the suit to the arbitrator and consistently with that attitude, his counsel did not demur to the suggestion of the defendants that the award be remitted for reconsideration.

(23) The learned counsel for the appellant contends that the first award must be deemed to have decided the entire controversy inasmuch as the arbitrator was not required to give his decision seriatim on all the issues but to decide the dispute as a whole. This is true of those cases where though the dispute is on many points, the decision of the arbitrator is given on the whole dispute. The arbitrator need not then give his decision point by point. The present case is, however, different. The defendants raised a specific issue about the legality of the contract of agency between the parties. That issue was one of the matters in dispute and the parties desired that it should also be referred to the arbitrator. The Judge, however, misunderstood the position and did not refer it to him. The power to refer that portion of the dispute remained so long as the parties intended that it be so referred. The parties agreed once again to refer it to the arbitrator and the action of the Court in acceding to their request cannot be said to be wrong.

(24) Thus, apart from Section 16 (1), Arbitration Act, the reference to the arbitrator of the issues on which there was no decision either expressly or by implication was not improper. If the Court lacked the power there was consensual jurisdiction in view of the agreement of the parties. I am, therefore, of opinion that the remittance of the award for a second consideration was with jurisdiction. It also follows that the second award is not a nullity. No doubt, the first award decreed a sum of Rs. 21,308/3/3, while the second award ordered the dismissal of the suit. But the pleas of the defendants make it clear that while the defendants admitted liability to the extent of Rs. 19,151/15/3 they avoided it on the ground that the contract of agency was illegal. To that extent there was confession and avoidance. The argument of the appellant, if accepted, would mean that the defendants raised no issue about Rs. 19,151/15/3 and accepted unconditionally their liability to pay that sum. This is not true as the facts stand. The defendants admitted the liability but subject to the legality of the transaction as a whole, and the tenth issue clearly sets out this controversy. In my judgment, the fifth point noted by me must be decided against the appellant.

(25) This brings me to the consideration of the last point. This is stated by me as follows:

"If the second award is not a nullity, can it be questioned on the ground of an error in law apparent on the face of the award because the arbitrator held the contract to be illegal and therefore held the claim of the plaintiff to be unenforceable?"

(26) In dealing with this question we have first to determine the powers of the Court to set aside the award or to refer it for reconsideration by the arbitrator. The powers of the Court material to this case are set out in Sections 16 and 30 of the Act. Under the former section the Court may remit the award or any matter referred to arbitration for reconsideration where 'inter alia' an objection to the legality of the award is apparent upon the face of it. Under the latter section the award can be set aside on specific grounds named therein or if the award is otherwise invalid. The appellant relies on both these sections and argues that the second award is invalid because the contract has been wrongly held to be illegal and to affect the admitted liability of the defendants. He contends that the award should be set aside and a decree should be passed for the admitted claim or at least the award should be remitted for reconsideration by the arbitrator.

(27) There is no allegation of misconduct on the part of the arbitrator nor could any such contention be raised inasmuch as the arbitrator acted with exemplary aloofness and propriety in this case. If there be any misconduct it can only be misconduct in law. For this purpose it will have to be first established that the award is invalid or that there is an objection to its legality apparent on its face. The arbitrator has with extreme candour and honesty stated that he has decided this knotty problem as best as he could taking into account such law as the parties placed before him. We cannot overlook the fact that in the first award the arbitrator was probably not aware of this contention and did not feel called upon to decide it. If the two awards are read together his decision merely comes to this: that he finds for the plaintiff in respect of a sum of Rs. 21,308/3/3 but does not decree this sum because he considers that the plaintiff "had made an illegal 'sauda". This fact has to be borne in mind because the decision of the arbitrator must be taken as a whole and not piecemeal.

(28) The law has been well-settled in England for centuries that a Court can interfere if there is some illegality in the award appearing on its face. The law was stated by Williams J. in — 'Hodginson v. Ferine', (1857) 3 CBNS 189 (A) as follows:

"The law has for many years been settled and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact .. .. The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award or some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

(29) Though the regret expressed by Williams J. was expressed by other learned Judges, this statement of the law has never been departed from. The observations of Williams J. were cited with approval by the Judicial Committee in — 'Champsey Bhara and Co. v. Jivraj Balloo Spinning & Weaving Co',. AIR 1923 PC 66 at p. 68 (B), see also — 'Attorney-General for Manitoba v. Kelly', 1922-1 AC 268 at p. 283 (C) and — 'Durga Prosad v. Sewkishendas', AIR 1949 PC 334 (D) and are the foundation of the rule in Section 16, sub-section (1), Cl. (c), Arbitration Act. Though the Act does not deny to the arbitrator the power to state a case for the opinion of the Court, no suggestion appears to have been made to the arbitrator to state a case to the Court. The arbitrator, therefore, gave his award that the contract of agency was illegal and that this disentitled the plaintiff to claim even the amount admitted by the defendants.

(30) If this is an error in law on the face of the award and if the decision is incidental to the making of the award then the Court is entitled to interfere. Now, an error in law on the face of the award was said by Lord Dunedin to mean:

"that you can find in the award or document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

(31) In English law a distinction is made between a question of law specifically referred to the arbitrator for his decision and a question of law which is not specifically referred but is material in the decision of matters which have been referred to him. In the former case the authorities are agreed that the Court cannot interfere. In the words of Channell J. in — 'In re King and Duveen', 1913-2 KB 32 at p. 36 (E):

".. .. ..that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

This view has been approved by the Judicial Committee and the House of Lords on more than one occasion.

(32) On the other hand, where a question of law has not specifically been referred to the arbitrator but is material in the decision of matters which have been referred to him, and he makes a mistake in law apparent on the face of the award, the award can be set aside: See — 'British Westing house Electric & Manufacturing Co., Ltd v. Underground Electric Railways Co. of London Ltd.', 1912 AC 673 (F); — 'Attorney-General for Manitoba v. Kelly', (C) (cit. sup.); — 'F. R. Absalom Ltd. v. Great Western (London) Garden Village Society, Ltd.', 1933 AC 592 (G) and others.

(33) This distinction is equally true of the Indian statute and their Lordships have on more than one occasion referred to the above cases with approval. Now the question is to which category does the present case belong? We must bear in mind that the Court had already framed the issues in the case and issues No. 10 (a) and (b) were specific issues of law. The parties intended that the whole dispute including the issues of law be referred to the arbitrator. It is true that the arbitrator did not decide the dispute according to the issues to begin with and gave his award on the difference between the parties as set out in the order of reference, but when that award was before the Court, the omission to decide the tenth issue 'inter alia' was seen and the parties agreed once again to refer that question to the arbitrator. Since the two awards must be read together, it cannot be said that the specific ques-

tion of law was not referred by the parties or that they did not agree to abide by the decision of the arbitrator.

(34) The observations of Lord Radcliffe in — 'AIR 1949 PC 334 at p. 337 (D)' apply to this case with considerable force. This is what was observed in that case:

"Their Lordships do not take the view that this award ought to be set aside or remitted as showing error of law on the face of it. In their view, the reference was of such a nature that the arbitrator must be treated as having been appointed by the parties to decide, amongst others, those specific questions of law which he is now said to have decided wrongly. What are the facts? Before any submission to arbitration had been agreed upon by the parties certain issues had been settled by Pancklridge J. in the High Court in the action that was then pending.

Of these issues two may be quoted:

(1)(o) Is the agreement dated 16-11-1916, relating to the alleged family settlement valid or admissible in evidence?

* * * *

(9) Is the plaintiff's claim or any portion thereof barred by limitation?'

After these issues had been settled, the parties agreed to refer to arbitration 'the outstanding matters in the suit'. It is indeed true that at the conclusion of the hearing before the arbitrator he did, in the presence of counsel for the respective parties, reframe the issues before him and that in so doing he did not include an issue as to the admissibility in evidence of the 1916 family settlement. It is not suggested that, except for this, the issues as framed by him differed in substance from those originally framed by Panckridge J.

It would need a fuller knowledge of the course of the arbitration proceedings than is available in these proceedings to know for certain why he did not at that time think it necessary to frame an issue as to the admissibility in evidence of either or both of the two 1916 documents. He may have been satisfied by that time that all the parties were agreed to regard them as admissible before him: or he may, not unreasonably, have supposed that having regard to the very special powers given to him by the terms of reference the admissibility of these documents was a question which he could decide for himself at his discretion.

However that may be, their Lordships are satisfied that the two points of law as to which it is said that the arbitrator's error vitiates the award were specifically referred to him to decide: and, if this is so, it would be contrary to well-established principles such as are laid down in — '1913-2 KB 32 (E)'; and — '1933 AC 592 (G)', for a Court of law to interfere with the award even if the Court itself would have taken a different view of either of the points of law had they been before it."

(35) These observations are conclusive of the matter. The parties chose a domestic tribunal and agreed to abide by its decision not only on fact but also on law and I cannot set aside or remit the award even if I were to reach a conclusion in law different from that reached by the arbitrator. The observations of the Lord Chancellor in — 'Kelantan Government v. Duff Development Co.', 1923 AC 395 at p. 409 (H) and of Denning L. J. in — 'David Taylor Ltd. v. Barnett', 1953-1 All ER 843 at p. 847 (I) do not apply because there was here no prohibition of law which the arbitrator was as much bound to respect as the Court but on the other hand the arbitrator had to decide whether there was an illegality on the facts of the case which prevented the plaintiff from maintaining his action. This case is the converse of those mentioned and the converse proposition cannot be supported by those authorities but falls within the rulings I have considered. In view of this, the appeal must fail.

(36) Before leaving the subject, I wish to say something on the question whether the decision of the arbitrator involved an error in law apparent on the face of the record. The Indian Contract Act makes illegal contracts unenforceable. The rule is bottomed on the maxims 'ex turpi causa non oritur actio' and 'in pari delicto potior est conditio dependentis'. Indeed, the learned Additional District Judge has applied these two maxims in holding that the decision of the arbitrator is correct.

(37) Under the Foodgrains Control Order then existing, no person could deal or store for sale specified foodgrains above certain quantities unless he was in possession of a licence to do so. The plaintiff did not possess a licence to store for sale or deal in 'tur dal' in the Nimar district. The breach of the Order was made penal and the plaintiff was exposed to certain penalties. His licence in the Akola district did not enable him to deal with foodgrains in the Nimar district: See — 'Provincial Government, C. P. & Berar v. Ganeshlal', AIR 1950 Nag 53 (J & K). The defendant was also liable as an abettor if certain facts existed. The question before the arbitrator then was whether the plaintiff, in those circumstances, could recover the price obtained by the defendant from the sale of the foodgrains admittedly in its possession on behalf of the plaintiff. The arbitrator held that the plaintiff could not so recover.

(38) The learned District Judge also applied the two maxims and came to the conclusion that as the contract was illegal, the plaintiff could not recover anything in this suit and that the arbitrator was correct in dismissing the plaintiff's claim.

(39) Though the distinction between 'mala in se' and 'mala prohibita' has long ago disappeared, the law does recognize certain exceptions to the rule contained in the two maxims. To begin with, I cannot do better than use respectfully as introductory remarks the observations of Lord Wright, M. R., in — 'Berg v. Sadler & Moore', 1937-1 All ER 637 (L):

"This case in some respects is peculiar and in some respects it involves a novel application of the well known rule which is sometimes expressed in the maxim 'ex turpi causa non oritur actio'. This, though veiled in the dignity of learned language, is a statement of a principle, and a principle of great importance, but, like most maxims, it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities. Our business here is to apply these rules, either precisely, according to the decisions which have been given, or following those decisions very closely, and acting on the analogy of those decisions."

(40) Of the exceptions to which I referred, some were mentioned by Fry, L. J., in — 'Kearley v. Thomsom', (1890) 24 Q B D 742 at p. 745 (M). A more exhaustive list is to be found in Salmond and Winfield's Law of Contract at page 145 'et seq'. Unfortunately, a later edition of the book was not available to me. Among the exceptions Salmond

mentions one based on the right of 'restitutio in integrum'. The learned author observes as follows:

"DUTY OF AGENT OR TRUSTEE TO ACCOUNT: A fourth and last exception to the rule of 'turpis causa' is that in which there exists between the parties the relation of principal and agent or trustee and beneficiary. An agent is bound to account to his principal for all moneys or other property received by him in the course of his agency, and he will not be suffered to refuse to account on the plea that the transaction in which he was employed was illegal. Whether legal or illegal, he must return his principal's property and fulfil the duty of accounting to him. So a trustee holds on behalf of his beneficiaries whatever he received in his capacity as trustee, and he will not be permitted to keep it for himself on the plea of illegality in the transaction in which it was received. 'Sheppard v. Oxenford', (1855) 1 K & J 491 (N).

In such cases public policy requires that the rule of 'turpis causa' shall be excluded in favour of the more important and imperative rule that agents and trustees must faithfully perform the duties of their office. The position of a stakeholder illustrates such agency. In — 'Hastelow v. Jackson', (1828) 8 B & C 221 (O) A & B arranged an illegal boxing match between themselves and deposited money with C as stake-holder, to abide the event of the battle. A the loser claimed his own share of the stake from C, who nevertheless paid it to B, and was held liable to restore the amount to A. If there had been no protest on A's part before C's payment, he could have recovered nothing; nor, even if he had won, could he have claimed more than his own stake."

In another part of the book (page 162) the learned author has observed that the maxim 'ex turpi causa', etc., has no application to a nugatory contract but applies exclusively to those which are illegal.

(41) In dealing with this exception, Williston in his book on Contracts (revised edition), Volume VI, page 5069, paragraph 1785, observes as follows:

"As a general principle it is certainly true that no accounting or recovery of profits can be had by one party to an illegal transaction against another.....On the other hand, it is not infrequently said that misappropriation by an agent cannot be permitted though the agent with his principal's authority was engaged in an unlawful enterprise, thus distinguishing the case of an agent from that of a partner. The Circuit Court of Appeals has said in allowing recovery of money advanced by a foreign corporation doing business without complying with local statutory requirements. One cannot make a sheild of void contract to rob an associate, and such a corporation has been allowed to recover from its agents money collected by them.

Doubtless, if a contract is merely void or unenforceable for any other reason than for illegality this is true; and in many jurisdictions, a foreign corporation which fails to comply with the required formalities for obtaining a licence to do business is held to be subjected thereby to such penalties only as the statute prescribes."

(42) There is a considerable body of opinion on this point and in paragraphs 1771 to 1774 Williston gives an analysis of cases in which the illegality was held to render the transaction void as a whole and those cases in which the liability was enforceable, not only in the case of principal and agent but also principal and principal. In paragraph 1786 the learned author offers his criticism of the distinction made in the case of an agent thus:

"If recovery is to be allowed by either partner or principal in any case, it must be where the illegality is of so slight or venial a character that it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gain the benefit of an illegal transaction."

(43) In recent years, however, a change is perceptible. That change is noticed in Bowstead on Agency at pages 93 and 94. The learned author observes on the authority of — 'Harry Parker, Ltd v. Mason', 1940-2 KB 590 (P) as follows:

"The maxim 'ex turpi causa, non oritur actio' applies as between principal and agent; and where the principal has paid money to the agent in pursuance of an agreement between them that the agent shall apply it to an illegal purpose, the principal cannot recover the money, after the time agreed for performance by the agent has passed, even though the agent has converted the money to his own use."

In the All England Reports Series the editorial note on 'Harry Parker's case (P)' is as follows:

"Until the decision in this case it had not been expressly decided that the above principle applied to an illegal transaction as between a principal and his agent, but the judgments herein show that the rule 'ex turpi causa non oritur actio' applies equally to the case of a principal seeking to recover money paid to his agent in pursuance of an illegal contract as to that of a principal seeking to recover from any other principal in the same circumstances."

(44) The law was summarised by Pollock and Mulla in their Contract Act, 7th Edn., at p. 584. The learned authors observed as follows:

"If an agent receive money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money. 'Tenant v. Elliot', (1797) 1 B & P 3 (Q)".

(45) The distinction which is sought to be made between the case of an agent and other cases is not quite clearly stated in any Indian report, though — 'Palaniyappa Chettiar v. Chockalingam Chettiar', AIR 1921 Mad 334 (R) and — 'Bnola Nath v. Mul Chand', 25 All 639 (S) illustrate that exceptions to the general rule of 'ex turpi causa', etc., do exist. The case on which Bowstead has based his statement of the law involved a breach of the Street Betting Act, 1906 (6 Edw. 7 c. 43) which made it an offence for

"any person frequenting or loitering in streets or public places on behalf either of himself or any other person, for the purpose of book-making or betting or wagering or agreeing to bet or wager, or paying or receiving any settling bets".

All betting and wagering contracts are void, though not illegal, by virtue of S. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109) as amended by Gaming Act, 1892 (55 & 56 Vict. c. 9). As Chitty in his compilation has pointed out, the Parliament in England passed no less than 29 Acts to repress the growing evil of gambling and wagering, from the time of Henry VIII to the Street Betting Act, 1906.

(46) The intention of the Gaming Acts was to prevent persons from having recourse to Courts

of Law for the enforcement of their gambling contracts. As Chitty points out, this intention was largely nullified by the decision of the Court of Appeal in — 'Hyams v. Stuart King', (1908) 2 KB 696 (T) and — 'Bubb v. Yelverton', (1870) 9 Eq 471 (U). These cases, however, have now been overruled by the House of Lords in — 'Hill v. William Hill (Park Lane) Ltd.', 1949-2 All ER 452 (V), though of the seven Law Lords who made speeches on the occasion, Viscount Simon, Lord Greene, Lord Normand and Lord Mcdermott were in favour of overruling those two cases, while Viscount Jowitt, L. C., Lord Oaksey and Lord Radcliffe dissented.

(47) It would therefore appear that the law with regard to gaming and wagering rests on independent considerations. Special statutes have been framed to prevent any party from having a recourse to the Courts of Justice. Indeed, in throwing out such claims it has become customary to refer to all the statutes together as 'gaming laws'; see for example — 'Morgan v. Ashcroft', 1937-3 All ER 92 at p. 95 (W) (in the judgment of Sir Wilfrid Greene, M. R.). A perusal of the statutes in question would show that betting and wagering of any kind have been made illegal and void and Courts are prohibited from giving any assistance whatever in the matter. The observations in 'Harry Parker's case (P)' regarding principal and agent are very brief.

In the opinion of Lord Mackinnon, L. J., it is stated as follows:

> "Counsel for the appellant also suggested that this rule as to the effect of illegality applicable as to the parties to a contract tainted with illegality, did not apply when those parties happened to be principal and agent. I think there is no foundation whatever for the suggestion."

Luxmoore, L. J., basing himself upon the dictum of Lord Mansfield C. J. in — 'Holman v. Johnson', (1775) 1 Cowp 341 at p. 343 (X) observed as follows:

> "With regard to the second condition, I can see no difference in principle between the case of a principal seeking to recover money handed to an agent for an illegal purpose and that of one principal seeking to recover money paid by him to another principal in pursuance of an illegal contract. In neither case will the Court assist the parties, whether the claim be to obtain money paid for an unfulfilled or partly fulfilled illegal purpose, or by way of damages for breach of an illegal contract."

(48) Whether these observations were made because the plaintiff had pleaded a betting deal is not clear. The statement of law as made by Sir John Salmond was approved in numerous cases and some of the exceptions have been judicially recognized on the authority of what the learned author stated: See — 'Alexander v. Rayson', 1936-1 KB 169 (Y) and — 'Bigos v. Bousted', 1951-1 All ER 92 (Z) by Pritchard J.

(49) As against 'Harry Parker's Case (P)', there is yet another and a later case of the Court of Appeal, viz: — 'Bowmakers, Ltd. v. Barnet Instruments, Ltd.', 1944-2 All ER 579 (Z1). On facts that case is almost analogous to the present one and if the dictum of Lord Wright, M. R., quoted above is borne in mind, it furnishes a better analogy than 'Harry Parker's Case (P)'. The facts have been adequately summarised in the head-note in the All England Reports Series and it is convenient to quote it:

> "The appellants hired machine tools from the respondents under three written agreements. The tools were the property of one Smith, who sold them to the respondents in order that the appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the respondents. After making some only of the agreed payments, the appellants converted the tools to their own use by selling them. The respondents, thereupon, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion.
>
> For the appellants it was contended: (i) that the sale between Smith and the respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the appellants and the respondents being affected by the illegality arising from the original sale; (ii) that the respondents' claim, therefore, should not be entertained on the ground of public policy. The respondents, whilst not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of the conversion."

(50) By the Defence (General) Regulations, 1939, any breach of the order was made an offence. The orders themselves were made under the authority of Regulations 55 and 98. There can be no doubt that the plaintiff in dealing with a used machine tools without a licence was acting contrary to the order of the Ministry of Supply (S. R. & O. 1940, No. 1374) which provided that no person

> "....in the United Kingdom at any time after 17-8-1940, dispose of or agree or offer to dispose of any used machine tool, except under the authority of a licence granted to him by the Minister of Supply."

Groom-Johnson J., who tried the case, found that there was no illegality and that the illegality, if any, was committed by Smith who had sold the used machine tool to the plaintiffs in the first instance. This conclusion was rejected by the Court of Appeal. The Court of Appeal held that Smith committed an offence in selling the machine tool to the plaintiffs as he had no licence and that as the plaintiffs were also without a licence, they had also committed an offence. The defendants contended that as a consequence the plaintiffs could not claim either the tools or damages in respect of the goods converted. This contention was repelled.

(51) There is considerable similarity in the facts of the present case and those decided by the Court of Appeal. Instead of the Defence of India Rules, there were the Defence (General) Regulations; instead of the order of the Deputy Commissioner, Nimar, there was the order of the Minister of Supply; and in both cases there was no licence and any dealing with the goods was an offence. 'In the present case also, there is conversion as in the English case' because the defendant sold the goods (albeit illegally in its possession) without the authority of the owner and admitted that it had received the price. It further admitted its liability to pay the price received and pleaded that it had made an account and issued a Bijak to the plaintiff. It, however, set up the illegality of the transaction by which it came in possession of the foodgrains to avoid payment.

Thus there was here also no right in the defendant and but for the illegality, the claim to the sum received from Government could not be resisted. It is no doubt true that the plaintiff pleaded the facts of the transaction but he could have fallen back upon his prior ownership of the food-

grains which the defendant converted by selling without instructions from the owner.

(52) In the case before the Court of Appeal, counsel for the appellant invoked the rule laid down by Lord Mansfield in — 'Holman v. Johnson (X)' (cit. sup.) and claimed that the plaintiff was not entitled to succeed. The Court of Appeal observed as follows:

" 'Prima facie', a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority.

It would indeed be astonishing if (to take one instance) a person in the position of the defendant in — 'Pearce v. Brooks', (1866) 1 Ex. 213 (Z2), supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is in truth followed by the Courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated, and no technical meaning must be ascribed to the words 'founded on an illegal contract'; 'the form of the pleadings is by no means conclusive'."

(Underlined (here in ' ') by me).

(53) After citing the earlier case of — 'Scot v. Brown', 1892-2 QB 724 (Z3) and the dictum of Lindley, L. J., in that case, Du Parcq, L. J. proceeded to observe as follows:

"In our opinion, a man's right to possess his own chattel will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, 'even though it may appear either from the pleadings, or in the course of the trial', that the chattels in question came into the defendants' possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim

* * * * *

* * * *

The Latin Maxim which Mellor J. cited must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the circumstances are such that the Court will refuse to assist either party, the consequence must in fact follow that the party in possession will not be disturbed. As Lord Mansfield said in the case already cited, the defendant then obtains an advantage 'contrary to the real justice' and, so to say, 'by accident'.

It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt, there are others, but it is unnecessary, and would, we think, be unwise, to seek to name them all or to forecast the decisions which would be given a variety of circumstances which may hereafter arise. We are satisfied that no rule of law and no considerations of public policy compel the Court to dismiss the plaintiff's claim in the case before us, and to do so would be, in our opinion, a manifest injustice."

(Underlined (here in ' ') by me).

(54) It would thus appear that the plaintiff in the present case could have based his claim entirely upon his prior ownership of the goods and their conversion by the defendants. He could have also called in aid the admission on the part of the defendant that it had to return the price of the goods received from Government which had waived the illegality. If recovery could take place between principal and principal, more so between principal and agent.

(55) There are other cases which go to support this principle, some of which are noted by Marshall, C. J., in — 'Armstrong v. Toler', (1861) 11 Wheaton 258 (Z4). There can be no doubt that the parties were in 'pari delicto', inasmuch as they were both guilty of entering into an illegal contract. But the delict of the defendant is made greater by the further wrong of misappropriation of the plaintiff's money. Added to this is the fiduciary relationship between the parties. The observations of Salmond already quoted that

"in such cases public policy requires that the rule of 'turpis causa' shall be excluded in favour of the more important and imperative rule that agents and trustees must faithfully perform the duties of their office"

must be borne in mind.

(56) I have already held that even if there is an error of law in the award, the question involved was specifically referred for the decision of the arbitrator. I am bound to say also that the error in law, if any, involved in the arbitrator's award is not apparent on the face of the award, and should I have held that I was entitled to interfere, I might have done so.

(57) I am also aware that the case was before the arbitrator without the plaintiff seeking to base his case on prior possession, as was done in the 'Bowmaker's Case (Z1)'. The arbitrator was asked to decide the entire controversy in the light of the pleadings which the parties had made and it does not appear from the record of the proceedings before him that the plaintiff sought at any time is confine his case to one of prior ownership of the goods and the conversion by the agent. 'The policy of the law is undoubtedly against unjust enrichment, but no plea of unjust enrichment was advanced in the present case before the arbitrator. In — 'Boissevain v. Well', 1950-1 All ER 728 (Z5) Lord Simonds, dealing with a case in which the principle of unjust enrichment was invoked, observed as follows:

"To me, my Lords, it appears that such a procedure cannot be justified. Had an amendment been duly made and the issue properly raised, it would have been a very different matter. Then the respondent would have been in a position in her turn to amend her defence and plead to the new issue, and it is at least possible that her advisers would have found material on which they could rely to displace such new case as the appellant might make. I do not think I am going too far if I say that substantial injustice is likely to be done if such a departure is made from the ordinary course of practice and pleading."

Whether or not the appellant would have succeeded in a Court of law makes no difference because the case was not decided by the Court but by an arbitrator.

(58) I have found it necessary to make these observations because, though the present case was founded upon a contract of agency, there were also averments about conversion. It was pointed out in the 'Bowmaker's Case (Z1)' that the original plea has little relevance. My brother Rao (whose opinion I have now read) distinguishes that case as one founded on tort. While I have the greatest respect for any opinion propounded by my brother, I am constrained to say that this is a distinction without a difference. The forms of action are things of the past and the 'Bowmaker's Case (Z1)' was also initially based on a hiring agreement. In spite of this, that case was limited to one of conversion and there was no reason why the present case could not also be so limited.

(59) The decision of the arbitrator in the first instance was one which would have resulted if the rule in the 'Bowmaker's Case (Z1)' were applicable. What distinguishes this case from the cited case is the fact that an arbitrator decided it upon a question of law which was specifically referred to him. The plaintiff's counsel having agreed to such a course, I have held that the decision of the arbitrator must be treated as final. But I do not think that the arbitrator's decision is correct if the claim before him was limited to the conversion of the goods. Of that there is no proof on the proceedings before the arbitrator.

(60) There is no absolute rule that once there is an illegality the Court will have nothing to do with the case in any aspect or form. Even Lord Mansfield whose pronouncements have established the law relating to fraud, illegality, made some exception or 'supposed exceptions' on more than one occasion. If a plaintiff can found his claim without relying on the illegality, the claim can be decreed; but if he is compelled to rely on the illegality he cannot succeed. It is easy to see to which category the present case belonged and no nearer case on facts can be found than the 'Bowmaker's Case (Z1)' to which I have referred. I may, however, mention here that neither that case nor 'Harry Parker's Case (P)' was referred at the Bar to say nothing of the cases cited by my brother and myself on this part of the case.

(61) It is not necessary to discuss this subject at greater length in view of my opinion on the main point, namely, that the Court is not entitled to go behind the decision of the arbitrator on a point of law which was specifically referred to him and that the error, if any, is not apparent on the face of the award. In the view I take, this appeal must fail.

(62) The question that remains is whether I should allow costs. Though in 'Harry Parker's Case (P)' the Court of Appeal did observe that there should be no order about costs, I am unable, with the greatest respect, to follow those observations in this case. There were special features in that case and no such principle can be gathered from other cases. To apply 'Harry Parker's Case (P)' in this way would leave no exception or 'supposed exception' to the rule of 'turpis causa' which is not the law. In meeting an appeal the respondent does not rely upon an illegality to which he was a party. I, therefore, order that the costs of this appeal shall be borne by the appellant.

(63) The appeal is dismissed with costs.

R. KAUSHALENDRA RAO J.:

(64) I agree that the appeal fails and must be dismissed.

(65) It is not necessary to reiterate the facts of the case which are set out in the judgment of my brother Hidayatullah. But as I am of a different view on a question which goes to the root of the case it has become necessary to give my reasons for the decision separately.

(66) My learned brother holds that the decision of the arbitrator that the 'Sauda' was illegal and the suit was therefore liable to be dismissed cannot be questioned on the ground of an error in law apparent on the face of the award because that was the very specific question referred to the arbitrator for decision. My learned brother, however, is of opinion that but for the rule in — 'AIR 1949 PC 334 at p. 337 (D)' he might have interfered with the award as according to him the claim could not fail on the ground of illegality.

(67) With the profound respect I entertain for the judgment of my learned brother, I am of opinion that the decision of the arbitrator proceeds on a right view of the claim in suit. The contention on behalf of the appellant is that the respondents who were in possession of the goods purchased and sold by them for the appellant or in receipt of monies in respect of them could not plead that the transactions were illegal by reason of the plaintiff s not holding a licence under the Foodgrains Control Order, 1945.

(68) To appreciate the contention it is necessary to understand the nature of the claim made by the appellant in the suit. The nature of the claim is indicated in paragraphs 2, 3, 4 (a) and 4 (b). The material allegation in the plaint is as under:

> "The defendants have been carrying on the business with or for the plaintiff's Akola shop and doing transactions for it. That the plaintiff had purchased in about October 1946, in all 1250 bags of Udid,.....deliverable in the godowns of Harsud and Bir in C. P. The said bags were lying with the defendants as the common agents of the plaintiff and by about 21-1-1947, the plaintiff had balance stock of 850 bags of Udid.. ....The defendants were to hold the said commodity with them on behalf of the plaintiff and they were to send the goods to the place or places or 'deal' with the goods as would be ordered by the plaintiff's Akola Munim in that behalf." (Para 3).

The plaintiff prayed for a true and proper account of the 850 bags of Urid held by the defendants or Rs. 40,466/8/-, its price by way of compensation and damages for misappropriation. It is not disputed that the plaintiff held a licence in the Akola and the Amravati districts but did not hold a licence in the Nimar district where the defendants purchased and sold the grain on behalf of the plaintiff. Though the plaintiff alleged in the plaint that no licence in the Nimar district was necessary, nothing was shown to make good the allegation: — 'R. v. Oliver', 1943-2 All ER 800 (Z6). The appeal was presented on the footing that a license was necessary but its absence did not justify the rejection of the claim by the arbitrator.

(69) Clause 3(1) of the Foodgrains Control Order runs:

> "No person shall deal in foodgrains as a wholesale dealer except under and in accordance with a licence issued by the Deputy Commissioner of the district."

The first condition of a licence granted under cl. 5 (1) provides:

> "The licencee shall carry on the aforesaid business at the places or within the area mentioned in the licence and at no other place."

(70) According to the definition in Cl. 2 (a), "deal in foodgrains" means:

"to engage in the business of purchase, sale, or storage for sale of foodgrains whether on one's own account or on account of or in partnership or 'in association with any other person' or as a commission agent or Arhatiya, and whether or not in conjunction with any other business; and the words 'dealer' and 'dealing' shall be construed accordingly."

(71) In view of the prohibition in the Control Order the plaintiff could not directly deal in the foodgrains in the Nimar district. Nor could he deal in partnership with another. The prohibition against dealing "in association with another person" is comprehensive enough to cover a dealing through an agent. In effect such is the view taken in — 'AIR 1950 Nag 53 (J & K)'. The provision infringed cannot be regarded as one made merely for administrative convenience or for the protection of public revenue. The prohibition against dealing in foodgrains without a licence was made in the public interest to regulate the distribution of scarce commodities with a view to ensuring the maintenance of essential supplies. The contravention of the provision is made an offence punishable with three years or with fine or with both. The question is whether he can get the assistance of the Court in claiming an account from the persons in association with whom he was illegally dealing.

(72) It is undoubted that what is done in contravention of the provisions of an Act of Parliament cannot be made a subject-matter of an action. (Per Lord Ellenborough C. J. in — 'Langton v. Hughes', (1813) 105 ER 222 (Z7)). The proposition is illustrated by the decision in — 'Mahmoud and Ispahani, In re' (1921) 2 KB 716 (Z8). In that case, the plaintiff sold to the defendant a quantity of linseed oil. The plaintiff had a licence under the Seeds, Oils and Fats Order, 1919, under which a person could not, either on his own behalf or on behalf of any other person, buy or sell or otherwise deal in linseed oil. The defendant told the plaintiff that he had a licence under the Order though he had not one. The plaintiff sold the defendant a quantity of linseed oil on a misrepresentation by the defendant and in the honest belief that he had a licence. The defendant refused to take delivery of the linseed on the ground that the contract was illegal as he had no licence under the Order. The Court dismissed the claim for damages by the plaintiff because the defendant had no license and the contract of sale was prohibited by the Order and was therefore illegal.

Bankes L. J. observed:

"The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into. The respondent had a licence; the appellant had no licence. The respondent contends that, as he had a licence, the appellant cannot be heard to say that in the circumstances he had not a licence. I cannot assent to that proposition. I do not think there is any authority for it, and as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

In short, the defendant was permitted to show turpitude in himself to defeat the claim of the morally innocent plaintiff on the ground of illegality of the contract between the parties.

(73) The turpitude in the present case was in the plaintiff. But it is contended that the sale and purchase of the Dal were already completed and all that the plaintiff asked was an account of the bags remaining with the defendants or the monies received by them instead. It is said that the defendants were in the position of an agent and as the relationship between them and the plaintiff was fiduciary they could not have been permitted to plead the illegality of the transactions done by the plaintiff to dishonestly escape the liability to account.

(74) In all cases of illegality, if the question were one of merely doing justice as between the parties to the action no Court would permit the defendant to dishonestly enrich himself by recourse to a plea of illegality. But the Court has over and above the duty of doing justice between the parties to the action the duty of enforcing the law by not countenancing anything forbidden by law or permitting anything which would defeat the provisions of any law. That paramount duty the Court has to perform irrespective of the question whether it results in the dishonest enrichment of one of the parties or not.

As observed by Lord Mansfield:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; 'ex dolo malo non oritur actio'. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." (— 'Holman v. Johnson', (1775) 98 ER 1120 at p. 1121 (Z9)).

To the same effect are the observations of the Master of the Rolls in — 'Thomson v. Thomson', (1802) 32 ER 190 at p. 191 (Z10):

"The defence is very dishonest; but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods; and keeps them; but refuses to pay for them. So in the Underwriter's case, an insurance contrary to the Act of Parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. ('Ex Parte Mather', (1797) 30 ER 1060 (Z11). No matter, who complains of it: the thing is illegal. You have no claim to this money except through the medium of an illegal agreement; which according to the determinations you cannot support."

Indeed the duty of the Court to decline assisttance to a party, implicated in illegality, if the illegality of the transaction comes to the notice of the Court, is not dependent on a plea being raised by the defendant. The Court acts 'suo motu' for reasons unconnected with the parties to the action: — 'Connolly v. Consumers' Cordage Co.', (1903) 89 LT 347 (Z12) and — 'Luckett v. Wood', (1908 24 TLR 617 (Z13). In the latter case though the defendant did not think it "honourable" to plead the illegality, the Court noticed it and dismissed the claim.

(75) It is an accepted proposition that no accounting can be had by one partner against another in respect of transactions arising out of an illegal partnership. In — 'Knowles v. Haughton', (1805) 32 ER 1052 (Z14) it was ruled that the profits of a partnership in underwriting, illegal by statute, could not be a subject of account in equity. In — 'Booth v. Hodgson', (1795) 101 ER 619 (Z15) one of the partners of a partnership

for insuring ships, contrary to a statute of Parliament, was held not entitled to recover the premiums received by the brokers in respect of policies underwritten in the name of one of the partners. In — 'Aubert v. Maze', (1801) 126 ER 1333 (Z16) the question submitted to the Court by the arbitrator was whether one partner could recover the money paid on account of an illegal partnership. It was contended that though it was illegal for underwriters to enter into a partnership, yet they were liable to the insured for the amount of the sums underwritten and, therefore, the defendant in the case, who paid on behalf of the plaintiff what the plaintiff would have been bound to pay the former, was entitled to recover the amount as money paid to the use of the latter. The contention was negatived.

To the same effect are the decisions in — 'Mitchell v. Cockburne', (1794) 126 ER 606 (Z17) and — 'Armstrong v. Armstrong', (1834) 40 ER 18 (Z18). If it be no part of the duty of a Court to make an account between partners in respect of profits or losses arising from an illegal partnership it is difficult to see the principle on which the Court can permit a principal to call his agent to account in respect of dealings into which the former could not in law enter through the agency of the latter.

(76) Williston criticises the distinction which is sought to be made between a claim based on an illegal transaction against a partner & one against an agent, with the remark:

"Certainly one who employs an agent to rob a till cannot recover the contents thereof which the agent acquires in the course of his employment." (Williston on Contracts, Vol. VI, Paragraph 1786).

The contention, that the relationship of principal and agent between the parties affords an exception to the general rule, that the Court would not assist a party to an illegal contract, was rejected by the Court of Appeal in — '1940-2 KB 590 (P)'.

(77) In that case the agent was employed to make a bet with street bookmakers which was prohibited and made an offence by an Act of Parliament and also a sham bet which itself involved a further element of illegality. The principal, discovering that the money had not been applied according to instructions but was retained by the agent, claimed to recover the money.

Du Parcq L. J. observed:

"It was submitted on Mr. Mason's behalf that this case was covered by another exception, which was said to be based on principles of commercial morality. Trusts, and the obligations of agency, said his counsel, are sacred, and nothing must be allowed to prevent the 'cestui que' trust or the principal from claiming money from a trustee or agent, however tainted may be the transaction from which the payment of the money flowed. In my opinion, a principal seeking to recover from his agent money which he handed to him for an illegal purpose, is in no better case, when he seeks relief from a Court of Law, than the contracting party seeking to recover back payments made by himself to another party to the contract (who is not his agent) for an illegal consideration. In neither case will the Courts order the repayment of the money."

(78) Sir John Salmond's opinion that public policy requires the rule of 'turpis causa' shall be excluded in favour of the more important and imperative rule that agents must faithfully perform the duties of their office is much too wide and can at any rate have no application where the law makes it criminal for the principal to deal even through an agent.

(79) The statement of Sir John Salmond which was approved in — (1936) 1 KB 169 at p. 190 (Y) and — '1951-1 All ER 92 at p. 99 (Z)' is really not in point here. The statement referred to in the two cases is the following:

"Where the illegal purpose has been wholly or partially effected the law allows no 'locus paenitentiae'.

Actually neither of the cases is in illustration of the exception stated by Sir John Salmond which is under question here. In both the cases the Court declined to enforce a claim tainted with illegality.

(80) It is necessary to refer to the decisions relied on by my learned brother: — '(1797) 126 ER 744 (Q)'; — 'AIR 1921 Mad 334 (R)'; — '25 All 639 (S)'; — '1944-2 All ER 579 (Z1)' and — '(1861) 11 Wheaton 258 (Z4)'.

(81) The first was an action for money had and received. The second and the third decisions were in cases of agency. But they are all distinguishable in that the claim in none of them unlike in the present case was against an agent in respect of a transaction which the principal was forbidden by law from entering into through the agency of the defendant. They are thus not pertinent to the question under consideration. In the present case the agent is not setting up the illegality of a transaction between his principal and a stranger but pointing to the illegality of the principal dealing through the agent himself.

(82) Though the facts in — 'Bowmakers, Ltd v. Barnet Instruments, Ltd. (Z1)' (supra) are apparently similar it cannot be forgotten that the case was not one in which the plaintiff was relying upon an illegal agreement. The claim there, was, in conversion, independent of the hiring agreements. The proposition stated is:

"In our opinion a man's right to possess his own chattels will, as a general rule, be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, 'provided' that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim." (pp. 582 & 583) (Underlining (Here in single quotation) is by me.)

In my view the facts of the instant case are not covered by the main proposition but by the proviso to it. The distinction between an action in tort and one on contract is brought to light by comparing the decision in 'Bowmakers' Case (Z1) (supra)' with that in — 'Anderson, Ltd. v. Daniel', (1924) 1 KB 138 (Z19).

(83) The present case cannot be regarded as founded on a promise entirely disconnected with the illegal act or founded on a new consideration as was the case before Chief Justice Marshall in — 'Armstrong v. Toler', (Z4) (supra). The case of the plaintiff here was not based on any 'bizak' or bond given by the defendants. One of the decisions on the basis of which Chief Justice Marshall proceeded in — 'Armstrong v. Toler', (Z4) (supra) is that of Lord Mansfield in — 'Faikney v. Reynous', (1767) 98 ER 79 (Z20) which has been repeatedly doubted in England and is now considered as overruled by — 'Cannan v. Bryce',

(1819) 106 ER 628 (Z21). See — '(1794) 126 ER 606 at p. 608 (Z17)', Foot-note (e) and Halsbury's Laws of England (Hailsham Edition) Vol. XXIV, page 412, Foot-note (n). The distinction made by Lord Mansfield in — 'Faikney v. Reynous', (Z20) (supra) between — 'Malum prohibitum' and 'Mala in se' was reprobated in — '(1801) 126 ER 1333 (Z16)' as "pregnant with mischief" and has ceased to be significant for the decision of this class of cases: See — 'Cannan v. Bryce', (Z21) (supra).

(84) It is bootless to speculate whether the plaintiff could not have succeeded by basing his claim differently. Nor is it permissible to assume that in such a contingency the written statement of the defendants would have been the same and not different. Suffice it to say to decree an account against the defendants on the facts disclosed would be to permit a claim grounded on dealings prohibited and made criminal by law and would amount to the enforcement of an agreement of agency void under Section 24 read with Section 23, Contract Act. In short, I am unable to subscribe to a doctrine which makes it imperative on the Court to enforce the claim of a principal based on a public wrong and encourage the defeat of a provision made in the public interest. If the considerations of public policy, on which Sir John Salmond bases the exception stated by him, have a place in the present case they seem to point more against the claim of the principal than the plea of the agent. I am, therefore, of the opinion that the action was not maintainable.

(85) The view of the arbitrator that the claim was liable to be dismissed because of illegality is correct. But the case against the appellant is concluded by the principle stated in Halsbury's Laws of England that a dispute arising from and founded on an illegal transaction cannot be referred to arbitration. See Hailsham Edition, Vol. I, page 628 and Symond's Edition, Vol. II, page 6 and — 'Joe Lee, Ltd. v. Lord Dalmeny', 1927-1 Ch. 300 (Z22). But it is unnecessary to enter into an elaborate discussion of this aspect of the case because whether the award can stand or not the result would not be different on the conclusion already reached that the action was not maintainable. See — 'Kershaw v. Sievier', (1904) 21 TLR 40 at p. 41 (Z23). So the decree dismissing the suit stands.

(86) Even if my view as to the nature of the claim and the maintainability of the action be not correct, the appellant must fail. If the case has to be considered on the footing that the claim was not tainted by any illegality, I agree with the conclusions reached by my learned brother on the six points formulated for decision by him.

(87) On my view of the nature of the claim I have at one stage felt some hesitation about the question of costs. In England the practice does not seem to be uniform in this class of cases. Compare — '(1940)-2 KB 590 at pp. 602, 614 (P) with — 'Granville & Co. v. Firth', (1903) 88 LT 9 (Z24). The decree of the trial Court ordered costs in the suit to be borne as incurred. In — 'Bhowanipur Banking Corpn. Ltd. v. Durgesh Nandini Dassi', AIR 1941 PC 95 at p. 99 (Z25) the respondent, who succeeded on a defence founded on Section 23, Contract Act, was held entitled to her costs in the appeal. In the circumstances, I see no justification for depriving the respondents here of their costs in the appeal. The appeal is dismissed with costs.

D.H.Z. Appeal dismissed.

A.I.R. 1954 NAGPUR 319 (Vol. 41, C.N. 112)

SINHA C. J. AND BHUTT J. (30-12-1953)

Hariharsingh Sukhiram Channahu, Appellant v. Deonarayan Bodhram Channahu and others, Respondents.

First Appeal No. 72 of 1948, from decree of Addl. Dist. J., Bilaspur, D/- 22-3-1948.

(a) Central Provinces Land Revenue Act (2 of 1917), Ss. 66, 80 (1), (3), 68, 69 — Entries in revenue records — Presumption — Finality — Entry of person being adopted son — Finality — Recital is not binding on rightful holder — (Evidence Act (1872), Ss. 35 and 115).

Under S. 66, Central Provinces Land Revenue Act (2 of 1917), the Settlement Officer has to ascertain and record the persons who are in possession as proprietors of the land comprised in each estate or mahal. The record thereof, however, is not conclusive under S. 80 (1), and sub-s. (2) of S. 66 lays down that no person shall be debarred from establishing his right to such land in a Civil Court. Under S. 68, the Settlement Officer is empowered to ascertain and determine the extent of all land which is held as 'sir' land which term includes Bhogra land. This section is also excluded from the operation of sub-s. (1) of S. 80. Finality is attached to the entry made under S. 69 respecting the land held as 'khudkasht' which term may be held to include Gauti Raiyati land. (Para 18)

Under sub-s. (3) of S. 80, Central Provinces Land Revenue Act, a presumption of correctness attaches to the entries in the record-of-rights which is defined in S. 45. (Para 18)

It may, therefore, be taken that the entries, showing the proprietary interest of a person and the land held by him, which were made in the 'khewat', 'khasra' and 'jamabandi' prepared at the time of settlement have a presumptive value. This, however, does not mean that the entry showing his status as the adopted son of his father has any presumption of correctness. An innocuous entry of this nature does not affect the rights of the rightful holder and need not have been contested by him, and, therefore, his failure to take any steps to get it corrected cannot amount to any conduct implying his admission of the person's adoption. (Para 19)

Anno: Evidence Act, S. 35 N. 11, 12; S. 115 N. 5, 6, 8, 16.

(b) Hindu Law — Adoption — Proof — Ancient adoption — Evidence, nature of.

In the case of ancient adoption it is only when there are clear indications that the adoption must have taken place, that want of evidence of the essential ceremony of giving and taking would not defeat the adoption, as such a ceremony would, in the peculiar circumstances of the case, be presumed to have been performed. (Para 10)

Where the evidence showed that for many years there was no conduct on the part of any of the parties indicating the alleged adoption, and it was only when the question of mutation of names came in that the widow in whose name the property stood, put in the statement that the appellant was her adopted son and that his name should be mutated in her place, and it was established that this statement was made on the suggestion of a revenue officer, it was held that

there was no convincing evidence of adoption. (Para 20)

When there are improbabilities in the story of adoption, which is inconsistent with the conduct of the principal parties concerned, it cannot be urged that the person setting up the adoption has discharged his burden of proof. (Para 20)

(c) **Limitation Act (1908), Arts. 120, 141, 142 and 144 — Adverse possession by alleged adoptee against widow — Rights of reversioner.**

Where a person is let into possession by the widow as his adopted son, the possession is permissive when the person himself has not entered into possession as adopted son.

If the adoption is not proved and the possession of the alleged adopted son is held adverse to the widow, it does not affect the right of the reversioner to recover possession after the widow's death. To such a case Art. 141, Limitation Act, is applicable so far as recovery of immoveable property is concerned and Art. 120 of the said Act applies to a claim for possession of movable property. Suit for possession brought by the reversioner within three years of the death of the widow is maintainable. (Para 21)

Anno: Limit. Act, Art. 141 N. 2; Arts. 142 and 144 N. 79, 13, 56, 60, 78; Art. 120 N. 12.

(d) **Hindu Law — Widow — Acquisitions by — Whether accretion to husband's estate — Intention — Presumption.**

The character of the acquisitions by a Hindu widow governed by Benaras School who is in possession of her husband's estate is determined by the intention of the widow to whom the income from which the acquisitions are made belongs. If this intention is not clear, the presumption that she intended the acquisitions to be her separate property would determine their character. The same principle would apply where she does not herself make the acquisitions and allows another to do so. 25 Mad 351, Relied on; Case law Ref. (Para 26)

Where the widow had set up an adoption and had allowed the alleged adoptee to make acquisitions for his personal benefit the presumption that in permitting the alleged adoptee to acquire the fields the widow intended to create a separate estate for his benefit cannot be deemed to be rebutted. (Para 28)

(e) **Limitation Act (1908), Arts. 141 and 118 — Suit by reversioner after widow's death for possession — Validity of alleged adoption of defendant by widow in question — Suit held governed by Art. 141 and not Art. 118.**

To a suit by a reversioner for possession of immovable property on the death of a widow Art. 141, Limitation Act, is applicable even though it is necessary to decide in the suit whether the adoption by her of the defendant was or was not valid. The challenge to the adoption being only incidental to the determination of the rights of the plaintiff as reversioner such a suit cannot be deemed to be "in truth and substance" a suit for a declaration that the defendant's adoption is invalid. AIR 1924 PC 137, Relied on; AIR 1927 PC 229, Distinguished.

Anno: Limit. Act, Art. 118 N. 2; Art. 141 N. 16.

CASES REFERRED: Paras

(A) (V10) AIR 1923 All 176: 45 All 59 8
(B) (V2) AIR 1915 PC 7: 42 Ind App 135 (PC) 8
(C) ('07) 29 All 184: 4 All LJ 102 (PC) 8
(D) ('07) 29 All 519: 34 Ind App 125 (PC) 8
(E) (V19) AIR 1932 Mad 198: 55 Mad 40 9
(F) (V24) AIR 1937 Lah 626: ILR (1938) 19 Lah 173 9, 10
(G) ('05) 27 All 271: 32 Ind App 113 (PC) 10
(H) (V10) AIR 1923 Cal 18: 72 Ind Cas 680 10
(I) (V8) AIR 1921 Cal 647: 67 Ind Cas 31 10
(J) (V38) AIR 1951 Nag 361: 1950 Nag LJ 528 18
(K) (V20) AIR 1933 Nag 77: 29 Nag LR 70 18
(L) ('09) 31 All 116: 36 Ind App 9 (PC) 20
(M) ('10) 32 All 104: 37 Ind App 1 (PC) 20
(N) (V32) AIR 1945 PC 79: ILR (1945) K PC 191 (PC) 20
(O) ('99) 26 Ind App 71: 23 Bom 725 (PC) 21
(P) (V16) AIR 1929 PC 166: 56 Ind App 267 (PC) 21
(Q) (V30) AIR 1943 Nag 193: ILR (1943) Nag 213 21
(R) ('75) 14 Beng LR 159: 3 Sar 370 (PC) 22, 27
(S) ('69) 2 Beng LR 101: 12 WR 1 (PC) 22
(T) ('84) 10 Cal 324: 10 Ind App 150 (PC) 23, 27
(U) ('87) 14 Cal 387: 14 Ind App 63 (PC) 23, 25, 27
(V) (V14) AIR 1927 Cal 868: 55 Cal 269 24
(W) (V23) AIR 1936 Pat 200: 14 Pat 518 25
(X) ('02) 25 Mad 351: 12 Mad LJ 5 25
(Y) (V27) AIR 1940 Nag 236: 1940 Nag LJ 292 25
(Z) (V30) AIR 1943 Nag 253: ILR (1943) Nag 779 25
(Z1) (V37) AIR 1950 Nag 62: ILR (1950) Nag 176 25
(Z2) (V14) AIR 1927 PC 229: 106 Ind Cas 488 (PC) 29
(Z3) (V11) AIR 1924 PC 137: 48 Bom 411 (PC) 29

M. R. Bobde and R. S. Dabir, for Appellant; D. T. Mangalmurti and N. S. Nandedkar, for Respondents (Nos. 1 to 5).

JUDGMENT: This appeal arises out of a suit for joint possession.

(2) Bisnath, the common ancestor of the parties, died long ago leaving five sons who, in order of seniority, were Sukhiram, Bhikari, Nainsingh, Bodharam and Janakram. Bhikari and Janakram predeceased Sukhiram and left no personal heirs. Sukhiram died in 1893 A. D. leaving a widow Mst. Kalamati and a posthumous daughter Padmavati who predeceased her mother. Mst. Kalamati died on 8-8-1941. At that time the family consisted of Bodharam and Nainsingh, and their sons. Bodharam was the plaintiff, who is dead and is now represented by respondents 1 (1) to 1 (5). Nainsingh was defendant 2. He is also dead and is represented by respondents 2 (a) to 2 (e). Appellant Hariharsingh is the eldest son of Nainsingh and was defendant 1 in the original action.

(3) Shortly before his demise Sukhiram began to live and mess separately with the intention to sever his connection from the joint family. At the time of his death the family property consisted of sixteen annas share of 'mouza' Bade Katekoni and twelve annas share of 'mouza' Turkapali with appurtenant Bhogra and Gauti Raiyati lands. It, however, appears that the share in 'mouza' Turkapali was treated as belonging to Bodharam and Nainsingh alone in which Sukhiram had no interest. After the death of Sukhiram, his share in 'mouza' Bade Katekoni was mutated in the name of his widow. This was consistent with his separation from the rest of the family.

(4) The case of the plaintiff was that after the demise of Sukhiram, his widow reunited with the family and began to live with his two brothers. However, in the family partition which took place

in or about the year 1910 A. D., she was given one-third share in 'mouza' Bade Katekoni and the appurtenant lands and the rest of the property, including the twelve annas share of 'mouza' Turkapali and the fields attached to that share, was apportioned half and half between the plaintiff and Nainsingh. According to the plaintiff, Mst. Kalamati was given the share only by way of maintenance. This contention, however, was negatived by the lower Court and has not been raised before us.

(5) In the year 1922-23 A. D. Mst. Kalamati applied to the Revenue Authorities for mutation of her share in the name of the appellant Hariharsingh. In her application, Exhibit P-3, she made the following statement:

"I have taken in adoption the eldest son of my eldest 'devar' (i. e husband's younger brother) namely Harihar Singh while he was child."

To this averment the plaintiff made the reply noted below:

"Mst. Kalamati had promised that on her desire(?) the share be divided into two shares half of which shall go to her adopted son and half to myself. Hariharsingh were (?) adopted by Mst. Kalamati as her son ten or 12 years ago. We were all joint then and only separated ourselves recently. I have got nothing to urge if she wants to give her whole share to Hariharsingh." (See Exhibit 1 D-4).

On this statement the name of the appellant was mutated in place of Mst. Kalamati in respect of the village share and the lands recorded in her name. Subsequently, in the settlement of 1930-31 the said property was recorded in the name of the appellant who was described as the adopted son of Sukhiram in the Settlement Parchas and Khewat (Exhibits 1 D-1, 1 D-2, and 1 D-5) and he was also appointed 'lambardar' of the village, i. e., Bade Katekoni.

It is not disputed that from the usufruct of this property, augmented by his own exertion, the appellant acquired the Gauti Raiyati fields mentioned in his second schedule, which were recorded in his name in the village papers. It may, however be noted that 'khasra' nos. 324, area 1.38 acres, and 955, area 0.56 acres, appear to be wrongly included in the list inasmuch as these very fields are also included in the first schedule which shows the land allotted to the share of Mst. Kalamati at the family partition and subsequently recorded in the name of the appellant.

(6) Plaintiff filed the present suit on 1-8-1944 on the ground that on the demise of Mst. Kalamati, the above-mentioned property devolved on him and his brother Nainsingh in equal shares as reversioners and he was, therefore, entitled to joint possession thereof to the extent of a moiety.

As regards the Gauti Raiyati fields acquired by the appellant, his case was that they were an accretion to the main property and partook of its character. He also based his suit on an alleged agreement of Mst. Kalamati that on her demise he would be entitled to a half share in her property. This plea, however, is now immaterial as it was repelled by the lower Court and has not been urged before us.

(7) The suit was resisted by the appellant on the following grounds:

(1) That he was adopted as a son by Sukhiram during his life and was, therefore, the rightful heir to his property;

(2) That he was in adverse possession of the property since the year 1922-23 and thereby acquired a prescriptive title;

(3) That the Gauti Raiyati land acquired from the usufruct of the parent estate was kept separate and became his own property; and

(4) That the suit was barred by limitation.

These points were negatived by the lower Court and are reiterated before us.

(8) ADOPTION: Before we deal with this question on its merits, it is advisable to consider the rulings which were referred to at the bar in support of the contention that in the case of an ancient adoption lack of proper evidence will not operate to defeat the claim of the adopted son.

In — 'Chhoty Lal v. Chandra Bhan', AIR 1923 All 176 (A) the adoption had taken place 48 years 'ante litem motam'. All the parties immediately concerned were dead. The adoption was, however, recited by the natural father in a formal deed of gift, the adopted son succeeded in due course to the property of his adoptive father and no objection to the adoption was raised at any time by any member of either family.

These circumstances had clearly indicated an adoption and it was on this account that it was held that it should be considered as a legal and valid adoption, notwithstanding that there was no evidence available of the usual ceremonies having been performed. In support of this view reliance was placed by their Lordships on — 'Bal Gangadhar v. Shrinivas', AIR 1915 PC 7 (B); — 'Chandra Kunwar v. Chaudhri Narpat Singh', 29 All 184 (C) and — 'Har Shankar Partab Singh v. Lal Raghuraj Singh', 29 All 519 (D).

(9) In — 'Ramakrishna Pillai v. Tirunarayana Pillai', AIR 1932 Mad 198 (E) it was held that though a person is 'prima facie' bound to prove, as a fact, that he is an adopted son, yet if for a long time he acted as such and was treated as an adopted son, the burden resting upon the person who disputes such an adoption is of the highest order.

In that case the adoption had taken place before 1884 the last male owner had died in 1899 and the suit was instituted in 1917. A special feature of the case was that the adopted son was treated as such by all the members of the family interested in denying the adoption and this conduct on their part was held to raise a presumption that the adoption was validly performed.

(10) Next we come to the case — 'Roshan Lal v. Samar Nath', AIR 1937 Lah 626 (F). In that case the adoption had taken place 45 years prior to the institution of the suit and there were circumstances to show that the adoption must have taken place, particularly the statement of the natural father in his will which was signed by his son as the adopted son of his maternal-grandfather.

In this connection, their Lordships observed:

"Mr. Achhru Ram, however, strenuously argued that none of the defendant's witnesses had stated that the essential ceremony of 'giving and taking' was performed at the time of adoption and in the absence of proof of this ceremony the adoption cannot be regarded as having been validly made. But, as pointed out already, the adoption took place 45 years ago, and at this distance of time it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony. In such circumstances, in the absence of anything to indicate the contrary, it must be presumed that all the requisite ceremonies were duly performed. As held in — 'Achal Ram v. Kazim Husain Khan', 27 All 271 at p. 290 (G); — 'Kailash Chandra Nag v. Bejoy Chandra Nag',

AIR 1923 Cal 18 at p. 21 (H) and — 'Jagan Nath v. Chandni Bibi', AIR 1921 Cal 647 at pp. 649, 650 (I), when a person has for nearly half a century enjoyed the status of an adopted son, and has been treated as such all his life, it must be assumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption. No facts have been brought out, which might displace this presumption."

It will thus be observed that it is only when there are clear indications that the adoption must have taken place, that want of evidence of the essential ceremony of giving and taking would not defeat the adoption, as such a ceremony would, in the peculiar circumstances of the case, be presumed to have been performed.

(11) Coming to the instant case, the special feature that is noticed is that until 1922-23 there was no conduct on the part of any of the parties indicating the appellant's adoption by Sukhiram. It was the widow Mst. Kalamati whose name was mutated in respect of the property after her husband's demise. Even in the family partition of 1910 when the appellant had grown up sufficiently it was the widow that was given a share of the property. This 'prima facie' indicates that it was Mst. Kalamati who was treated by the family as representing the estate of her husband.

(12) It was in the year 1922-23 that Mst. Kalamati for the first time spoke about the adoption while initiating proceedings for mutation in appellant's favour. However, the statement was equivocal inasmuch as she alleged that the appellant was taken in adoption by herself. It is true that she also stated that the appellant was taken in adoption while a child, making it possible that he was adopted by Sukhiram himself, it cannot be forgotten that she did not ascribe the adoption to any act of her husband but to her own.

The reply of the plaintiff to this statement was, however, categorical. He said that Mst. Kalamati had adopted the appellant about ten or twelve years ago. This statement cannot be treated as an admission of the appellant's adoption by Sukhiram who had died about 30 years before. It is no doubt true that in her subsequent application, Exhibit 1 D-6, Mst. Kalamati made the statement that the appellant was adopted by her husband during his life. However, this document, as admitted by the appellant in the witness-box, was executed by Mst. Kalamati on the direction of the Tahsildar who indicated the kind of deed for execution which could justify mutation being effected in his name.

Evidently the document came into existence because it was thought that unless the adoption was stated to have been made by Sukhiram, the appellant could not be accepted as representing his estate. The document coming into existence in such circumstances, when there was apparent motive for executing it in that particular form, cannot carry much evidentiary value. In any case it was not binding on the plaintiff who is not shown to have assented to its contents.

(13) However, it was urged that there are indications in the case showing that the appellant must have been adopted by Sukhiram. These may be summarised as below:

(i) that in the family partition of 1910 'jethausi' (i.e., a larger share which is given to the senior branch of the family) was given to Mst. Kalamati, indicating that her branch was supposed to be represented by a male member;

(ii) that. in the subsequent partition between Nainsingh and his sons, no share was given to the appellant and his next brother Kanhaiyalal was given 'jethausi' indicating that he was transferred to another family;

(iii) that, the appellant had shaved his mustache on the death of Mst. Kalamati, indicating that he regarded her as his own mother; and

(iv) that, the appellant was described as the adopted son of Sukhiram in the settlement papers of 1930-31 and was appointed as 'lambardar', to which no objection was taken by any member of the family, indicating that they had accepted him as Sukhiram's adopted son, representing the senior-most branch of the family.

(14) As regards the 'jethausi' alleged to have been given to Mst. Kalamati, there is not any proper evidence on record. There is no doubt that the plaintiff in the witness-box stated that at first good 100 acres of land were given to Mst. Kalamati and the rest of the property was then divided in equal shares between him and Nainsingh. Even if good land was given to Mst. Kalamati by way of 'jethausi', it would not indicate that the appellant was accepted as representing the branch of Sukhiram, for there is nothing on record to indicate that 'jethausi' could not be given to a female heir of the senior branch.

It is, as such, likely that since Mst. Kalamati was recognised as representing the branch of Sukhiram she was, if at all, given 'jethausi' in her own right as his heir. As against this evidence, Panditram (1 D. W. 2) and Nainsingh (1 D. W. 4) were examined to prove that 'jethausi' was given to the appellant at the time of the family partition. According to Nainsingh, he was given about 8 acres of land in excess of his share by way of 'jethausi'. If this was so, the matter could have been better proved by production of the village papers showing the different areas of land allotted to the three branches at the partition. The evidence of these witnesses, namely, Panditram and Nainsingh, to the effect that 'jethausi' was given to the appellant cannot also obviously be accepted because admittedly the share of Sukhiram was given to Mst. Kalamati and not to the appellant at the time of the partition.

(15) The evidence on record relating to the partition between Nainsingh and his sons and the 'jethausi' alleged to have been given to Kanhaiyalal is equally unreliable and also insufficient.

It was admitted by Nainsingh that even after the alleged partition the lands continued to be recorded in his own name. No village papers have been produced showing separate cultivation of any fields by his sons, nor is there any evidence regarding the areas allotted to them. The other witness on the point is Pila (1 D. W. 3). He was not sure as to whether six or five shares were made at the partition. Satavadis (1 D. W. 6) who was the village Patwari stated that at the time of the 'girdavali' he always found the land of Nainsingh being cultivated jointly by him and his sons. His evidence contradicts the story of the alleged partition.

In these circumstances, if Nainsingh's sons were at all cultivating any lands separately they must have been doing so only for the sake of convenience and not as a result of any partition. This conclusion is supported by the evidence of Chotelal (P. W. 3), who is one of the sons of Nainsingh. He denied that there was any partition between him and his brothers and that he began to live and cultivate lands separately only because of family disputes. As no 'jethausi' is proved to have

been given to Kanhaiyalal, no inference can be drawn of the appellant's adoption.

(16) Although the appellant alleged in the witness-box that he shaved his mustache on the death of Mst. Kalamati this was denied by his brother Chotelal who said that, as he and the appellant had their father living, they did not shave their hair and it was Deolal (P. W. 4), his nephew, whose father was dead, that had shaved the mustache and offered 'pindas'. This is also the version of Panditram. The evidence of Nainsingh on this point was halting and equivocal, and the impression left on the mind of the lower Court was that it was false. He admitted that it was Deolal who performed the obsequies and offered ablution.

His explanation that he did so for the appellant after two days as the latter had fallen ill, coming as it does from an interested person, is not reliable. We are not, therefore, inclined to accept that the appellant took any such part in the obsequies of Mst. Kalamati as to indicate that he had done so as the adopted son of Sukhiram.

(17) There is no doubt that in the settlement papers of 1930-31 the appellant was described as the adopted son of Sukhiram. However, we have already adverted to the circumstances under which he was first trotted out as an adopted son by Mst. Kalamati in the year 1922-23.

The story of adoption was obviously set up to enable the revenue authorities to effect the mutation in the appellant's name. Once this allegation became a matter of record, it was evidently accepted by the Settlement Officer as a matter of course. However, as will be discussed below, the entry cannot be read as evidence of adoption.

(18) Under S. 66, Central Provinces Land Revenue Act (2 of 1917) the Settlement Officer has to ascertain and record the persons who are in possession as proprietors of the land comprised in each estate or mahal. The record thereof, however, is not conclusive under S. 80 (1), and sub-s. (2) of S. 66 lays down that no person shall be debarred from establishing his right to such land in a Civil Court. Under S. 68, the Settlement Officer is empowered to ascertain and determine the extent of all land which is held as 'sir' land which term includes Bhogra land. This section is also excluded from the operation of sub-s. (1) of S. 80.

Finality is attached, so far as the present suit is concerned, to the entry made under S. 69 respecting the land held as 'khudkasht' which term may be held to include Gauti Raiyati land: — 'Dharamsingh v. Mayaram', AIR 1951 Nag 361 (J). It may be assumed, as was held in — 'Gulabsingh v. Ajmersingh', AIR 1933 Nag 77 (K), that the entry was made after due enquiry and became conclusive against the plaintiff. But what is it that has become final or conclusive? Under S. 69 the enquiry is directed to ascertaining and determining the extent of all land held as 'khudkasht'. It is, therefore, the record of the land as 'khudkasht' that became final; and this leads us nowhere.

(19) Under sub-s. (3) of S. 80, Central Provinces Land Revenue Act, a presumption of correctness attaches to the entries in the record-of-rights which is defined in S. 45, as including—

(1) 'khewat' or statement of persons possessing proprietary rights;

(2) 'khasra' or field-book showing the names of persons cultivating or occupying land, the right in which it is held, and the rent, if any, payable; and

(3) 'jamabandi' or list of persons cultivating or occupying land in the village.

So far as other papers are concerned, they are not material for purposes of the instant case. It may, therefore, be taken that the entries, showing the proprietary interest of the appellant and the land held by him, which were made in the 'khewat', 'khasra' and 'jamabandi' prepared at the time of settlement have a presumptive value. This, however, does not mean that the entry showing his status as the adopted son of Sukhiram has any presumption of correctness. An innocuous entry of this nature did not affect the rights of the plaintiff and need not have been contested by him, and, therefore, his failure to take any steps to get it corrected cannot amount to any conduct implying his admission of the appellant's adoption. As regards the appointment of the appellant as 'lambardar', it is evident that it was due to his stepping into the shoes of Mst. Kalamati who was formerly appointed to the office as representing the senior most branch of the family. It, therefore, carries no special significance.

(20) Coming to the direct evidence on record, the witnesses on the point are Nainsingh, Chandabai (1 D. W. 5) and Pilwa (1 D. W. 7). The first two are the natural parents of the appellant and the third is his maternal uncle. These persons are doubtless interested in advancing the cause of the appellant and are not readily worthy of reliance. Their testimony might have carried weight, had there been circumstances in the case indicating clearly that adoption must have taken place. However, as discussed above, the circumstances are of a contradictory or equivocal nature, which suggest that the story of adoption was an afterthought.

There is also the additional factor, namely the young age of Sukhiram at the time of his death (according to Panditram he was then about 35 years old), when he could not have despaired of having a natural-born issue; nor is it the appellant's case that he was in the grip of any mortal disease which compelled him to think of taking a son in adoption. When there are improbabilities in the story of adoption, which is inconsistent with the conduct of the principal parties concerned, it cannot be urged that the person setting up the adoption has discharged his burden of proof: (— 'Kishori Lal v. Chunni Lal', 31 All 116 (PC) (L) and — 'Lal Kunwar v. Chiranji Lal', 32 All 104 (PC) (M)).

In — 'Radha Krishen v. Sri Krishen', AIR 1945 PC 79 (N) their Lordships of the Judicial Committee doubtless held that where in the disputes between the widow and the reversioners no mention was made by either party of the existence of an adopted son, the omission was not conclusive that the adoption was not made by the widow's husband. In the instant case, however, there were no such disputes and no reasonable explanation is offered to account for the omission to mention the adoption until the year 1922-23. In the case which their Lordships were considering, there was clear evidence pointing to the adoption, particularly the statement of the adoptive father himself in his will. Such convincing evidence does not exist in the case before us. We, therefore, uphold the finding of the lower Court that the appellant's adoption by Sukhiram, which was the sole ground on which he based his title, is not proved.

(21) ADVERSE POSSESSION: The facts of the case indicate that it was by the permissive act of Mst. Kalamati that the appellant was inducted into the property in the year 1922-23. It is no

doubt true that she had, in doing so, given him the status which was adverse to her own interest. The reason for her action, however, would not change the permissive nature of the appellant's possession inasmuch as he himself had not entered on the property in assertion of any title as the adopted son of Sukhiram.

However, treating the case as one of adverse possession it is apparent that it did not affect the rights of the plaintiff as a reversioner to recover possession after the death of the widow. To such a case Art. 141, Schedule I, Limitation Act, 1908, is applicable so far as recovery of immovable property is concerned and Art. 120 of the said Act applies to a claim for possession of movable property. (See — 'Runchordas Vandrawandas v. Parvatibhai', 26 Ind App 71 (PC) (O); — 'Jaggo Bai v. Utsava Lal', AIR 1929 PC 166 (P) and — 'Badrinarayan v. Narayansingh', AIR 1943 Nag 193 (Q)). The present suit having been brought within three years of the death of Mst. Kalamati, the appellant's adverse possession during her life did not affect the plaintiff's right to recover the property, either movable or immovable, on her demise.

(22) ACCRETION: It is no doubt true that a widow, under the Benares School of Hindu Law by which the parties are governed, has got an absolute right over the income of the estate of her husband and if she acquires any property from the savings of that income she may either keep the property separate or mix it up with her husband's estate.

In — 'Gonda Kooer v. Kooer OOdey Singh', 14 Beng LR 159 (PC) (R) the widow had acquired certain properties from the income of her husband's estate. The will that she had left in favour of the defendant comprised the property which she had power to dispose of. However, no specific property was mentioned in the will. Treating the subsequent acquisitions as accretions to the husband's property their Lordships of the Privy Council observed as below:

"In the present case their Lordships are of opinion that Khoosal Koeer, who always maintained the validity of her son's adoption as heir to her deceased husband and treated him as entitled to succeed to her husband's property, must be presumed to have intended to make her purchases as accretions to that property; nor do they see any evidence to rebut this presumption. It is true that she made a will in her son's favour, but it contains no specific gift of the property in question, and might well have been intended to apply to any property of her own which may have belonged to her as her 'stridhan'. That the property in question was understood by Puddum Singh himself to be part of Nem Singh's estate is shown by the pleadings in the original suit, in which he claimed it as the adopted son and heir of Nem Singh. It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself, and to sever from the bulk of the estate such purchases as she had made, with the view of conferring them on her adopted son."

In the above case the widow had always treated the adopted son (the adoption was later negatived by the Judicial Committee in — 'Chowdhry Padan Singh v. Koer Udayar Singh', 2 Beng LR 101 (PC) (S)) as heir to her deceased husband, and as she had bequeathed to him all her property without making any distinction between the original estate and the subsequent acquisitions, the entire property was held to partake of the same character.

(23) The first authoritative decision of the Judicial Committee is reported in — 'Isri Dutt Koer v. Hansbutti Koerain', 10 Cal 324 (PC) (T), in which their Lordships observed:

"In this case the properties in question consist of shares of lands, in which the husband was a share-holder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases. Parts of both are conveyed to Dyaji immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purpose which would not justify alienation of that original estate."

The distinguishing feature of this case was that the two sets of properties were not distinguished and parts thereof were alienated with the common intention of changing the succession.

This case was followed in — 'Sheolochum Singh v. Saheb Singh', 14 Cal 387 (PC) (U), in which their Lordships observed:

"Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, 'prima facie', it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, 'prima facie', be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention and that she intended to appropriate the savings in another way."

In this case also, the properties were treated alike and were alienated to a so-called adopted son with the view to divert the succession.

(24) In — 'Nirmala Sundari Dassi v. Deva Narayan Das', AIR 1927 Cal 868 (V) the property was purchased by the mother not in her own name but the 'benami' of another, and it was accordingly held that the onus of proving that such a property was not treated by the mother as her own separate property was on the plaintiff who alleged it to be so.

In that case, however, the fact that the property was not acquired in her own name was an indication that it was kept separate from the parent estate. 'Parbati Kuer v. Baijnath Prasad', AIR 1936 Pat 200 (W) was also a case where the widow had purchased the property in the name of another, namely her daughter, and this fact was considered as indicative of her intention to keep the property separate.

(25) In all these cases there were circumstances showing the intention of the widows. In — 'Akkanna v. Venkayya', 25 Mad 351 (X) their Lordships, after stating that the dictum of the Judicial Committee in — 'Sheolochum Singh v. Saheb Singh (U)', (supra) applied to the particular facts of the case, observed:

"The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one, which though derived from her husband's property, was at her absolute disposal .....Her absolute power of disposition over the income derived from (her) limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect this presumption."

It would thus appear that where there are no special circumstances indicating the intention of the widow one way or the other, the presumption would be that she intended to keep the acquisition as separate. This is the view that has been consistently held in this Court. (See — 'Rupabai v. Nokhesing', AIR 1940 Nag 236 (Y); — 'Prabhakar v. Sarubai', AIR 1943 Nag 253 (Z) and — 'Lalsingh v. Vithalsingh', AIR 1950 Nag 62 (Z1).

(26) The decisions noted above indicate that the character of the acquisitions is determined by the intention of the widow to whom the income from which the acquisitions are made belongs. If this intention is not clear, the presumption that she intended the acquisitions to be her separate property, would determine their character. The same principle would apply where she does not herself make the acquisitions and allows another to do so.

(27) This is not a case of a widow making the acquisition herself and then disposing them of along with her husband's estate by one transaction with the sole intention of changing the line of succession. Had it been a case of that type the dictum of their Lordship of the Privy Council in — '14 Beng LR 159 (PC) (R)'; — '10 Cal 324 (T) (supra)' and — '14 Cal 337 (U) (supra)' would have applied and the subsequent acquisitions treated as an accretion to the parent estate.

In the instant case, although the intention of Mst. Kalamati in setting up the adoption and letting the appellant into possession of her husband's estate was doubtless to change the line of succession, the same intention cannot be attributed to her in respect of the subsequent acquisitions which she obviously permitted him to make for his personal benefit. The case is like one where a widow makes a gift of the income of her husband's estate, which she has full power to dispose of. As the income thus given away cannot be claimed by the reversionary body, the acquisitions made therefrom by the donee cannot also be claimed. In such a case it cannot be urged that the widow had permitted the acquisitions to be made only to change the line of succession and not the character of the property.

(28) It is true that the appellant stated in the witness-box that the fields of Sukhiram and the new fields acquired subsequently were treated alike both by him and Mst. Kalamati. The statement, however, should not be taken literally. What he evidently meant was that both the sets of fields stood alike in his name and were cultivated by him with the same stock of husbandry. In fact, it would appear from paragraph 33 of his deposition that he claimed that even while the village share stood in the name of Mst. Kalamati, the fields were entered in his name in the village papers. This indicates that he could not have intended in his earlier statement that neither he nor Mst. Kalamati treated the acquisitions as constituting separate property. In such circumstances, the presumption that in permitting the appellant to acquire the fields Mst. Kalamati intended to create a separate estate for his benefit cannot be deemed to be rebutted. The acquisitions made by the appellant did not, therefore, form part of the reversionary estate.

(29) LIMITATION: It was urged in this connection that the suit is, in effect, one in which the validity of the adoption is challenged and as such it is governed by Art. 118, Schedule I, Limitation Act, 1908. Reliance is placed in this connection on — 'Jagmohan Saran v. Deoki Nandan', AIR 1927 PC 229 (Z2).

In that case their Lordships of the Judicial Committee no doubt held that where an action is in truth and substance a suit for a declaration that a particular adoption is invalid, and it is found that the fact that a claim was being made on the basis of the alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, the suit would be barred if brought after the period prescribed in Art. 118.

The facts of that case, however, are not stated in the report. The principle is no doubt sound, but the instant case is analogous to — 'Kalyandappa v. Chanbasappa', AIR 1924 PC 137 (Z3) where in a suit by a reversioner for possession of immovable property on the death of a widow Art. 141, Limitation Act, was held to be applicable even though it was necessary to decide in the suit whether the adoption was or was not valid. In the instant case the challenge to the adoption is only incidental to the determination of the rights of the plaintiff as reversioner and on that account the suit cannot be deemed to be "in truth and substance" a suit for a declaration that the appellant's adoption is invalid. We, therefore, hold that the suit is not barred by limitation.

(30) The result is that the claim in respect of the subsequent acquisitions and the profits arising therefrom is liable to be dismissed. The appeal is accordingly partly allowed. The decree of the lower Court is modified by deleting therefrom the words "II. Joint possession to the extent of half over the lands Gauti Rayati as described in Sch. B", the claim in respect of which is dismissed, and substituting in place of the figures "Rs. 1230", "Rs. 1800" and "Rs. 2058", the figures "Rs. 565", "Rs. 1165" and "Rs. 1730" respectively. Considering the partial success and failure of the suit, it is directed that the parties shall suffer their own costs throughout. Counsel's fee Rs. 400/-.

R.G.D. Order accordingly.

A.I.R. 1954 NAGPUR 325 (Vol. 41, C.N. 113)

SINHA C. J. AND BHUTT J. (30-11-1953)

Vaman Ganesh Kolhatkar, Plaintiff-Appellant v. Western India Life Insurance Company Ltd., Satara, Defendant-Respondent.

First Appeal No. 69 of 1945, from decree of 2nd Addl. Dist. J., Nagpur, D/- 2-1-1945.

Insurance — Life — Proposal on joint life plan — Joint declaration by assured — Construction — Survivor held could not claim on policy because of false answers to medical questions by deceased — (Contract — Insurance).

An insurance proposal on joint life plan by partners A and B, on their lives contained the following joint declaration: "We A and B do hereby severally and solemnly declare that the statements and representations made in the proposal are, whether written by hand of each or either of us or not, correct and true to the best of our knowledge and belief and shall along with the declaration and statement made before the medical examiner be the basis of the contract between us and the above Life Insurance Company."

Held that each of the proposers had agreed to be bound by the statement of the other. Therefore, the conditions which were liable to defeat the claim of one would also be effective against the other. (Para 5)

Held further that B the deceased partner had given false answers to the questions, regarding his health contained in the proposal, that the answers were untrue to his knowledge, that the answers formed material part of the contract, that the declaration was the basis of the contract and that therefore A, the surviving partner, could not claim upon the policy on the death of B. The question of A's own knowledge regarding the truth or otherwise of B's statement was not material. (Paras 10, 12)

CASES REFERRED: Paras

(A) (1853) 4 HLC 484: 10 ER 551 11
(B) (1925) 1925 AC 344: 94 LJPC 60 11
(C) (V19) AIR 1932 Bom 582: 140 Ind Cas 575 12
(D) (V23) AIR 1936 Cal 437: 166 Ind Cas 707 12
(E) (V18) AIR 1931 Bom 146: 55 Bom 124 12
(F) (V31) AIR 1944 Mad 559: ILR (1945) Mad 150 12
(G) (V29) AIR 1942 Cal 412: ILR (1942) 1 Cal 100 12

G. B. Sidhye, for Appellant; M. R. Bobde and K. G. Chendke, for Respondent.

JUDGMENT: This is plaintiff's appeal from the decree dismissing his claim to recover the amount of the life insurance policies.

(2) Appellant Waman and Ramchandra Vartak were partners carrying on business in Nagpur. They made a proposal to the respondent Company on 26-11-1938 for an insurance policy for an amount of Rs. 10,000/- each, on what is called a Joint Life Plan under which each partner was to be entitled to the entire amount of Rs. 20,000/- on the demise of the other. The proposal was accepted on 10-5-1939 and two policies Nos. 52161 and 52162, each for Rs. 10,000/-, were issued on 13-5-1939, by the Company.

Vartak died on 27-9-1940 but the appellant's claim for recovery of the amount was negatived by the Company on the ground that his partner "intentionally omitted to mention true facts which he was bound to disclose according to law." As the appellant's suit for enforcement of the claim was dismissed, he has come up in appeal.

(3) The defence of the Company relevant for purposes of this appeal, which prevailed in the lower Court, was that Vartak's answers to questions regarding his health and previous illnesses in the form of proposal (Exhibit D-6) and to similar questions in his personal statement to the medical examiners, (Exhibit D-4 and Exhibit D-5), were untrue to his knowledge, which vitiated the contract.

Besides challenging the finding that Vartak's statement was untrue, the learned counsel for the appellant has urged the following points:

1. That the policies being separate, the appellant cannot be bound by his partner's statement.
2. That there was no covenant to warrant the truth of the statement and as it is not shown to be untrue to his knowledge and belief, the policies cannot be avoided.

(4) Exhibit D-6 contains the joint proposal of the appellant and Vartak which is embodied in the following passage, viz.,

"We V. G. Kolhatkar and R. A. Gailad-Vartak do hereby severally and solemnly declare that the statements and representations made in the proposal are, whether written by hand of each or either of us or not, correct and true to the best of our knowledge and belief and shall along with the declaration and statement made before the medical examiner be the basis of the contract between us and the above Life Insurance Company."

The question is one of construction of this document.

(5) The subject of joint and several liability has been discussed by Leake in his book on Contracts, 8th Edn., on pages 317 and 318. It is true that "a written contract is construed according to the primary meaning of the words used", and "if it purports that they (parties) bind themselves or covenant severally, the liability is several only."

However, the learned author further observes:

"If it purports that they bind themselves jointly and severally, or bind themselves and each of them, or covenant for themselves and each of them, using both joint and several words, the liability is both joint and several. Covenantors will be bound jointly and severally if they are expressed to covenant 'for themselves and each of them'."

There may, therefore, be different modes of expressing the joint and several liability under the contract, and even if specific words to that effect are not used the intention of the parties has to be gathered from the document as a whole and not merely from its isolated parts.

Each of the proposers in this case had agreed to be bound by the statement of the other. Therefore, the conditions which were liable to defeat the claim of one would also be effective against the other. This conclusion is strengthened if their interests and relations are taken into consideration, which, as the learned author says, may be referred to for the purpose of determining the proper construction of the instrument, if the language of the contract is ambiguous. The proposers in the instant case were partners, each of whom had a beneficial interest jointly in both the policies. In such a case, their liability would correspondingly be also joint.

(6) The pertinent questions and answers in the proposal form, on which reliance was placed in defence, are the following:

"7. Have you suffered within the last 5 years from any serious illness, disease or accident? If so, give dates and particularts. ..... No.
8-A. What have been your usual states of Health? .....Good."

Corresponding questions and answers in the personal statement to the medical examiner are these:

"V. a. What has been your usual state of health?
....Good.

c. Have you had any illness within the last five years? (If so, mention all details below). .. .. None."

Questions VIII. a, c, d and e in the personal statement, which were also relied on, only mention the illnesses in detail, to all of which Vartak had given a negative reply. However, question VIII. i, to which particular reference was made in the arguments, is reproduced below together with its answer:

"VIII. i. In particular have you ever suffered or do you suffer from any other illness, or any operation, accident, injury, deformity or disability whether considered by you to be important or not? If so, give particulars stating how long you were confined to bed or to the house. .... No. .... No."

It will thus be seen that although question No. 7 in the form of proposal was limited to a serious illness, the questions in the personal statement included all the illnesses, whether serious or comparatively minor. In view of these general questions, to which categorical replies were given, it is immaterial whether questions VIII. a, c, d, and e, of the personal statement, which were of a technical nature, were properly understood by Vartak.

(7) The evidence on record concerning the state of Vartak's health before he made the proposal on 26-11-1938 consists of the testimony of K. T. Khare (D. W. 3), M. A. Gailad-Vartak (D. W. 4), Keshao (D. W. 5), Dr. S. R. Paranjape (D. W. 7) and Narayan (D. W. 10). K. T. Khare, who is the deceased's wife's sister's husband, and M. A. Vartak, his real brother, state that the deceased had come to Bombay and then gone to Poona, about the middle of 1938 A. D., for consulting Dr. Bhadkamkar, a well-known physician of the south, regarding his health and had later gone to Murud, a village in Ratnagiri district, for change of climate and native treatment.

To K. T. Khare he had disclosed his illness as paralysis and heart-trouble. M. A. Vartak had detected his defective gait, that is, he could not put his legs correctly and used to swing while walking. While in Nagpur, he was under the treatment of Keshao (Dr. Daftari), who practises Homeopathy, and of Dr. Paranjape. Dr. Daftari had treated him from 18-11-1937 to 1-3-1938 for general obesity and fatness of heart. The deceased had stated to him his symptoms as extreme weakness and breathlessness on very slight exertion.

The deceased, however, got no relief and towards the end of treatment developed dropsy on his feet. Dr. Paranjape claims to have treated him for about three months in the middle of 1937 A. D. for Arterial Sclerosis, kidney disease and liver enlargement, while Narayan, a native physician, treated him in September or October 1938 for a disease called SHIRAGAT-WAT in Ayurveda, which involves the arteries and causes defective walking. Narayan had found the deceased a fatty person with an impaired digestion.

(8) The evidence of these witnesses was criticised by the learned counsel of the appellant on the ground that they had only relied on the symptoms disclosed by the patient, without confirming the basic disease by pathological tests. However, there is no reason to doubt that the deceased did suffer from the symptoms which he had described. In fact, the patient is the best person to state his complaints and is not likely to mislead the physician regarding his symptoms.

It is true that the symptoms may be due to a variety of causes. For instance, inability to walk properly, i.e. without pain, defective gait or breathlessness, may be due to Cardiac Failure, Thrombo Angiitis Obliterans, or Arterial Hypertrophy. (See A Text-Book of the Practice of Medicine by Price, 3rd Edn., pages 753, 939 and 945). The lameness caused by Arterial Hypertrophy may be intermittent, the pain and the loss of power being due to the spasm of the thickened arteries. The disease may also cause transient attacks of paralysis and result in cardiovascular hypertrophy with attendant functional disorders of the heart, e.g., palpitation, tachycardia, etc. (See Price, pages 777 and 945). The diagnosis of SHIRAGAT-WAT made by Narayan corresponds with this disease. What, however, may be the actual cause of the symptoms is difficult to determine unless the disease responds to the treatment or when the cause of death in a case of fatal end is known.

(9) Dr. Patwardhan (D. W. 9) was the medical attendant of the patient in his last illness. According to him, death was due to Primary Myocardial Degeneration and Secondary Heart (Cardiac) Failure. This diagnosis was not challenged before us and satisfactorily explains the symptoms which the deceased was complaining of. In cross-examination Dr. Patwardhan doubtless stated:

"The diseases which I told might have developed in the deceased at any time."

This, however, does not mean that the disease had developed suddenly shortly before his death. Myocardial Degeneration is generally due to Atheroma which is a variety of arterial degeneration associated either with heredity, advancing age or wear-and-tear of the vessels, with hypertension as a factor. (See Price, page 940).

In the instant case there is no history of heredity and the patient was not of an advanced age. The remaining cause of the disease cannot have a sudden onset. We accordingly see no reason to disbelieve the witnesses abovenamed and have no difficulty in accepting their testimony that the deceased had, to his own knowledge, symptoms of the disease some time in the middle of 1937 A. D., which had developed considerably by the middle of the year 1938 A. D. when he was constrained to consult an eminent physician like Dr. Bhadkamkar of Poona. In the light of these facts, we are not inclined to give any weight to the medical reports of Dr. Hardas and Dr. Gayaprasad who had, curiously enough, categorised the deceased as a first class life as per Exhibits D-4 and D-5.

(10) This is, therefore, a case of wilful suppression of true facts, which were within Vartak's own knowledge. In this view it is not necessary to determine if the warranty, in the contract, was in respect of the truth of the representation, or only with regard to the knowledge or belief of the assured. Nor is it pertinent to enquire if the contract was 'uberrimae fidei' in which only the materiality of the fact disclosed counts for avoidance of the contract. The reason is that the fact that was not disclosed was doubtless material in that the illness that was suppressed had defied prolonged treatment and evidently had an unfavourable prognosis.

So far as the appellant's own knowledge is concerned, it has to be noted that he and Vartak were associated in a joint business for a long time and must have had frequest occasions to meet and know each other's condition of health. In these circumstances, it is not possible to postulate that the appellant remained completely ignorant of his partner's health, particularly when he had

begun to exhibit symptoms, e.g., breathlessness and oedema of the legs, which any one could notice on sight and had also gone out for treatment—a fact which was not likely to remain secret to his partner.

However, as already discussed, this is a case of joint and several liability, in which it is sufficient to defeat the claim on facts which make the policy of any one of the assured void and unenforceable. The question of appellant's own knowledge regarding the truth or otherwise of Vartak's statement is not, therefore, material.

(11) Coming to the terms of the policies in question, it is pertinent to notice that the statements and representations made in the proposal and also in the personal statement made to the medical examiner by either of the assured formed the basis of the contract. (See Exhibit P-9, Exhibit P-10 and D-6).

In — 'Anderson v. Fitzgerald', (1853) 4 HLC 484 (A), the two answers that were false were not included in the subjects warranted in the policy which provided:

> "If anything so warranted shall not be true, or if any circumstance material to the insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the Company in or about the obtaining or effecting of the insurance, this policy shall be void, and the premiums shall be forfeited."

Their Lordships observed that it was a misdirection to the Jury to say whether the answers to the two questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict, and held that the representation being part of the contract, its truth, not its materiality, was in question. It is only when statements made by an insured person are not made on the basis of contract but are to be treated merely as representations, that the question of the materiality of the statement so as to vitiate the policy arises for consideration. (See—'Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.', 1925 AC 344 (B).

(12) The law in India is the same. (See — 'Lakshmishankar v. Gresham Life Assurance Society', AIR 1932 Bom 582 (C); — Light of Asia Insurance Co. v. Karatoya', AIR 1936 Cal 437 (D) and — 'Great Eastern Life Assurance Co. v. Bai Hira', AIR 1931 Bom 146 (E). In — 'East and West Life Insurance Co. Ltd. v. Venkiah', AIR 1944 Mad 559 (F), the declaration was filled by the Company's agent in English and signed by the assured, who did not know English, in Telugu, still he was held bound by the declaration which being untrue on a material point, was held to vitiate the policy. This was, however, a case in which the declaration did not form the basis of the contract, and that is why the question of the materiality of the representation became relevant. In — 'Western India Life Insurance Co. Ltd. v. Asima Sarkar', AIR 1942 Cal 412 (G), which was a case of the declaration being the basis of the contract, it was held that

> "in order to succeed on the plea of waiver, it would not be sufficient for the representatives of the assured to prove that the insurer had the means of knowing that the statements made by the assured were untrue; they must prove that the insurer did in fact know at the time it accepted the premiums that the assured's statements were untrue."

Although no plea of waiver was raised by the appellant, the decision cited above shows the sanctity attached by law to the declarations which form the basis of a contract in respect of an insurance policy. The instant case where the statement was made on a material point and was untrue to the assured's knowledge, is much stronger for avoidance of the contract.

(13) The result is that the appeal fails and is dismissed with costs. Counsel's fee Rs. 500/-.

R.G.D. Appeal dismissed.

A.I.R. 1954 NAGPUR 328 (Vol. 41, C.N. 114)

MANGALMURTI AND DEO JJ. (19-2-1954)

Balaprasad Asaram Charkha and others, Appellants v. Asmabi w/o Fakruddin Bohri, Respondent.

Second Appeal No. 457 of 1951, from appellate decree of Addl. Dist. J., Wardha, D/- 30-6-1951.

(a) T. P. Act (1882), S. 111 (g) — Denial of title of lessor by lessee — Forfeiture and determination of lease.

The renouncing of his character as a lessee by setting up a title in a third person or by claiming a title in himself makes the lease voidable but does not 'ipso facto' put an end to the lease. The lessee is thereby exposed to the risk of forfeiting his lease and the lessor is given the right if he so elects to determine the lease. There is, therefore, no determination of lease by forfeiture unless and until the lessor gives notice that he has exercised the option to determine the lease. (Para 6)

Anno: T. P. Act, S. 111 N. 16.

(b) T. P. Act (1882), S. 111 (d) — Determination of lease by merger of interests.

Where the lease-hold right & the reversion coincide there is a merger of the lesser estate in the greater, i.e., leasehold rights are merged in the reversion. There cannot, however, be any merger unless the lessee acquires the reversion by a valid transaction. (Para 8)

Anno: T. P. Act, S. 111 N. 7.

(c) Specific Relief Act (1877), S. 31 — Rectification of instrument — Essentials for.

Rectification of an instrument consists in bringing it in conformity with the prior real agreement between the parties. The Court has not only to find it clearly proved that there has been fraud or mistake in framing the instrument but has also to ascertain the real intention of the parties in executing it. (Para 9)

Anno: Sp. R. Act, S. 31 N. 1.

(d) Deed — Construction of — (Maxims).

Two maxims have to be borne in mind in construing a deed. Courts are bound so to construe contracts or agreements by deed or parol 'ut res magis valeat quam pereat' (i.e., that it may be made to operate rather than be inefficient). The other maxim is 'falsa demonstratio non nocet', i.e., a mere false description does not vitiate if there be sufficient certainty as to the object. In order to ascertain this the false description in the

instrument should be omitted. Without it, if there is certainty as to the property conveyed, the instrument is valid. AIR 1918 PC 102; (1850) 117 ER 445 (450), Foll. (Para 9)

(e) Specific Relief Act (1877), S. 31 — Suit for possession — Power of Court to rectify sale deed — (Evidence Act (1872), S. 92, Prov. 1).

Section 31 of the Specific Relief Act is an enabling provision and it is not the only remedy for seeking the relief of rectification. If the conditions of S. 31 are satisfied, the Court cannot refuse rectification merely on account of the omission of a prayer for it. The combined effect of S. 31, Specific Relief Act and S. 92, Proviso (1), of the Evidence Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving the mistaken expression of the agreement. And if the suit for possession of the property sold is within limitation, Court may allow rectification of the instrument of sale wherein the mistake has crept. 34 Mad 51; AIR 1916 Mad 519, Rel. on; AIR 1928 Nag 4, Foll.; AIR 1948 Nag 67, Expl. (Para 10)

Anno: Sp. R. Act, S. 31 N. 6; Ev. Act, S. 92 N. 23.

(f) Specific Relief Act (1877), S. 27 (b) — Applicability.

Where a sale deed executed on 28-11-1947, is in pursuance of an agreement of 30-5-1947, the plaintiff has a prior title to that of defendant who takes the sale deed dated 24-8-1948 under the agreement dated 12-9-1947. Section 27 (b), Specific Relief Act, has no application in such a case. (Para 15)

Anno: Sp. R. Act, S. 27 N. 3.

CASES REFERRED: Paras

(A) (V5) AIR 1918 PC 102: 46 Cal 458 (PC) 9
(B) (1850) 117 ER 445: 15 QB 227, 241 9
(C) ('11) 34 Mad 51: 8 Ind Cas 390 10
(D) (V3) AIR 1916 Mad 519: 39 Mad 792 10
(E) (V15) AIR 1928 Nag 4: 104 Ind Cas 736 10
(F) (V35) AIR 1948 Nag 67: ILR (1947) Nag 449 11
(G) (V18) AIR 1931 PC 79: 58 Cal 1235 (PC) 11

G. B. Badkas, for Appellants; M. R. Bobde, and K. G. Chendke, for Respondent.

JUDGMENT: This is defendants' appeal against a decree for possession.

(2) On 28-11-1947 Devising executed the sale deed Exhibit P-1 of the house property in dispute in favour of the plaintiff. Her contention in the trial Court that she purchased this property under the agreement dated 3-10-1946 (Exhibit P-16) in favour of her husband was abandoned in the lower appellate Court in view of the findings of the first Court that the document appeared to be ante-dated and that the transaction evidenced by it was not satisfactorily proved. She now contends that she purchased it under a later agreement dated 30-5-1947. This agreement was not specifically pleaded though the facts from which it can be established were pleaded. They were put in issue as the defendants denied them. The trial Court found that Exhibit P-1 which was written on 30-5-1947 and was executed on 28-11-1947 was a fresh and independent transaction between the plaintiff and Devising and that Devising delayed the execution for such a long time. These findings do not appear to have been disputed before the lower appellate Court.

(3) The trial Court found that on 24-8-1948 Devising executed the sale deed Exhibit 2-D-2 of the same property in favour of defendant 3 under an agreement dated 12-9-1947 (Exhibit 2-D-1). This finding is not disputed before us. The trial Court did not decide the defendants' contention that defendant 3 was a benamidar for defendant 2 on the ground that it was immaterial for the disposal of the suit. The lower appellate Court also has not decided it. Defendant 1 is the husband of defendant 2 and manages her medical store located in the premises in dispute. Defendant 2 has been a tenant of Devising since 1944.

(4) Originally, this suit was for arrears of rent for ten months, November 1947 to August 1948, for declaration of title and for injunction. On amendment the suit is for possession and arrears of rent for these ten months, or, in the alternative, for damages for use and occupation. The trial Court dismissed the suit but the lower appellate Court decreed it on the ground that the plaintiff had no notice of the agreement Exhibit 2-D-1. A decree for Rs. 300/- for damages for use and occupation was also passed.

(5) The learned Counsel for the appellants contends that the finding that the defendants have failed to prove that the plaintiff had notice of the agreement, Exhibit 2-D-1, is in utter disregard of S. 27 (b), Specific Relief Act, and that the lower appellate Court should have placed the burden of proof on the plaintiff and not on the defendants. The second contention of the learned Counsel is that defendant 2 was admittedly a tenant of Devising. Consequently, the plaintiff cannot maintain a suit for possession without determining her tenancy. Since the plaintiff had not obtained permission of the Rent Controller to determine her tenancy and as the plaintiff had not determined the tenancy by giving a notice under S. 111 (g) or 111 (h), Transfer of Property Act, the suit is not maintainable.

The third contention of the learned Counsel is that the plaintiff has not purchased the house purchased by defendant 2 and is not entitled to bring the suit. This last contention is based on the fact that the number of the nazul plot in the plaintiff's sale deed is 56/1 and that in the defendant's sale deed is 56/2. It is proved that the house standing on No. 56/1 belongs to one Taher Ali and not to Devising and that the house on plot No. 56/2 was owned by Devising and defendant 2 has been occupying it as a tenant. It is, therefore, clear that the house sold by Devising to plaintiff and defendant 2 is the same property standing on nazul plot No. 56/2. The learned Counsel for the appellants, however, submits that the plaintiff is not entitled to maintain this suit without getting the sale deed rectified according to law.

(6) There is no force in the contention of the learned Counsel for the plaintiff that the defendant has not raised the plea that her tenancy was not validly terminated. Her plea is to be found in paragraph 16 of the written statement, in answer to paragraph 3 of the amended plaint. Defendant 2 had no doubt denied plaintiff's title over the suit house before the Rent Controller, but the denial of title entails only forfeiture and does not determine the tenancy unless a notice is given under S. 111 (g), Transfer of Property Act. This provision regarding notice was added by Act 20 of 1929 (Transfer of Property (Amendment) Act). The words "gives notice in writing to

the lessee of" have been substituted for the words "does some act showing".

The renouncing of his character as a lessee by setting up a title in a third person or by claiming a title in himself makes the lease voidable but does not 'ipso facto' put an end to the lease. The lessee is thereby exposed to the risk of forfeiting his lease and the lessor is given the right if he so elects to determine the lease. There is therefore no determination of lease by forfeiture unless and until the lessor gives notice that he has exercised the option to determine the lease. Such a notice is absent in the instant case. Consequently the lease is not determined by forfeiture. Admittedly, no notice was given even under S. 111 (h). That notice requires the written permission of the Rent Controller and that is wanting. We therefore hold that the plaintiff is not entitled to possession as the lease was not determined.

(7) The learned Counsel for the plaintiff, however, submits that the stand of defendant 2 before the Rent Controller and the Deputy Commissioner was that she was not the tenant as the tenant's rights had merged by the purchase Exhibit 2-D-2. Consequently it is argued that this case falls under S. 111 (d) and notice is not necessary. It is further contended that defendant 2 having waived her right as a tenant is now estopped from asserting that right even in the alternative. Reliance is placed on a passage at page 970 of Sarkar's Law of Evidence, 9th Edn., relating to 'Estoppel by Inconsistent Position'. There is no material on record for the application of the principle "He is not to be heard who alleges things contradictory to each other." There is no evidence to hold that defendant 2 had made the alleged pleading.

The plaintiff's application and the written statement of defendant 2 are not on record. Exhibit 2-D-3, dated 4-10-1948, which is an order in appeal, only states that defendants 1 and 2 denied that the plaintiff was their landlord. The sale deed Exhibit 2-D-2 is dated 24-8-1948. Unless the written statement had been filed after 24-8-1948 the defendants could not have pleaded merger of interest. There is no material even to show that the written statement was filed after this date. Ordinarily, the proceedings before the Rent Controller and the Deputy Commissioner are not disposed of in such a short time. The plaintiff has not set up this case in the plaint nor has she produced the relevant documents. No doubt, defendant 2 has now alleged that the plaintiff is not entitled to possession in view of the sale deed Exhibit 2-D-2 and has pleaded in the alternative that if Exhibit 2-D-2 does not make her owner of the property her tenancy rights continue unextinguished but these are not allegations contradictory of each other.

(8) No doubt, when the leasehold right and the reversion coincide there is a merger of the lesser estate in the greater, i.e., leasehold rights are merged in the reversion. There cannot, however, be any merger unless the lessee acquires the reversion by a valid transaction. If in this case the sale in favour of the plaintiff be good, Devising had no right to execute a sale deed Exhibit 2-D-2 in favour of defendant 3 on a later date and he or defendant 2 for whom he is said to be the benamidar could not legally acquire the reversion. Defendant 2 could then hold the leasehold rights as a shield against the plaintiff. In that case, in the absence of determination of the lease either under S. 111 (g) or 111 (h), plaintiff would not be entitled to eject defendant 2.

(9) The next point for consideration is whether the plaintiff is entitled to maintain this suit for possession without getting her sale deed rectified under S. 31, Specific Relief Act. Rectification of an instrument consists in bringing it in conformity with the prior real agreement between the parties. To attract S. 31 in the instant case it is necessary to prove: (a) that the sale deed does not truly express the intention of the parties to it, and (b) that this is due to fraud or mutual mistake in framing the instrument.

The Court has not only to find it clearly proved that there has been fraud or mistake in framing the instrument but has also to ascertain the real intention of the parties in executing it.

The first question of decision, therefore, is whether the sale deed does not truly express the the intention of the parties to it. As already stated, the only misdescription is that the number of the nazul plot as appearing in the nazul register is wrongly stated. Instead of 56/2, 56/1 is stated. Two maxims have to be borne in mind in this connection. Courts are bound so to construe contracts or agreements by deed or parol 'ut res magis valeat quam pereat' (i.e. that it may be made to operate rather than be inefficient). As stated by their Lordships of the Judicial Committee in — 'Harihar Banerji v. Ramshashi Roy', AIR 1918 PC 102 (A), deeds are to be construed not with a desire to find faults in them which render them defective but are to be construed to make them operative. If the appellants' contention is accepted, the suit house was not conveyed because number 56/2 is not stated in the sale deed and the house standing on plot No. 56/1 could not be conveyed by it as it belonged to a stranger. The deed becomes, therefore, ineffective. This is not a sound rule of construction.

The other maxim is 'falsa demonstratio non nocet' i.e., a mere false description does not vitiate if there be sufficient certainty as to the object. In — 'Doe v. Hubbard', (1850) 117 ER 445 at p. 450 (B), Patterson J. said:

> "I agree to the doctrine that 'falsa demonstratio non nocet': but that is only where the words of the devise, exclusive of that 'falsa demonstratio', are sufficient of themselves to describe the property intended to be devised, reference being had, if necessary, to the situation of the premises, to the names by which they have been known, or to other circumstances properly pointing to the meaning of the description....."

In order to ascertain this the false description in the instrument should be omitted. Without it, if there is certainty as to the property conveyed, the instrument is valid.

The intention of the parties as expressed in Exhibit P-1 was to convey the house property having the area and the boundary stated therein together with the lease-hold rights in the land on which the house stood, situated in the locality of Pulgaon, specified in the deed. The description without the nazul plot number is sufficient to identify the property intended to be conveyed. As stated at p. 726 of the Indian Contract and Specific Relief Acts by Pollock and Mulla, edited by Sir Maurice Gwyer:

> "There is no need to invoke the jurisdiction under S. 31 in case of such verbal slips or omissions as are obvious on the face of the writing and can be corrected by the context alone. The remedy of these minor blunders is within the Courts' ordinary function of construing the expressions used. Even a missing clause

can be supplied in an instrument of a well-known form if the sense clearly requires it."

As the sale deed truly expresses the intention of the parties to it, S. 31 has no application.

(10) Even if plaintiff were required to sue for rectification of the sale deed her claim is tenable. Section 31 is an enabling provision and it is not the only remedy for seeking the relief of rectification. It is stated in the plaint in the instant case that No. 56/1 was written in the instrument due to a common mistake. Under similar circumstances it was held in — 'Mahadeva Aiyar v. Gopala Aiyar', 34 Mad 51 (C), that omission of a prayer for rectification was, at most, a matter of form. If the conditions of S. 31 are satisfied, the Court cannot refuse rectification merely on account of the omission of a prayer for it. This decision was followed in — 'Rangaswami v. Sowri Ayyangar', AIR 1916 Mad 519 (D) and — 'Sabhaji v. Nawalsingh', AIR 1928 Nag 4 (E). In — 'AIR 1928 Nag 4 (E)', the intention of the parties was to sell survey No. 181, but by mutual mistake it was shown as survey No. 161, Kinkhede A. J. C. held that the combined effect of S. 31, Specific Relief Act, and S. 92, proviso (1), Evidence Act was to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving the mistaken expression of the agreement. The suit was brought within 3 years. In the instant case, the suit was brought within three years of the execution of Exhibit P-1 and as a suit for rectification it is within time. The plaintiff would therefore be entitled to relief under this section in view of the mutual mistake.

(11) The learned Counsel for the appellant relies on — 'Ajab Singh v. Jhabbulal', AIR 1948 Nag 67 (F), where Pollock J. dismissed the suit for possession on the ground that the sale deed was not rectified by a suit brought within limitation. There the defendant had agreed to sell Khasra No. 267/1 and put the plaintiff in possession of that field; but the sale deed mentioned khasra No. 265/1. Relying on — 'Ariff v. Jadunath Majumdar', AIR 1931 PC 79 (G), Pollock J. took the view that by the sale deed the plaintiff did not acquire the title to Khasra No. 265/1 as the title could be acquired only by a registered instrument. In — 'Ariff v. Jadunath Majumdar (G)', the title rested with the plaintiff. Defendant resisted the suit for possession of land under an oral agreement of permanent lease and on the ground of having constructed a permanent structure. Their Lordships held that even if the facts of the case established an equity, it could not operate to nullify the provisions of S. 107, Transfer of Property Act, which require a registered lease to acquire the right claimed by the defendant. It does not follow from the decision of Pollock J. that where in a suit for possession, facts necessary for rectification are proved, the plaintiff will not get relief of rectification merely because the relief was not formally claimed even though the suit is brought within limitation.

(12) We are of the opinion that the plaintiff can maintain the suit without first getting the document rectified by a suit under S. 31, Specific Relief Act.

(13) Now remains the last contention of the appellants that the plaintiff has not proved that she was a purchaser for value without notice of the agreement dated 12-9-1947 in favour of defendant 3. Reliance was placed on S. 27(b), Specific Relief Act. The learned Counsel assumes that there was no agreement between the plaintiff and Devising prior to 12-9-1947 which resulted in the sale deed Exhibit P-1. As already stated, plaintiff relies on the prior agreement dated 30-5-1947. It is clear beyond doubt that Exhibit P-1 was written on 30-5-1947. It is stated therein that

"(a) Rs. 1000/- were received in cash from the plaintiff's husband on 3-10-1946 without interest for payment of the debts of the vendor's marriage, of which havala was taken by the vendee;

(b) Rs. 200/- were received about 3 months before that date;

(c) Rs. 1800/- would be paid before the Sub-Registrar at Wardha."

This document was executed by Devising on 27-11-1947. There are two documents of dates prior to 30-5-1947 evidencing receipt of Rs. 200/- by Devising. One is Exhibit P-17, a bond dated the 24th February and the other is Exhibit P-3, a receipt dated 12-3-1947, executed by Devising in favour of Fakruddin. One of these payments at any rate is included in Exhibit P-1. P. W. 2 Fakruddin swears that Exhibit P-1 was written on 30-5-1947 and that Devising promised to execute it the next day at Wardha but he failed to turn up. Devising as P. W. 3 admits that the document was written on 30-5-1947 and that he had agreed to go to Wardha on the following day to execute it. On 20-9-1947 Fakruddin sent a notice Exhibit P-7 to Devising requiring him to perform the agreement dated 3-10-1946 to sell the house and field as stated in Exhibit P-16.

It was stated in that notice that a stamp of Rs. 60/- was purchased on 30-5-1947 for execution of the sale deed and that when the sale deed was completely written by the petition-writer Devising avoided signing it. Exhibit P-10 is the reply of Devising dated 25-9-1947 in which he asked Fakruddin to meet him at Wardha on 30-9-1947 to do the needful. Prior to this on 14-7-1947 Devising had sent a postcard to Fakruddin asking for some more money and promising that he would be at Wardha on 28-7-1947. Exhibit P-9 is a telegram dated 28-10-1947 from Devising to Fakruddin asking him to show to his Advocate, Shri Gole, the agreement between the parties. Accordingly, Isarchitthi dated 3-10-1946 was shown to Fakruddin's Counsel Shri Gole. Exhibit P-6 is the admission of Shri Gole who has proved it as P. W. 1. It is significant that Devising did not deny the statement in Exhibit P-7 that the document was written on 30-5-1947. It is thus manifest that the agreement stated in Exhibit P-1 took place on 30-5-1947 if not earlier.

(14) Exhibit P-14, dated 29-9-1947 is the telegraphic notice to defendant 1 stating that Devising had contracted to sell the house to Fakruddin in October 1946 and warning him that if he purchased it, it would be at his risk. Defendant 1 did not send any reply to this notice and there is no explanation for it.

(15) In view of the fact that the sale deed Exhibit P-1 executed on 28-11-1947 was in pursuance of an agreement of 30-5-1947, the plaintiff has a prior title to that of defendant 3 who took the sale deed dated 24-8-1948 under the agreement dated 12-9-1947. Section 27 (b), Specific Relief Act, has therefore, no application here. Plaintiff's title must prevail over that of defendant 3.

(16) In this view it is not necessary to decide the contention that defendant 3 is benamidar for defendant 2. We leave the question open.

(17) It was not disputed that defendant 2 had agreed to pay rent at Rs. 30/- p. m. She is therefore liable for Rs. 300/- claimed by the

plaintiff as rent for 10 months—November 1947 to August 1948. Plaintiff is not entitled to obtain possession from her without determination of the tenancy. The suit for possession is therefore dismissed. The appeal is allowed to this extent. As regards costs here and in the Courts below, plaintiff will be entitled to costs (Court-fees, pleaders' fees, and summons to defendant and vakalatnama) calculated on the claim of Rs. 300/- and must pay the costs of the defendants as the defence was principally directed towards the claim for possession. A decree be drawn up accordingly.

V.S.B. Appeal allowed partly.

A.I.R. 1954 NAGPUR 332 (Vol. 41, C.N. 115)

MANGALMURTI AND DEO JJ. (28-1-1954)

Abdul Quddoos Dost Mohammad Momin and another, Plaintiffs-Appellants v. Abdul Gani Abdul Rahman and another, Defendants-Respondents.

Misc. First Appeal No. 49 of 1951, from order of 2nd Addl. Dist. J., Nagpur, D/- 18-12-1950.

(a) Arbitration Act (1940), S. 34 — Step in proceeding.

Making an oral application for time to file a written statement is undoubtedly taking a step in the proceedings. It is not necessary that the step in the proceeding must be taken by a written application. Misc. App. No. 70 of 1950, D/- 19-9-1954 (Nag), Rel. on. (Para 3)

Anno: Arb. Act, S. 34 N. 16.

(b) Arbitration Act (1940), Ss. 34, 35 — Conditions for stay.

It is necessary for the defendants applying to stay the proceedings to prove that the legal proceedings are commenced in respect of a matter agreed to be referred and that he was and is ready and willing to have the matter decided by arbitration. Unless the suit refers to the whole of the subject-matter referred to arbitration, the section is not attracted because the plaintiff will still have to seek relief in a Civil Court for matters which are not referred to arbitration. Where the award of the arbitrators will not dispose of the whole suit the suit cannot be stayed. AIR 1953 SC 182, Relied on. (Paras 11, 14)

Section 35 of the Act will not be a bar to the continuance of the arbitration proceedings to the extent provided by the arbitration agreement. (Para 16)

Anno: Arbi. Act, S. 34 N. 8, 9; S. 35 N. 1.

CASES REFERRED: Paras

(A) ('54) Misc. F. A. No. 70 of 1950, D/- 19-9-1954 (Nag) 6, 8
(B) (V30) AIR 1943 Cal 484: ILR (1943) 2 Cal 298 7
(C) (V36) AIR 1949 Mad 582: 1948-2 Mad LJ 606 7
(D) (1898) 1898-2 Ch 92: 67 LJ Ch 370 7
(E) (V37) AIR 1950 Bom 127: ILR (1951) Bom 357 9
(F) (1913) 108 LT 921 9
(G) (V40) AIR 1953 SC 182: 1953 SCJ 217 (SC) 14

S. R. Mangrulkar and G. B. Shidhye, for Appellants; M. Adhikari, for Respondents.

JUDGMENT: This is plaintiffs' appeal against an order, staying the suit, passed under S. 34, Arbitration Act.

(2) On 2-9-1950 plaintiffs instituted a suit for dissolution of partnership and rendition of accounts and on 5-9-1950 they made an application for appointment of a receiver. This application was fixed for hearing on 11-9-1950. On that date the defendants and their Counsel Shri Nisaralli appeared and he filed their reply supported by an affidavit.

This case was taken up on 14-9-1950. On that date, after the case was partly heard the Court sent for the record of the Court of 3rd Civil Judge, Class II, Nagpur. Parties were further heard on 25-9-1950 and the application for appointment of a receiver was disposed of on that day.

(3) The suit was originally fixed for settlement of issues on 16-11-1950 and the defendants were directed to file their written statement a week before the date of hearing. The defendants did not file the written statement as directed. On 16-11-1950 the defendants engaged Shri Imdadali. He appeared and made an oral prayer for adjournment to file the written statement. It was allowed. The defendants were ordered to pay Rs. 5 as adjournment costs. The hearing was adjourned to 13-12-1950 with a direction to pay the costs and file a written statement a week before the date of hearing.

(4) On 9-12-1950 the defendants made an application under S. 34 for stay of suit till the disposal of the application for revision in the High Court against the order of 3rd Civil Judge, Class II, and till the arbitration agreement did not cease to have effect. The plaintiffs opposed this application on the ground that there was sufficient reason why the matter should not be referred in accordance with the arbitration agreement.

They contended that the agreement had ceased to subsist, having been revoked by a competent Court, and consequently no question of reference to arbitrators arose. On 18-12-1950 the lower Court stayed the suit on the grounds that the agreement between the parties still subsisted in spite of the order of the 3rd Civil Judge, Class II, that arbitrators could still be appointed under S. 12 (2) and that the application for revision against the order of the 3rd Civil Judge, Class II, was pending in the High Court.

(5) In appeal the contentions raised in the lower Court are repeated with a further addition that the application under S. 34 is not maintainable as the defendants have taken steps in the proceedings. What those steps are has not been stated in the grounds of appeal.

(6) There is no substance in any of the contentions except the last. They were not pressed. The learned Counsel for the plaintiffs submits that in filing a written statement and affidavit in answer to the application for appointment of a receiver the defendants have taken a step in the proceeding. Reliance was placed on a number of decisions which were noticed in — 'Kisanlal v. Nagpur Improvement Trust', Misc. F. A. No. 70 of 1950 (Nag) (A), to which one of us (Deo J.) was a party. They all refer to making an application for time to file a written statement.

(7) The learned Counsel for the defendants relies on — 'Subal Chandra v. Md. Ibrahim', AIR 1943 Cal 484 (B); — 'Gannu Rao v. Thiagaraja

Rao', AIR 1949 Mad 582 (B) and — 'Zalinoff v. Hammond', 1898-2 Ch 92 (D). According to him, the defendants were not taking any steps in the proceeding: they were only defending an attack by opposing the application for appointment of a receiver and that does not amount to a step in the proceedings.

(8) Before the application for stay was made, the defendants made an application for time to file a written statement. Making such an application is undoubtedly taking a step in the proceedings. (Vide Misc. Appeal No 70 of 1950 (A), and the decisions noticed therein). It is not necessary that the step in the proceeding must be taken by a written application. In this view it is not necessary to examine for the disposal of this appeal the contention that appearing in opposition to the application for the appointment of a receiver is not taking a step in the proceedings within the meaning of S. 34, Arbitration Act.

(9) Relying on — 'Nuruddin Abdulhusein v. Abu Ahmed', AIR 1950 Bom 127 (E), the learned Counsel for the respondents submits that making an application for time to file a written statement does not amount to taking a step in the proceedings in view of the other circumstances of the case.

He submits that in opposing the application for appointment of a receiver the respondents had pleaded that the Court had no jurisdiction to entertain the suit for dissolution of partnership in view of the existence of the arbitration agreement. In the cited case reliance was placed on the following observations of Ridley J. in — 'Austin and Whiteley Ltd. v. S. Bowley and Son', (1913) 108 LT 921 (F):

> "In my opinion what is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter should be referred to arbitration."

Applying this test, the oral application for time to file a written statement can have no other meaning than a desire to proceed with the suit. The respondents had a copy of the plaint with them, and if they did not want to defend the suit on merits they would not have asked for time to file a written statement; they would have straightway made an application under S. 34. Arbitration Act.

(10) The other consideration is whether the other conditions of the section are satisfied in this case. Unfortunately, the plaintiffs did not raise this point in the Court below or in the grounds of appeal. But as the matter can be disposed of on the facts admitted before this Court, it is its duty to examine the applicability of the section to those facts.

(11) Section 34, Arbitration Act, so far as it is material for this case runs thus:

> "Where any party to an arbitration agreement .....commences any legal proceedings against any other party to the agreement..... in respect of any matter agreed to be referred, any party to such legal proceedings, may apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

It is therefore necessary for the defendants applying to stay the proceedings to prove that the legal proceedings are commenced in respect of a matter agreed to be referred and that he was and is ready and willing to have the matter decided by arbitration. There is no dispute as regards the second condition. For determination of the first condition it is necessary to examine the arbitration agreement and the subject-matter of the suit. Unless the suit refers to the whole of the subject-matter referred to arbitration, the section is not attracted because the plaintiff will still have to seek relief in a civil Court for matters which are not referred to arbitration.

(12) The first arbitration agreement, dated 31-5-1948, is to decide the dispute between the parties

> "in respect of making a settlement of the accounts of the brick business which is continuing since 1946-47, 1947-48, in our partnership at Beed, Bina."

This reference was made to only three arbitrators.

By a second agreement, dated 21-8-1948, five more arbitrators were added but the scope of the matters referred to arbitration was not enlarged. The suit is for dissolution and rendition of accounts of the partnership commenced in 1946 and continuing till the date of suit.

If the allegations in the plaint are denied, the matters to be decided in the suit are:

(a) Whether the partnership of the plaintiffs and defendants continued till the date of the suit.
(b) What were the shares of the partners?
(c) What were the terms of partnership?
(d) Who is liable to render accounts, and in respect of which business?
(e) Whether the accounts have been made and closed on 28-4-1948? If so, up to what period?

(13) The learned Counsel for the defendants contends that the partnership was dissolved on 28-4-1948 and a new partnership was formed in which the plaintiffs were not partners and the assets shown in the plaint, though not accurately stated, referred to the assets of that partnership. This was the stand taken by the defendants in the proceedings for the appointment of a receiver.

(14) It is manifest that all these disputes were not referred to the arbitrators. All that they had to do was to settle the accounts for the two years 1946-47 and 1947-48. The award of the arbitrators will therefore not dispose of the whole suit. The suit cannot therefore be stayed. 'The Gaya Electric Supply Co. Ltd. v. State of Bihar', AIR 1953 SC 182 (G).

(15) In a suit for dissolution of partnership and accounts a preliminary decree will have to be passed, determining the shares of partners, the duration of the partnership and the liability of the different partners to render accounts of the partnership. The Court will also have to decide on other controversies that may be raised in the suit. If the Court finds that the partnership was dissolved on 28-4-1948 and the accounts are to be taken only for the years 1946-47 and 1947-48 as the defendants seem to contend, there may be no final decree proceedings as the taking of accounts for these years is already before the arbitrators.

(16) Under these circumstances, S. 35 of the Act will not be a bar to the continuance of the arbitration proceedings to the extent provided by the arbitration agreement.

(17) The appeal is therefore allowed with costs. Counsel's fee Rs. 20/-. The lower Court will proceed with the suit till the stage of the preliminary decree and further proceedings for taking accounts for the years 1946-47 and 1947-48 will be stayed till the final disposal of the arbitration proceedings.

R.G.D. Appeal allowed.

A.I.R. 1954 NAGPUR 334 (Vol. 41, C.N. 116)

R. KAUSHALENDRA RAO AND CHOUDHURI JJ. (1-7-1954)

Shamlal Yadorao Bhau, Appellant v. Yesaram Lodku Powar, Respondent.

First Appeal No. 104 of 1946, from decree of Civil Judge, 1st Class, Bhandara, D/- 8-7-1946.

(a) Civil P. C. (1908), Ss. 100-101 — New case — Case not set up in plaint and not tried — It cannot be raised in second appeal. **(Para 5)**

Anno: C. P. C., Ss. 100-101 N. 55.

(b) Hindu law — Joint family — Acquisition.

Property acquired by or with the aid of coparcenary property, itself becomes coparcenary property. 13 Moo Ind App 542 (PC), Relied on. (Para 6)

(c) Civil P. C. (1908), O. 6, R. 6 — Suit for specific performance — Averment in plaint.

Where the plaint in a suit for specific performance, does not contain the specific words "readiness and willingness" on the part of the plaintiff but the plaint as a whole complies in substance with this requirement, the plaint cannot be thrown out on this ground. (1851) 117 ER 1229 (1236), Relied on. (Para 8)

Anno: C. P. C., O. 6, R. 6, N. 1.

(d) Specific Relief Act (1877), S. 15 — Agreement to sell joint family item, by manager without necessity — ILR (1950) Nag 397: AIR 1950 Nag 78, Overruled; 32 Mad 320, Dissent.

The managing member of a joint Hindu family who, for purposes not binding upon the other coparceners and without their concurrence, agrees to convey a specific item of the joint family property, cannot perform the contract in its entirety and the suit for specific performance falls under S. 15. ILR (1950) Nag 397: AIR 1950 Nag 78, Overruled, 32 Mad 320, dissented from. AIR 1926 Nag 493; AIR 1921 Mad 172 (FB), Followed. (Paras 11 and 17)

Anno: Specific Relief Act, S. 15 N. 3.

CASES REFERRED: Paras

(A) ('69-70) 13 Moo Ind App 542: 6 Beng LR 232 (PC) 6
(B) (V29) AIR 1942 Nag 19: ILR (1941) Nag 707 6
(C) (V37) AIR 1950 Nag 259: ILR (1950) Nag 726 (FB) 6, 15
(D) (1851) 117 ER 1229: 17 QB 127 8
(E) (V24) AIR 1937 Nag 345: ILR (1938) Nag 308 8
(F) (V15) AIR 1928 PC 208: 52 Bom 597 (PC) 8
(G) (V13) AIR 1926 Nag 493: 96 Ind Cas 949 11, 17
(H) (V8) AIR 1921 Mad 172: 44 Mad 605 (FB) 11, 14, 17
(I) (V18) AIR 1931 Cal 463: 131 Ind Cas 849 11
(J) (V37) AIR 1950 Nag 78: ILR (1950) Nag 397 12, 17
(K) ('09) 32 Mad 320: 4 Ind Cas 506 12, 13, 14, 17
(L) (V1) AIR 1914 Mad 456: 37 Mad 387 13, 14
(M) ('80-81) 7 Ind App 181: 5 Bom 48 (PC) 15
(N) (V40) AIR 1953 Nag 241: ILR (1952) Nag 198 16
(O) ('03) 26 Mad 686 (FB) 16
(P) (V7) AIR 1920 Mad 316: 43 Mad 309 16

D. T. Mangalmurti and N. R. Raut, for Appellant; N. B. Chandurkar, for Respondent.

JUDGMENT: This appeal is by the plaintiff.

(2) The suit was instituted for specific performance of an agreement (Exhibit P-1, dated 5-11-1942) against the respondent (defendant). Under the agreement the defendant agreed to sell occupancy fields of a total area of 80.34 acres for Rs. 7,500. Rs. 50 were paid as earnest money and the sale deed was to be executed on 31-3-1945 on payment of the balance of consideration, Rs. 7,500. The case of the plaintiff was that the defendant purchased the land in suit (18 occupancy fields, total area 80.34 acres) from one Kasturbai under a registered sale deed (Exhibit D-1) on 9-5-1942 and since that date he (the defendant) was recorded as an occupancy tenant of the land.

(3) The main defence was that the defendant and his sons agreed to purchase the land and the defendant as manager of the joint family purchased it for Rs. 7,500. The defendant pleaded that the 'kararnama' was executed because of coercion and undue influence by the plaintiff and it was accordingly not binding.

It was further pleaded that the property was joint Hindu family property and could not be sold in the absence of necessity and the agreement could not bind the interests of the sons. The defendant, however, concluded by saying that he could not represent the family to which the property belonged, and unless the plaintiff was willing to take the defendant's interest only and gave up all rights to compensation and damages, the agreement could not be enforced specifically.

(4) The learned trial Judge negatived the defence based on the ground of coercion and undue influence by the plaintiff. He however found that the purchase by the defendant from Kasturbai was in his capacity as manager of the family.

On the question whether the agreement by the plaintiff bound the family or not the learned trial Judge found that in the absence of legal necessity the contract did not bind the interests of the sons. He accordingly held that the defendant alone was not competent to sell the whole of the land. According to the learned Judge the case was governed by S. 15, Specific Relief Act. Though the plaintiff was given an opportunity to apply under the proviso to that section, he did not do so: Vide order-sheet dated 25-6-1946.

The claim for specific performance was therefore dismissed.

(5) In appeal, the learned counsel for the appellant contends that the purchase from Kasturbai was itself subject to a term of reconveyance and, therefore, even if the property be held to be that of the joint Hindu family the family was bound to reconvey it. This argument cannot be permitted, because it was not the case of the plaintiff that the sale dated 9-5-1942 and the agreement dated 5-11-1942 were, in fact, part and parcel of the same transaction, viz., a sale subject to a term of reconveyance. Such a case did not arise on the plaint and was not tried. So, we do not think the appellant can be allowed to succeed on a ground which was not raised in the Court below.

(6) The learned counsel, however, contended that the property was not joint Hindu family property.

It is well settled that property acquired by or with the aid of coparcenary property itself becomes coparcenary property: — 'Umrithnath v. Gourneenath', 13 Moo Ind App 542 (PC) (A); — 'Bajirao v. Ramkrishna', AIR 1942 Nag 19 (B) and — 'Ratanlal v. Ashoka', AIR 1950 Nag 259 at p. 262 (FB) (C). The learned trial Judge held on this point in favour of the defendant.

The defendant deposed as D. W. 1 that he and his three sons Parasram, Gyaniram and Kuwarlal constituted a joint Hindu family. There is also the evidence of the first son of the defendant as D. W. 2 and that of D. Ws. 3 and 4 in support of the fact that the defendant and his sons formed a joint Hindu family and that the estate was joint. The plaintiff admitted in cross-examination that the defendant and his sons were joint. The consideration for the sale was paid out of the proceeds of the sale of grain belonging to the family and the funds that were available in the family. In view of all this the finding of the learned trial Judge that the property was joint family property is correct.

(7) The question then is whether the plaintiff is entitled to specific performance of the contract in the absence of proof that the sale was for a binding purpose. The appellant does not suggest that there was any necessity for the alienation by the family or that the agreement was binding on the family. But the appellant contends that the agreement did not purport to be on behalf of the family but was only by the father and the plaintiff would be content with a decree for specific performance against the father.

Whether the interest of the sons be bound or not the appellant submits that the interest of the father at any rate was bound under the agreement and specific performance ought to be decreed against him leaving the plaintiff to work out his remedy against the sons. To this the respondent replies that the suit should have been thrown out on the ground that there was no averment of continuous readiness and willingness on the part of the plaintiff to perform the contract, and, in any case, the learned trial Judge rightly dismissed the suit applying S. 15.

(8) Before we deal with the question of the applicability of S. 15 of the Act, it will be convenient to dispose of the respondent's contention that the suit must fail because of a defect in the plaint. It is true that the averment in the plaint does not contain the set words, "readiness and willingness".

But the plaintiff did assert that he had been unnecessarily put to loss in keeping the amount of Rs. 7450/- ready for payment from the time of the agreement. When the time for completing the contract arrived, he demanded the execution of the sale deed by the defendant. He alleged that he had sent a notice to the defendant, one through his pleader on 13-10-1944 calling upon the defendant to execute the sale deed and receive the balance of the consideration. On 16-3-1945 the plaintiff sent a telegram to the defendant asking him to receive the balance of the consideration and execute the sale by coming over to Gondia where the stamp would be kept ready. The defendant sent a reply to the notice alleging misrepresentation and undue influence and denying liability under the agreement. But to the telegram he did not send any reply.

The plaintiff asserted that he was, therefore, required to file the suit for specific performance and that he was ready to perform his part of the contract. Reading the averments in paragraph 1 (c) as a whole, we have no doubt that they complied in substance with the requirement as to the essential averment in a suit for specific performance. As observed by Lord Campbell in — 'Cort v. Amber-gate, etc., Railway Co.', (1851) 117 ER 1229 at p. 1236 (D):

> "In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants" (see — 'Arjunsa Raghusa v. Mohanlal Harakchand', AIR 1937 Nag 345 at p. 349 (E)).

If that be the true test, the suit could not be thrown out on the ground that there was absence of the necessary averment in a suit for specific performance as laid down by their Lordships of the Privy Council in — 'Ardeshir Mama v. Flora Sassoon', AIR 1928 PC 208 (F).

(9) The defendant denied the allegations of the plaintiff in para. 1 (c) of the plaint. But on looking into the evidence there is no manner of doubt that the contract could not be completed not because the plaintiff was not ready and willing to carry out his part of the contract but because of the repudiation of the contract by the defendant in his reply to the first notice and by his silence after the second.

(10) The point however remains for consideration whether S. 15, Specific Relief Act, governed the case and the plaintiff was not entitled to specific performance because of his insistence on performance of the whole of the contract, instead of partial performance of the contract in respect of the interest of the defendant alone and relinquishing all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(11) In — Singhai Ramlal v. Kanhayalal', AIR 1926 Nag 493 (G) it was held following the Full Bench decision of the Madras High Court in — 'Baluswami Aiyar v. Lakshmana Aiyar', AIR 1921 Mad 172 (H) that the managing member of a joint Hindu family who, for purposes not binding upon the other coparceners and without their concurrence, agreed to convey a specific item of the joint family property, could not perform the contract in its entirety and the case fell within the purview of S. 15 of the Act. It was ruled that the purchaser in such a case could not enforce specific performance of the entire contract without satisfying the conditions laid down in the proviso to that section. To the same effect is the decision in — 'Panchananda v. Rajani Kanta', AIR 1931 Cal 463 at p. 467 (I) though it was given under the Dayabhaga.

(12) Our attention is drawn by the appellant to a decision of a learned single Judge of this Court reported in — 'Radhelal v. Subhadrabai', AIR 1950 Nag 78 (J). It may be observed that in the case cited unlike in the present case no question was raised whether the purpose for which the property had been agreed to be sold was binding upon the family or not. The learned Judge held that it could not be assumed either that the father intended to bind his son or that he intended to sell the property for a purpose not binding upon the family. The facts are thus distinguishable.

It may however be observed that the learned Judge expressed agreement with the decision in — 'Srinivasa Reddi v. Sivarama Reddi', 32 Mad 320 (K). That decision is to the effect that S. 15, Specific Relief Act, does not apply to a sale of undivided property by the manager of the joint family because the manager has an interest in

and in certain circumstances power of disposal over every portion of the family property.

(13) The decision in — 'Srinivasa Reddi v. Sivarama Reddi (K)' (supra) was dissented from in — 'Nagian v. Venkatarama Sastrulu', AIR 1914 Mad 456 (L) by Wallis and Ayling JJ. The learned Judges observed:

"To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus: 'Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole,.....he is not entitled to obtain a decree for specific performance'. We think the words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share; and the present case is a particularly plain one, because according to the plaintiff's own evidence the first defendant agreed to get the other members of the family to execute the sale deed. Further the contract has been decided in the present suit not to be binding on the other members of the family: and to decree specific performance against the first defendant only would be merely encouraging useless litigation."

(14) The question again came up for consideration before the Full Bench in — 'AIR 1921 Mad 172 (H)'. Wallis C. J. with whom Oldfield J. agreed adhered to the conclusion arrived at in — 'Nagiah v. Venkatarama Sastrulu (L) (supra)'. The third Judge Kumaraswami Sastri also agreed with that view:

"With all deference I am unable to follow the reasoning of Sankaran Nayar, J. in — '32 Mad 320 (K)', to the effect that S. 15 would have application only when the person agreeing to sell has no interest in any portion of the property agreed to be sold. No such restriction appears in the section and the language applies to all cases where a party cannot perform the whole of what he contracts to do, whether such inability is due to his not having a good title to the property agreed to be conveyed or has a good title over only a part of the property.

The section only reproduces the English Law with the difference that where the party elects to take what he can get he can only do so by giving up claims to compensation: and I can find no such distinction in any of the cases though joint tenants are entitled 'per tout et per mie' in the joint property. I agree with — 'AIR 1914 Mad 456 (L)' that S. 15 is applicable to cases where a father or a member of a joint family agrees to sell an item of joint property under circumstances that would not bind the other members."

(15) It is true that each co-parcener is seized 'per mie et per tout' of the coparcenary property. Each has interest in and possession of every parcel as of the whole. But that rule does not and cannot enlarge his power of alienation because each coparcener has an undivided moiety of the whole and not the whole of an undivided moiety. The power of alienation even in States where it is countenanced must in the absence of necessity or other cause binding the family be necessarily restricted to the interest of the alienating coparcener. He can in such a case alienate only his interest even though it be in every portion of the undivided property. The essence of Mitakshara coparcenary is aggregate ownership. The members of the coparcenary are not fractional owners of the undivided property. 'Ratanlal v. Ashoka (C) (supra)'.

No doubt, according to the prevailing law as interpreted in Madras and Bombay and accepted in this State, an alienation by a coparcener of his undivided interest in the coparcenary is countenanced. But the rule which has been gradually developed by modern jurisprudence is, in fact, inconsistent with the strict theory of a joint undivided Hindu family and is really founded upon the equity under which a purchaser for value nas to be allowed to stand in his vendor's shoes to work out his rights by means of a partition.

"The question, therefore is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence." Per Sir James Colvile in — 'Lakshman Dada Naik v. Ramchandra Dada Naik', 7 Ind App 181 at p. 195 (PC) (M).

Since what the alienee obtains is but an equity to secure the interest of the alienating coparcener by a suit for partition, it does not seem right to us that the rule based on "an exceptional doctrine" should be extended so as to involve a right to specific performance of an agreement to convey his undivided interest by the coparcener.

(16) If the agreement was not for a purpose binding on the coparcenary, then the alienating coparcener when he purports to alienate the whole of the property must be held to be a person unable to perform the whole of his part of the contract within the meaning of S. 15.

As observed by Kumaraswami Sastri J.:

"The chance of his getting the properties allotted on partition is not in such cases equivalent to his ability to perform the contract."

The Court cannot act on the chance of the alienating coparcener or his alienee getting the property alienated in a suit for partition. Such a course would not only result in perfecting a breach of duty on the part of the karta to the other coparceners in making an alienation not binding on them, as here, but would also expose the latter to avoidable litigation. Besides, the chance of the alienating coparcener or his alienee getting the alienated item allotted to his share may or may not materialise either because of a suit for partition of the particular item by any of the non-alienating coparceners or because of their superior equities even in a suit for partition by the alienating coparcener or his alienee: See — 'Atmaram v. Anandrao', AIR 1953 Nag 241 at p. 242 (N); — 'Rajah of Vizianagram v. Rajah Setrucherla Somasekharaz', 26 Mad 686 at pp. 718-719 (FB) (O) and — 'Sabapathi Pillay v. Thandavaroya Odayar', AIR 1920 Mad 316 at p. 317 (P).

(17) In conclusion, we cannot, if we may say in all respect, subscribe to the view indicated in 'Radhelal v. Subhadrabai (J) (supra)' about S. 15 agreeing with the decision in 'Srinivasa Reddi v. Sivaram Reddi (K) (supra)'. The true view is that taken in 'Singhai Ramlal v. Kanhayalal (G) (supra)' following 'Baluswami Aiyar v. Lakshman Aiyar (H) (supra)'. The learned trial Judge was therefore right in holding that the case was governed by S. 15 of the Act and that the plaintiff did not bring himself within the conditions laid down in the proviso thereto. The relief was rightly refused.

(18) In the result, we affirm the decree of the Court below and dismiss the appeal with costs.

R.G.D. Appeal dismissed.

A.I.R. 1954 NAGPUR 337 (Vol. 41, C.N. 117)

SEN AND DEO JJ. (30-10-1953)

Shaikh Mohammad, Plaintiff-Appellant v. Governor-General in Council, Indian Union, Delhi, Defendant-Respondent.

Second Appeal No. 353 of 1948, from decree of Addl. Dist. J., Sagar, D/- 18-2-1948.

(a) Civil P. C. (1908), S. 100 — Finding of fact when not binding in second appeal.

A finding of fact by the lower appellate Court which is contrary to pleading and evidence is not binding in second appeal. (Para 4)

Anno: Civil P. C., Ss. 100-101 N. 53.

(b) Railways Act (1890), S. 72 — Risk Note B — Non-delivery, meaning of.

Non-delivery means failure of the Railway Administration to give delivery to the consignee or his assignee as required by the contract. It may be due to misdelivery, detention, conversion, or loss. Loss is both to the consignee and the Railway Administration and may be due to one or more of the several causes such as accident to trains, fire, destruction including destruction when the goods have perished, short delivery in cases of bulk consignments, and from causes which cannot be located. Risk Note B contemplates non-delivery due to loss of the consignment by accident or fire. It may as well be due to destruction, the consignment having decayed. In the case of perishable goods, if the contents of the whole consignment deteriorate to such an extent that they become of no value, there is a loss of complete consignment. (Para 7)

Anno: Railways Act, S. 72 N. 1a, 12.

(c) Railways Act (1890), S. 72 — Risk Note B — Misconduct — Burden of proof.

In cases of consignment booked under Risk Note B, no doubt the initial burden to prove misconduct is on the plaintiff, but in cases falling under the first or the second proviso to Risk Note B the Railway Administration is bound to disclose to the plaintiff how the consignment was dealt with throughout the time it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. If misconduct on the part of the Railway Administration or its servant cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the plaintiff; but if the Railway Administration fails to make the requisite disclosure to the consignor, or, in the event of the disclosure being made but being not found to be satisfactory, fails to give evidence in regard to the manner in which it dealt with the consignment throughout the time it was in its possession or control, the inevitable result of such a failure on the part of the Railway Administration to make the disclosure and to give evidence would be to fasten on it the liability for the loss as the Court will have in such a contingency no other alternative than to presume misconduct from the aforesaid failure and to hold the company liable for the loss caused by the misconduct of its servant. AIR 1928 Nag 340, Rel. on. (Para 8)

Anno: Railways Act, S. 72 N. 25.

(d) Railways Act (1890), S. 72 — Risk Note B —Misconduct, meaning of—(Words and Phrases).

Misconduct literally means wrong or improper conduct i.e., conduct in violation of a definite rule of action. It ordinarily means failure to do what is required of a person to be done. An omission to do what is required of a person to do may therefore constitute misconduct even though the person has not acted wilfully or maliciously. Case law discussed. (Para 19)

(Distinction between the words 'wilful neglect' in the old Risk Note B, 'wilful misconduct' in the English risk note and 'misconduct' in the present Risk Note B pointed out). (Paras 9-18)

(e) Railways Act (1890), S. 72 — Risk Note B — Misconduct — Suit for damages for non-delivery due to deterioration and destruction — Liability of Railway Administration.

A consignment of potato bags booked from Sagar to Raipur under Risk Notes A and B, reached the destination nearly a week after the normal period of transit required. Though the goods were despatched in a through road-van the consignment was detained at Katni for 4 days, transhipped into another wagon and then despatched to Bilaspur where it was again detained for 3 more days due to the omission of the Railway servants to label the wagon containing potatoes as 'perishable' as required by the Tariff Rules. Though the potatoes were in a sound condition at the time of despatch, the entire consignment was found to be rotten at the destination and therefore was destroyed by the railway authorities. The plaintiff brought a suit for damages for non-delivery. The defendant had not made the full disclosure and had not given evidence as to how the consignment was delayed for about 7 days after the despatch, why there was transhipment at Katni and how the wagon remained at Katni unattended to:

Held, that the plaintiff was entitled to succeed firstly because the defendant had not made full disclosure as to how the consignment was dealt with and secondly because the servants of the defendant committed a breach of a specific duty imposed upon them by the rules of the Railway Administration to label wagons of potatoes as "perishable." Consequently the failure to label the wagon as perishable, transhipping a through wagon at Katni and delaying it at that junction and at Bilaspur without any reasonable explanation for the delay amounted to an improper behaviour on the part of the Railway Administration or its servants and misconduct within the meaning of the Risk Note B. (Paras 19, 20)

Anno: Railways Act, S. 72 N. 17.

CASES REFERRED: Paras

(A) (V18) AIR 1931 Pat 201: 130 Ind Cas 837 4
(B) ('51) Civil Revn. No. 492 of 1950, D/- 30-11-1951 by Sen J. (Nag) 7
(C) (V13) AIR 1926 Lah 614: 94 Ind Cas 173 7

(D) (V14) AIR 1927 Lah 854: 103 Ind Cas 287 7
(E) (V15) AIR 1928 Nag 340: 111 Ind Cas 535 8
(F) (V24) AIR 1937 PC 152: ILR (1937) Bom 375 8
(G) (V34) AIR 1947 Pat 84: 230 Ind Cas 288 8, 14
(H) (V7) AIR 1920 Mad 512: 43 Mad 617 11, 12
(I) (V22) AIR 1935 Cal 811: 159 Ind Cas 907 11
(J) (V36) AIR 1949 Pat 119: 27 Pat 301 11, 13
(K) (V20) AIR 1933 Cal 742: 60 Cal 996 11, 14
(L) (1873) 29 LT 423: 38 JP 181 11, 15
(M) (1877) 3 QBD 195: 47 LJQB 131 11, 12, 15, 16
(N) (1905) 1905-2 KB 532: 74 LJKB 871 11, 16
(O) (V33) AIR 1946 Cal 249: ILR (1944) 2 Cal 487 14, 18
(P) (V20) AIR 1933 Pat 630: 148 Ind Cas 396 13
(Q) (V32) AIR 1945 Pat 159: 219 Ind Cas 431 13
(R) (V21) AIR 1934 Mad 715: 154 Ind Cas 453 13
(S) (V23) AIR 1936 Mad 508: 59 Mad 789 13
(T) (V16) AIR 1929 Cal 654: 122 Ind Cas 625 13, 18
(U) (V17) AIR 1930 Cal 298: 57 Cal 634 13
(V) (V17) AIR 1930 Cal 815: 58 Cal 585 13, 17
(W) ('52) F. A. No. 131 of 1948, D/- 31-7-1952 (Nag) 14
(X) (V15) AIR 1928 PC 24: 52 Bom 169 (PC) 14
(Y) (1885) 52 LT 324: 49 JP 310 15
(Z) (1877) 37 LT 186: 25 WR 631 15
(Z1) (V17) AIR 1930 Bom 129: 54 Bom 105 17
(Z2) (V20) AIR 1933 All 477: 55 All 625 17
(Z3) (V11) AIR 1924 Nag 425: 80 Ind Cas 1 17
(Z4) (V38) AIR 1951 Nag 357(2): 1951 Nag LJ 470 18

M. Y. Shareef, for Appellant; S. T. Bhave, for Respondent.

DEO J.:

This is plaintiff's second appeal against a reversing decree dismissing his suit for damages.

(2) The facts of the case are: A consignment of 61 bags of potatoes which left Sagar (G. I. P. Railway) on 15-6-1945 at 7 a.m. reached the destination Raipur (B. N. Railway) on 29-6-1945. The normal period for this transit is about six days. Under the Tariff Rules a wagon containing potatoes is to be marked "perishable" so that it should have priority of movement. It was therefore the duty of the railway servants to put up such a label and to move the wagon as early as possible. This was not done. Though the goods were despatched in Through Road Van No. 12935, the consignment was detained at Katni for at least four days. transhipped into another wagon and reached Bilaspur on 25-6-1945 at 1-45 a.m.

As the nature of the contents was not known for want of a label, this wagon did not receive the required attention and priority at Bilaspur; and the wagon was despatched from that station on 28-6-1945 at 0-30 a.m. The detention at Bilaspur was largely due to this omission to mark the wagon "perishable". On unloading the consignment at Raipur at 9 a.m. on 29-6-1945 it was found to be wholly rotten. On the advice of the railway doctor that the potatoes were rotten and unfit for human consumption, the consignment was dumped away the same day; and the goods were not delivered to the consignee.

(3) The potatoes were in a sound condition at the time of their despatch from Sagar. It is admitted in the written statement that the wagon reached Katni on the 16th but was not attended to till the 20th. There is no explanation for this delay. It was pleaded that when the goods were transhipped to another wagon on the 20th it was noticed that only 10 bags were in a deteriorated and rotten condition. There is no explanation for this transhipment though the goods were loaded in a Through Road Van.

Though it was pleaded that this wagon could not be dealt with owing to congestion in the marshalling yard at Katni, the defendant did not adduce any evidence from this delay at Katni and how it took five days from Katni to Bilaspur if the wagon was despatched from the former station on the 20th. It is impossible to believe that in the ordinary course it took five days for the wagon to move from Katni to Bislaspur. It was pleaded that the delay at Bilaspur was due to heavy congestion of military goods traffic and heavy allotment of general merchandise etc. There is, however, no such evidence. There is no evidence that other traffic was to be given priority over these perishable goods. It therefore follows that the consignment was delayed unnecessarily for about a week at Katni and Bilaspur.

(4) The following observations in — 'Gati Shah Mahadeo Ram v. Secretary of State', AIR 1931 Pat 201 (A), relied on by the lower appellate Court, do not help the defendant but they rather help the plaintiff :

> "It is true that these goods were perishable but not perishable in the sense that they belong to some class of goods which under no circumstances can stand a long railway journey; but I think it is abundantly clear that had these potatoes been in good condition when they were first consigned they would not have perished during the 11 days in which they were upon the railway."

Relying on the railway receipt Exhibit D-3 stating that the goods "were liable to rot in transit", the learned Judge of the lower appellate Court presumed that the potatoes were not in a sound condition when tendered for despatch on 14-6-1945. This is not the defendant's case. and is contrary to the evidence of the loading foreman (D. W. 1) who despatched the goods from Sagar. The witness stated that the potatoes were in good condition when they were despatched. The finding, being thus contrary to pleading and evidence, is not binding in second appeal. Disagreeing with the lower appellate Court, I hold that the potatoes were in a sound condition when they were despatched and it is unlikely that they would have perished during the normal period of transit between Sagar and Raipur.

(5) The consignor had executed two risk notes A and B which are Exhibits D-2 and D-3 respectively. In the former it is stated that the consignment in question

> "is in bad condition and/or liable to damage, leakage, or wastage in transit as follows:
>
> 'Loaded in other than wagon as per sender's request liable to rot in transit R. A.'."

What this really means is not clear. No argument was based on this risk note. Under risk note B, on which alone reliance was placed here by the learned counsel for the respondent, in consideration of carriage at a specially reduced

rate instead of at the ordinary tariff rate, the consignor undertook to hold the Railway Administration harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, or deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants.

There are two provisos to this risk note. Under the first proviso in case of non-delivery of the whole of the said consignment or of the whole of one or more packages of the said consignment, where such non-delivery is not due to accidents to trains or to fire, and where the consignment complied with the requirements of packing mentioned in the proviso, the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct; but if misconduct on the part of Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor. It was not alleged that the consignment did not comply with the requirements of packing stated in this proviso. This proviso is relied on by the appellant as, according to him, this is a case of non-delivery of the whole consignment.

(6) The lower appellate Court held that this is not the case of a non-delivery of the consignment but is the case of deterioration of the consignment during transit and its destruction at the destination. The learned Judge further held that the defendant was not bound to explain the delay in view of the risk note B executed by the consignor and that the plaintiff is not entitled to succeed unless he proves that the omission to label the wagon as perishable and the delays at Katni and Bilaspur were due to "the deliberate, culpable, and malicious negligence" of the railway servants. The learned Judge relied on the passage in the Patna case reproduced 'supra' and held that the plaintiff has failed to discharge this burden.

(7) Under the terms of the contract of carriage the delivery of the consignment is to be made by the Railway Administration to the consignee or his assignee. Non-delivery, therefore, means failure of the Railway Administration to give such delivery. It may be due to misdelivery, detention, conversion, or loss. Loss is both to the consignee and the Railway Administration and may be due to one or more of the several causes such as accident to trains, fire, destruction including destruction when the goods have perished as in the instant case, short delivery in cases of bulk consignments, and from causes which cannot be located. Non-delivery includes loss within the meaning of S. 77, Railways Act. 'Parwar Brothers v. Dominion of India', Civil Revn. No. 492 of 1950, D/- 30-11-1951 (Nag) (B). Risk note B contemplates non-delivery due to loss of the consignment by accident or fire. It may as well be due to destruction, the consignment having decayed. In the case of perishable goods, if the contents of the whole consignment deteriorate to such an extent that they become of no value, there is a loss of complete consignment. 'Firm Jagan Nath v. Secretary of State', AIR 1926 Lah 614 (C) and — 'E. I. Rly. Co. v. Mohammad Shah', AIR 1927 Lah 854 (D). Consequently the first proviso to the risk note B is attracted.

(8) No doubt the initial burden to prove misconduct is on the plaintiff, but in cases falling under the first or the second proviso to risk note B the Railway Administration is bound to disclose to the plaintiff how the consignment was dealt with throughout the time it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. If misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the plaintiff; but if the Railway Administration fails to make the requisite disclosure to the consignor, or, in the event of the disclosure being made but being not found to be satisfactory, fails to give evidence in regard to the manner in which it dealt with the consignment throughout the time it was in its possession or control.

> "the inevitable result of such a failure on the part of the Railway Administration to make the disclosure and to give evidence would be to fasten on it the liability for the loss as the Court will have in such a contingency no other alternative than to presume misconduct from the aforesaid failure and to hold the company liable for the loss caused by the misconduct of its servants."

'Secretary of State v. Gulabchand', AIR 1928 Nag 340 at p. 342 (E). This is the first case under the new risk note B which I came across. Such a presumption was drawn in — 'Surat Cotton Spinning and Weaving Mills Ltd. v. Secy. of State', AIR 1937 PC 152 (F), where evidence of important witnesses was withheld.

In — 'Governor General in Council v. Visheshwar Lal', AIR 1947 Pat 84 (G), it was held that where the Railway Administration fails to make a full disclosure of how the consignment was dealt with during the time it was in its possession or control, the consignor is entitled to an inference in his favour and adverse to the Administration. In the instant case the defendant has not made the full disclosure and has not given as to how the consignment was delayed for about 7 days after 16-6-1945, why there was transhipment at Katni and how the wagon remained at Katni unattended to. In the view taken in these cases the plaintiff is entitled to a decree straightway without any further evidence.

(9) Interpretation of the word "misconduct" in the new risk note B has given rise to a divergence of judicial opinion occasioned in many cases by placing implicit reliance on English decisions and the Indian decisions interpreting the old risk note B. Under the English risk note plaintiff has to prove "wilful misconduct" and under the old risk note B he had to prove "wilful neglect". The wide protection afforded to the railways by the old risk note B was the subject of great popular agitation on the ground that it rendered wellnigh impossible the proof of liability of the railways

under it by placing the burden on the claimant to prove the intention of the different railway servants handling his consignment. The new risk note B, therefore, came into force in 1924. The words "wilful neglect" were substituted by the word "misconduct". Some other changes were made and the two provisos were added. The liability of the Railway Administration under this risk note is wider than that under the old risk note. The proviso throws the burden on the Railway Administration in certain events to disclose, and to give evidence of, the manner in which the consignment was dealt with throughout the time it was in its possession or control. Under the old risk note the burden of proving "wilful neglect" was in all cases on the claimant.

(10) In view of the deliberate change of language the English decisions dealing with "wilful misconduct" and the Indian decisions which interpret "wilful neglect" by reference to those English decisions are really of little assistance.

(11) The learned counsel for the defendant relied on — 'M. & S. M. Rly. Co., Ltd., Madras v. Subba Rao', AIR 1920 Mad 512 (H); — 'M. & S. M. Rly. Co. Ltd. v. Ravi Shing Deepsing & Co.', AIR 1935 Cal 811 (I); — 'Governor General in Council v. Jamuna Das', AIR 1949 Pat 119 (J) and — 'Ishwari Prasad v. Dominion of India', 1949-4 Dom LR (Pat) 221. In the last case it was found that the consignment of potatoes was in a bad condition before despatch and was liable to rot during the normal period of transit, and that the unexplained delay of six days did not materially add to their rotten condition. It was therefore held that the loss was not due to the misconduct of the Railway Administration or its servants. The Calcutta case merely adopts the view taken by Guha J. in — 'M. & S. M. Rly. Co., Ltd. v. Sundarjee Kalidas', AIR 1933 Cal 742 (K), following — 'Glenister v. Great Western Rly. Co.', (1873) 29 LT 423 (L); — 'Lewis v. G. W. Rly. Co.', (1877) 3 QBD 195 (M) and — 'Forder v. G. W. Rly. Co.', 1905-2 KB 532 (N). These English decisions were interpreting "wilful misconduct."

(12) In — 'M. Subba Rao's case (H)', Seshagiri Ayyar J. relied on the following observations of Lord Bramwell, L. J. in — 'Lewis v. G. W. Rly. Co. (M)' (Supra) at page 206:

> "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence: the misconduct, not the conduct, must be wilful.....Perhaps one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it."

The learned Lord Justice further observed:

> "I am much inclined to think that that would be 'wilful misconduct' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct."

Brett L. J. observed:

> "If it is brought to his notice that what he is doing or omitting to do may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally he is guilty of wilful misconduct." (p. 210).

Seshagiri Ayyar J. apparently made no distinction between "wilful misconduct", "wilful neglect" and "wilful default". He upheld the finding of the trial Court that there was "wilful negligence" by calling it "wilful default" and relied on the meaning of "wilful misconduct".

(13) 'AIR 1949 Pat 119 (J)' was decided on its own facts. The learned Judge who delivered the judgment of the Division Court held that there was no evidence that the loss was due to omission to attach caution lables to the wagon or to loose shunting. The learned Judge thought that the loss might as well have been due to the second-hand tins in which the cocoanut oil was packed & which were liable to leakage. The rule that made it obligatory on the railway employees to fasten caution labels was not brought to the notice of their Lordships. These findings were sufficient to dispose of the appeal in view of the risk notes A and B executed by the consignor. However, the learned Judge proceeded to refer to some English decisions which examined the meaning of "negligence", to — 'Rallia Ram v. Governor General in Council', AIR 1946 Cal 249 (O) and stated:

> "Misconduct denotes something more than mere negligence. Plaintiff has to prove wilful neglect or misconduct."

The view of misconduct taken by Jwalaprasad J. in — 'Jamunadas Ramjas v. E. I. Rly. Co. Ltd.', AIR 1933 Pat 630 (P) was not approved for the reasons said to have been stated in the earlier decision in — 'Governor General in Council v. Motilal Kajriwall', AIR 1945 Pat 159 (Q) to which the learned Judge was a party. There it was stated:

> "In the present case I am not called upon to decide whether misconduct, as it appears in the risk note now in vogue, is interchangeable with the phrase 'wilful neglect' as it occurred in the previous risk note which has been replaced by the risk note in question in this case."

He added:

> "It is doubtful that this should be so inasmuch as the Legislature deliberately prescribe a change in the form of the risk note as a result of popular agitation to mitigate the rigours of the law requiring as it did, the plaintiff to prove wilful neglect on the part of the Railway Administration or its servants."

This decision is hardly helpful to the defendant. No doubt, reference was made to several other decisions viz. — 'S. I. Rly. Co. Ltd. v. Dandayutham Chettiar', AIR 1934 Mad 715 (R); — 'Roshan Umar Karim and Co. v. M. & S. M. Rly. Co. Ltd.', AIR 1936 Mad 508 (S); — 'B. N. Rly. Co. Ltd. v. Moolji Sicka & Co.', AIR 1929 Cal 654 (T); — 'B. N. Rly. Co. Ltd. v. Dhanjishah Pestonji', AIR 1930 Cal 298 (U) and — 'B. N. Rly. Co. Ltd. v. Moolji Sicka & Co.', AIR 1930 Cal 815 (V). The learned Judge observed that they did not approve of the view taken by Jwalaprasad J. who had stated the law rather widely. Jwalaprasad J. had stated:

"The word used in those Risk Notes is 'misconduct' and not 'wilful misconduct'. A mere omission to do what is expected of a person to do constitutes misconduct, whereas if such failure is directed to intentionally cause mischief or loss to any person, then it is called wilful misconduct'. The Railway Administration or its servants might not have intended to cause any damage to the plaintiff's consignment and with that object neglected to do their duty, but a mere neglect of duty will charge them with misconduct and will bring the case within the Risk Notes."

(14) In — 'Babu Brajakishore v. Governor General in Council', F. A. No. 131 of 1948, D/-31-7-1952 (Nag) (W) my brother Sen J. with the concurrence of Hidayatullah J. held that the appellant failed to prove negligence on the part of the Railway Administration or its servants. No doubt, reference was made to — 'Ardeshir Bhikaji Tamboli v. G. I. P. Rly. Co', AIR 1928 PC 24 (X), where it was held that negligence does not amount to wilful negligence under the old risk note H, which was identical in terms with old risk note B, to — 'AIR 1933 Cal 742 (K)' and to — 'AIR 1947 Pat 84 (G)'. In the Calcutta case distinction was not made between "wilful misconduct" and "misconduct." Relying on certain English decisions it was held that misconduct is not necessarily established by proving even culpable negligence. It was said:

"'misconduct' is something opposed to accident or negligence and it is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result would be."

This is the interpretation of "wilful misconduct" which is required by the English risk note. Reference was also made to the following observations in — 'AIR 1946 Cal 249 (O)':

"..for an act to amount to misconduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the nature of improper behaviour and is not merely either wrongful commission or wrongful omission."

My brother did not follow any of these decisions as in his view it was not necessary to do so as the plaintiff had failed to prove even negligence.

(15) In — (1873) 29 LT 423 (L)', it was held on the facts that there was no proof of wilful misconduct. It was said that culpable negligence is not necessarily a misconduct. It was also stated that

"if railway servants were to shunt trucks of cattle into a siding and leave them unattended for twenty-four hours,"

it would be a case of wilful misconduct even though there may be no malice. '(1877) 3 QBD 195 (M)' is already referred to. In — 'Stevens v. G. W. Rly. Co.', (1885) 52 LT 324 (Y) goods were delivered to a wrong party. As soon as the mistake was discovered the goods were obtained from that party and offered to the consignee who refused to accept the delivery and claimed damages. It was held that this might be a case of inadvertence or negligence and could not necessarily be a case of wilful misconduct.

In — 'Hoare v. G. W. Rly. Co.', (1877) 37 LT 186 (Z) a station master of the receiving station, without making enquiries of the consignor and after a delay of a week, delivered the goods to a person of a name very similar to that of the person named as consignee. It was held to be wilful misconduct because if the station master had enquired he would have found that he was delivering the goods to a wrong person and could have found out the right one. This failure to take precautions which a prudent man in dealing with those goods would take amounts to wilful misconduct.

(16) '(1905) 2 KB 532 (N)' adopts the statement of law of Brett L. J. in — 'Lewis v. G. W. Rly. Co. (M)'. It was held that the proper course of conduct must not only be brought to the notice of the servants of the railway who actually superintend the handling of the goods but they must also be made aware of the damage that would ensue if the proper course were not followed. If the servant then acts with reckless carelessness, not caring what the result of his carelessness will be, that would be wilful misconduct. This extreme view places a practically impossible burden of proof on the plaintiff. It was with a view to relieve the claimants of this burden that risk note B was amended by omitting the word "wilful".

(17) In — 'B. B & C. I. Rly Co., Ltd. v. Rajnagar Spinning Weaving and Manufacturing Co., Ltd.', AIR 1930 Bom 129 (Z1), it was observed that the word "misconduct" suggests that the railway servant had been guilty of doing something which was inconsistent with the conduct required of him by the rules of the Company. In — 'Secretary of State v. Madhuri Das Narain Das', AIR 1933 All 477 (Z2), it was stated that the word "misconduct" is of wider import than the popular sense in which it is used i.e. negligence, want of proper care and caution may amount to misconduct within the meaning of risk note B. There it was held that if through negligence the Railway Administration could not deliver the goods on due date, or even within a reasonable time after that date, it must be held liable for any loss which the plaintiff suffered. There the number in the railway receipts and on the bags did not tally. The goods clerk refused to give open delivery. By the time such delivery was given on the orders of the higher authorities, plaintiff suffered considerable loss by fall in prices. It was held that the Railway Administration was liable for this loss. The decision does not really turn on the interpretation of the risk note B, because there was no loss, destruction, or deterioration of or damage to the consignment.

In — 'E. I. Rly Co. v. Muradali', AIR 1924 Nag 425 (Z3), the Railway Company was held liable for unreasonable delay in transit notwithstanding the risk note B. In — 'AIR 1930 Cal 815 at p. 820 (V)', it was stated:

".....the word 'misconduct' denotes any unbusinesslike conduct and includes negligence or want of proper care which a bailee is to take under S. 151. Contract Act. The immunity, which the risk note brings to the railway company, is by shifting the burden of proof. In the case of a bailee if the goods are found damaged

in his possession the onus is upon him to prove how the damage occurred, if he wants to avoid liability. In the case of goods damaged in the possession of the railway company covered by a risk note, the owner of the goods is to prove that the injury to the goods was caused by the misconduct of the railway company."

(18) In — 'Dominion of India v. Firm Chhaganlal Premji', AIR 1951 Nag 357 (2) (Z4) Bose C. J. stated at page 359:

".....even in one of the cases on which the learned counsel for the defendant relies, namely, — 'AIR 1946 Cal 249 at p. 255 (O)' Gentle J. states that misconduct is the genus and negligence a species of the genus. If that is correct then every case of negligence must amount to misconduct though every case of misconduct would not necessarily amount to negligence."

In certain cases negligence may be a good evidence of misconduct and mismanagement on the part of the Railway Administration. 'AIR 1929 Cal 654 (T)'.

(19) It is not necessary for the purpose of this case to attempt an exhaustive definition of 'misconduct'. 'Misconduct' literally means wrong or improper conduct i.e. a conduct in violation of a definite rule of action. It ordinarily means failure to do what is required of a person to be done. An omission to do what is required of a person to do may therefore constitute misconduct even though the person has not acted wilfully or maliciously. The plaintiff is entitled to succeed in the instant case firstly because the defendant had not made full disclosure as to how the consignment was dealt with and secondly because the servants of the defendant committed a breach of a specific duty imposed upon them by the rules of the Railway administration to label the wagons of potatoes as "Perishable". The servants concerned can be presumed to have known that potatoes are liable to deteriorate on a long journey and the wagons must be moved as early as possible and to give priority to such wagons they should be labelled "Perishable". This is therefore a breach of a specific duty imposed by the defendant on its servants.

(20) I am therefore of the view that failure to label the wagon as perishable, transhipping a through wagon at Katni and delaying it at that junction and at Bilaspur without any reasonable explanation for the delay amount to an improper behaviour on the part of the Railway Administration or its servants and misconduct within the meaning of the risk note B. Disagreeing with the lower Appellate Court, therefore, I hold that the loss was due to the misconduct of the servants of the defendant Railway Administration.

(21) The appeal is therefore allowed with costs. Counsel's fee Rs. 90/- if certified.

(22) SEN J.: I agree that the appeal be allowed.

K.S.B. Appeal allowed.

A.I.R. 1954 NAGPUR 342 (Vol. 41, C.N. 118)

MANGALMURTI AND DEO JJ. (9-3-1954)

State of Madras v. C. P. Agencies and another, Non-Applicant No. 1.

Civil Revn. No. 858 of 1951, to revise order of Ist Addl. Dist. J., Nagpur, D/- 28-9-1951.

(a) Partnership Act (1932), S. 69 (2) — Scope.

Section 69(2) bars the institution of a suit by or on behalf of an unregistered firm to enforce a right arising from a contract of the firm. It does not bar the firm from entering into the contract. The disability created by sub-s. (2) is with regard to the right to institute a suit and not with regard to the right to enter into a contract. The disability continues while the partnership is in existence. AIR 1948 Mad 187, Ref. (Paras 6, 7)

Anno: Partnership Act, S. 69 N. 6.

(b) Civil P. C. (1908), S. 80 — Service of notice.

Section does not prescribe any particular form of address — Notice of suit against State of Madras addressed to the Secretary to the Commissioner of Civil Supplies, Government of Madras, who was also the Secretary, Civil Supplies Food Department, Madras and received by latter — It is sufficient compliance with the requirement of the delivery of notice. (Para 10)

Anno: Civil P. C., S. 80 N. 14.

(c) Civil P. C. (1908), S. 80 — Form and sufficiency of notice.

All that S. 80 requires is residence and not address, and mention of address in the cause title of the plaint does not render the notice invalid. (Para 11)

Anno: Civil P. C., S. 80 N. 13.

(d) Civil P. C. (1908), S. 80 — Form and sufficiency of notice.

A notice stating that the plaintiff is a partnership firm without stating that it is a registered partnership is a valid notice. A firm need not be registered at the date of the transaction. It need not be a registered one when the notice is given. Registration is necessary for the institution of a suit. Notice by an unregistered firm does not become invalid for want of description that it is registered firm. (Para 12)

Anno: Civil P. C., S. 80 N. 13.

(e) Civil P. C. (1908), S. 80 — Form and sufficiency of notice — Statement of cause of action.

Section 80 requires the intending plaintiff to give a notice "stating the cause of action." "Cause of action" has been compendiously defined to mean every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. (1888) 22 QBD 128; 16 All 165 (FB); 18 All 131, Ref. (Para 14)

The cause of action refers to the media upon which the plaintiff asks the Court to arrive at the conclusion in his favour. It has

no relation whatever to the defence that might be set up. (Para 14)

The Court must import a little common sense into these notices. The term "cause of action" in this section should not be construed in a narrow sense. (Para 15)

Held that the cause of action as appearing in the plaint was substantially set out in the notice and that the requirements of S. 80, Civil P. C., were substantially fulfilled. (Para 17)

Anno: Civil P. C., S. 80 N. 13.

(f) Civil P. C. (1908), S. 80 — Notice if necessary for amendment of plaint.

In considering whether the notice in question was valid or invalid under S. 80, the Court is not concerned with the success of the suit as framed. If the plaintiff is not entitled to succeed without amendment of the plaint and if the amendment is allowed, a question may well arise whether the cause of action as amended was substantially stated in the notice. (Para 19)

But if, on the plaint as it is, the cause of action disclosed therein is substantially stated in the notice that is sufficient. (Para 19)

Anno: Civil P. C., S. 80 N. 16.

CASES REFERRED: Paras

(A) (V40) AIR 1953 Nag 122: ILR (1952) Nag 527 1, 4, 20
(B) (V36) AIR 1949 PC 156: 76 Ind App 67 (PC) 4
(C) (V28) AIR 1941 Pat 385: 20 Pat 417 4
(D) (V36) AIR 1949 PC 239: 76 Ind App 131 (PC) 4
(E) (V35) AIR 1948 Nag 258: ILR (1948) Nag 16 (FB) 4
(F) (V30) AIR 1943 Mad 284: 210 Ind Cas 418 4
(G) (V35) AIR 1948 Mad 187: ILR (1948) Mad 481 7
(H) (V14) AIR 1927 PC 176: 54 Ind App 338 (PC) 9
(I) (1844) 153 ER 149: 13 M and W 361 9
(J) (V25) AIR 1938 Nag 415: ILR (1939) Nag 206 9, 15
(K) (1888) 22 QBD 128: 58 LJQB 120 14
(L) (1873) 8 CP 107: 42 LJCP 98 14
(M) ('94) 16 All 165: 1894 All WN 65 (FB) 14
(N) ('96) 18 All 131: 1896 All WN 2 14
(O) (V36) AIR 1949 PC 78: 75 Ind App 121 (PC) 14, 18
(P) ('03) 27 Bom 189: 5 Bom LR 30 15
(Q) (1822) 106 ER 1397: 5 B and Ald 837 15
(R) ('01) 24 Mad 279: 11 Mad LJ 117 15
(S) (V13) AIR 1926 Mad 408: 91 Ind Cas 368 15
(T) (V15) AIR 1928 Cal 74: 54 Cal 969 15
(U) (V21) AIR 1934 Pat 701: 14 Pat 283 15
(V) (V34) AIR 1947 Nag 224: 1947 Nag LJ 540 17

K. V. Tambe, for Applicant; M. Adhikari, R. M. Hazarnavis, H. L. Khaskalam, G. B. Shidhye and Kumari Rama Gupta, for Non-Applicant No. 1.

ORDER: This application for revision under S. 115, Civil P. C., which under the Rules of this Court had to be heard by a Judge sitting singly, is referred to a Division Bench for disposal. The reference is either under Rule 9(1) or under R. 9(2)(b) of Chapter 1 of these Rules. There is no other provision for a reference of this kind. Unfortunately, there is no order of reference to indicate the rule under which the reference is made; nor are the questions of law of difficulty or importance indicated. If the reference is to be regarded as one under R. 9(2)(b), the decision of this Court which requires reconsideration for the disposal of this case and the grounds for reconsideration have not been stated. The learned counsel for the non-applicant no. 1 relies on — 'Wamanrao v. Vidyacharan', AIR 1953 Nag 122 (A) in support of his submission that an application for revision does not lie in the instant case. The learned counsel for the applicant submits that it requires reconsideration. If this necessitated the reference, it should have made to a Full Bench under R. 10 as a Division Bench cannot reconsider the decision of another Division Bench. We therefore desire to point out the desirability of passing an order of reference and compliance with the Rules of this Court in making reference to facilitate proper disposal of the cases referred.

(2) The plaintiff non-applicant no. 1 instituted a suit against the applicant, the State of Madras, and the non-applicant no. 2 Shri M. K. Gopalan, Assistant Marketing Officer of the applicant, for recovery of Rs. 31,239/8/- claimed as rent, interest on rent and lawyer's charges. The trial Court raised the following preliminary issues and answered them in the affirmative:

"1. Whether the plaintiff had sent a valid notice to defendant no. 1 in accordance with S. 80, Civil P. C., before the institution of the suit?

2. Whether the plaintiff's suit is not maintainable on account of the non-registration of the plaintiff firm before the transaction in suit?"

(3) The defendant no. 1 has applied for revision of this order. It is contended that the suit should have been dismissed 'in limine' because (a) there was no valid notice under S. 80. Civil P. C., and (b) the firm was not registered at the date of the transaction in dispute though it was registered before the institution of the suit. According to the learned counsel, the lower Court assumed jurisdiction to try the suit on erroneous findings on these two conditions precedent which gave jurisdiction to the Court to entertain the suit.

(4) A preliminary objection is taken to the maintainability of this application for revision on the grounds that the order in question which directs the suit to continue is not a final order but is an interlocutory order which can be disputed in an appeal against the decree, and that the findings on which the order is based are findings on the merits of the case and do not give rise to a question of jurisdiction even if they are erroneous. Reliance is placed on — 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras', AIR 1949 PC 156 (B), on — 'Wamanrao v. Vaidyacharan (A)' (cit. sup.), to which the learned referring Judge was a party, and on — 'Nandkumar Sinha v. Pashupati Ghosh', AIR 1941 Pat 385 (C). The learned counsel for the applicant on the other hand relies on — 'Joy Chand v. Kamalaksha Chaudhury', AIR 1949 PC 239 (D); — 'Narayan v. Sheshrao', AIR 1948 Nag

253 (FB) (E); — 'Madras Province v. Maharaja of Jeypore', AIR 1943 Mad 284 (F) and submits that — 'Wamanrao v. Vaidyacharan (A)' (supra) requires reconsideration.

(5) Before dealing with this question we propose to examine the case on merits to find if there is a case for interference. This course will obviate an unnecessary reference to a Full Bench.

(6) We are of the opinion that the objection about registration is without any substance. Section 69(2), Partnership Act, bars the institution of a suit by or on behalf of an unregistered firm to enforce a right arising from a contract of the firm. It does not bar the firm from entering into the contract. There is considerable divergence of judicial opinion as to the interpretation of S. 69 (2). One view is that registration is a condition precedent to the institution of a suit and the other view is that a suit by an unregistered firm can be validated by a subsequent registration. It is not necessary for the purposes of this case to examine these conflicting views as the plaintiff firm was admittedly registered before the institution of the suit.

(7) Sub-section (3)(a) of S. 69, Partnership Act, is an exception to sub-s. (2) and excludes from the operation of that sub-section a suit to enforce any right or power to realize the property of a dissolved firm. If the contention of the learned counsel for the applicant were correct, such a suit would also be barred. In our view, the disability created by sub-s. (2) is with regard to the right to institute a suit and not with regard to the right to enter into a contract. The disability continues while the partnership is in existence: — "Shanmugha Mudaliar v. Rathina Mudaliar', AIR 1948 Mad 137 (G). Want of registration has been held to be a formal defect and suits have been allowed to be withdrawn with permission to bring a fresh suit on the same cause of action after registration. We are, therefore, of the opinion that the finding of the lower Court on issue no. (2) is correct.

(8) The next contention is about the validity of the notice, dated 9-9-1948, under S. 80, Civil P. C. That section, so far as it is material for the purposes of this case, is:

"No suit shall be instituted against the Government..... until the expiration of two months next after notice in writing has been delivered to or left at the office of....., in the case of a suit against a State Government, a Secretary to that Government or the Collector of the District.....stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims....."

(9) In — 'Bhagchand Dagdusa v. Secy. of State', AIR 1927 PC 176 (H), their Lordships of the Judicial Committee have stated at pp. 184-185:

"The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions.....Section 80 imposes a statutory and unqualified obligation upon the Court."

Since the conditions of the section were not complied with their Lordships held that the action was "unsustainable 'in limine' ".

In view of this statement of the law it is not necessary to refer to the decisions of the various High Courts relied on by the learned counsel for the applicant. But in dealing with these matters, as stated by Pollock C. B., in — 'Jones v. Nicholls', (1844) 153 ER 149 at p 150 (I) cited in — 'Secy. of State v. Nagorao', AIR 1938 Nag 415 (J):

"We must import a little common sense into notices of this kind."

Grille J. stated in the above-cited — 'Nagorao's case (J)' that the language in — 'Bhagchand's case (H)' does not preclude the Court from looking at the wording of the notice and interpreting it in the light of common sense. He points out that the object of the notice under S. 80, Civil P. C., is:

"to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that restitution is due, without recourse being had to a Court of law in which Government might be mulcted in costs."

In the light of these observations, we proceed to consider the several objections taken to the notice.

(10) The first contention is that the notice is not addressed to defendant no. 1. The finding of the lower Court is that the notice, though addressed to the Secretary to the Commissioner of Civil Supplies, Government of Madras, was received by the Secretary to the Commissioner of Civil Supplies, Madras, and the Secreary, Civil supplies Food Department, Madras. It is conceded that a notice, if addressed to the Secretary, Civil Supplies Food Department, Madras, would be a validly addressed notice. Apparently the Secretary, Food Department, is also the Commissioner of Civil Supplies. The section does not prescribe any particular form of address. The contents of the notice leave no doubt that it was a notice of suit against the State of Madras and the fact that it was received by the Secretary to that Government concerned is sufficient compliance with the requirement of the delivery of notice of suit against the applicant. The notice was replied to by the Secretary to Government, Food Department, in the name of the defendant no. 1. This is Ex. P-12, dated 20-11-1948.

(11) It is next contended that the name and address of the plaintiff who is suing is not stated in the notice. The name of the plaintiff as given in the cause title of the plaint is "C. P. Agencies". Its residence is shown as "Surana Chambers, Sadar Bazar, Nagpur". The name of the partner suing is also shown in the cause title. In paragraph 1 of the plaint it is stated that the plaintiff is a registered partnership firm. In the notice the name of the intended plaintiff is stated as "Central Provinces Agencies, Nagpur". It is admitted in the written statement of the applicant that defendant no. 2 purchased black gram from defendant no. 1 and made payments to the "C. P. Agencies" and that there was some correspondence regarding the bills for godown rent between the defendant no. 1 and the C. P. Agencies to whom a conditional offer was made that the claim for godown rent would be considered if certain conditions were fulfilled; but the

C. P. Agencies did not accept the offer. There is really no difference in the name of the plaintiff as "C. P." is a well-known abbreviation for Central Provinces. The residence at Nagpur given in the plaint is also stated in the notice. All that S. 80 requires is residence and not address, and mention of address in the cause title of the plaint does not render the notice invalid.

(12) The learned counsel further stated that the description of the plaintiff as given in the plaint was not to be found in the notice. The description in the notice, according to the learned counsel, sought to have been "the firm is a registered partnership". We do not agree. The notice sufficiently states that the plaintiff is a partnership. As already pointed out, a firm need not be registered at the date of the transaction. It need not be registered one when the notice is given. Registration is necessary for the institution of a suit. Notice by an unregistered firm does not become invalid for want of description that it is registered firm.

(13) The next contention of the learned counsel is that the cause of action which is sued upon is not stated in the notice. As we find from the plaint, the plaintiff's case in substance is that the defendant no. 2 purchased for the applicant black gram, ex-godown, from the plaintiff, and as there was no arrangement made by the applicant for storing it, which became necessary on account of difficulty of transport, the defendant no. 2 agreed to pay godown rent to the plaintiff. According to the plaint, the defendant no. 2 had full authority to make purchases and enter into necessary incidental contracts on behalf of defendant no. 1 and those contracts were acted upon by the defendant no. 1. He had, therefore, authority to enter into the contract to pay godown rent. The terms of agreement to pay godown rent as stated in the plaint are:

"(a) That godown rent shall be paid as per bag per month according to the rates settled between the plaintiff and defendant no. 1 at Nagpur and payable at Nagpur. These rates are mentioned in the bills submitted to the defendant on 15-4-1946.

(b) That the defendant no. 1 shall pay the whole amount of godown rent when all the bags have been despatched and bills for the payment of godown rent are submitted.

(c) That interest shall be paid at 6 per cent. per annum.

(d) That no godown rent shall be charged for the first two months after the delivery of the goods to defendant no. 1 ex-godown and that godown rent and interest shall be charged as mentioned in sub-paras (a), (b) and (c) above until the goods are despatched and Railway Receipts are submitted to defendant no. 2 in his office in token of that fact."

Plaintiff claimed Rs. 27,000/- for godown rent and interest at 6/- per cent. per annum and lawyer's fee.

(14) Section 80 requires the intending plaintiff to give a notice "stating the cause of action".

"Cause of action has been compendiously defined to mean every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

'Read v. Brown', (1888) 22 QBD 128 (K); — 'Cooke v Gill', (1873) 8 CP 107 (L); — 'Murti v. Bhola Ram', 16 All 165 at p. 170 (FB) (M) and — 'Salima Bibi v. Sheikh Muhammad', 18 All 131 at p. 137 (N). The cause of action refers to the media upon which the plaintiff asks the Court to arrive at the conclusion in his favour. It has no relation whatever to the defence that might be set up. As pointed out in — 'Md. Khalil Khan v. Mahbub Ali Mian', AIR 1949 PC 78 at p. 85 (O):

"Where the question is whether the cause of action in two suits is the same or not, one of the tests that is applied is whether the same evidence would support the claims in both suits; if the evidence required to support the claims is different, then the causes of action are also different."

(15) In — 'Jehangir M. Cursetji v. Secy. of State', 27 Bom 189 at p. 206 (P), it was held that notices under S. 80 (under S. 424 of the then Code of 1882)

"must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove, and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed."

In — 'Jones v. Bird', (1822) 106 ER 1397 (Q), it was said, with reference to a similar section, that the object of such notices was merely to inform the defendant substantially of the grounds of complaint. See also — 'Secy. of State v. Perumal Pillai', 24 Mad 279 (R); — 'Venkatakrishnier v. Secy. of State', AIR 1926 Mad 408 (S); — 'Kessoram Poddar & Co. v. Secy. of State', AIR 1928 Cal 74 (T); — 'Sourendra Mohan v. Secy. of State', AIR 1934 Pat 701 (U) and — 'Secy. of State v. Nagorao (J)' (cit. sup.). As pointed out by Pollock C. B., we must import a little common sense into these notices. The term "cause of action" in this section should not be construed in a narrow sense.

(16) In the notice in question a claim is made for Rs. 27,000/- as godown rent and interest thereon at 9/- per cent. per annum till realization and lawyer's fees. This means that relief claimed in the notice is claimed in the suit though a lesser rate of interest is claimed. It is not stated in the notice that there was an agreement with defendant no. 2 to pay godown rent and interest and that he had authority to enter into this agreement on behalf of the applicant. It is however stated that the plaintiff supplied black gram to the applicant through its Assistant Marketing Officer, that the gram remained undespatched because the applicant had not arranged for transport facilities, that there was considerable correspondence on the subject ending with the letter of the Assistant Marketing Officer, dated 23-4-1948, (which was enclosed for ready reference), that the appli-

cant was not making payment on the pretext that they wanted to verify the bills from the plaintiff's account books, and that the books were taken away by the Anti-Corruption Department which neither returned them in spite of efforts, nor allowed the plaintiff to inspect them and take copies. The learned counsel for the plaintiff contends that though the notice is not drawn up with the formality and accuracy of the plaint, the plaintiff had stated in the notice all the material facts which constitute its cause of action, in particular, the use of the plaintiff's godown by the applicant for a particular period and its liability to pay rent and interest.

(17) The applicant sent the reply Ex. P-12, dated 20-11-1948, to the notice of this suit. Therein the applicant did not dispute the agreement with the plaintiff for the supply of gram. All that it says is that the godown rent till the date of despatch was included in the agreed charge of -/8/- per maund and that there was no separate agreement to pay additional rent for the period in excess of two months. This letter manifestly demonstrates that the applicant understood the claim in the notice in the way it is set out in the plaint. No doubt, the plaint sets out several other facts and details, but they are not strictly the plaintiff's cause of action; they are more or less evidence in support of the claim. Following the principle adopted in the above decisions, we hold that the cause of action as appearing in the plaint is substantially set out in the notice and that the requirements of S. 80, Civil P. C., are substantially fulfilled. 'Sitaram Bindraban Firm v. Governor-General in Council', AIR 1947 Nag 224 at pp. 228-229 (V).

(18) In — 'Md. Khalil Khan v. Mahbub Ali Mian (O)' (cit. sup.) on which the learned counsel for the applicant relied, the Privy Council was not dealing with the question of sufficiency of a notice under S. 80, Civil P. C., but was discussing the meaning of "cause of action" for the purpose of O. 2, R. 2 of the Code.

(19) The learned counsel for the applicant submitted that no decree could be passed on the claim as made in the notice or on the claim as made in the plaint. That is another matter. In considering whether the notice in question was valid or invalid under S. 80, the lower Court was not concerned with the success of the suit as framed. If the plaintiff is not entitled to succeed without amendment of the plaint and if the amendment is allowed, a question may well arise whether the cause of action as amended was substantially stated in the notice. That question was not before the lower Court in passing the order under revision. On the plaint as it is, the lower Court has, in our view, rightly held that the cause of action disclosed therein was substantially stated in the notice.

(20) Since the application fails on merits, it is not necessary to consider whether — 'Vamanrao v. Vaidyacharan (A)' (cit. sup.) was correctly decided.

(21) The application for revision fails and is dismissed with costs. Counsel's fee Rs. 200/-.

K.S.B. Revision dismissed.

A.I.R. 1954 NAGPUR 346 (Vol. 41, C.N. 119)

MANGALMURTI AND DEO JJ. (22-2-1954)

Union of India, Representing the Central (G.I.P.R.) Railway Administration, Applicant v. Dhanpal Patni and another, Non-Applicants.

Civil Revn. No. 7 of 1952, for revision of decree of Civil Judge, II Class, Chhindwara, D/- 29-11-51.

Railways Act (1890), S. 72 — Risk Note A — Short weight.

16 bundles of fresh dates, whose weight as shown in the railway receipt was 23 maunds and 18 seers, were booked from Wadibundar to Parasia in the Chhindwara district under risk note A. On arrival at the destination it was found that three bundles were in broken condition and some contents were missing. These three bundles were separately weighed and were found to weigh 56, 51 and 54 seers. One unbroken bundle was found to weigh 52 seers. Delivery was taken six days later. The total weight of 16 bundles at the time of delivery was 21 maunds and 15 seers. Plaintiffs therefore claimed damages for the short weight of 2 maunds and 3 seers. It was stated in the Risk Note A that a consignment of 16 bundles tendered for carriage was in bad condition and/or liable to damage, leakage or wastage in transit as the bundles were insecurely sewn and the contents were dropping:

Held that the bailment in the instant case was of 16 bundles. Unexplained failure to return the thing bailed is presumed to be by the bailee's default. An unexplained failure to deliver a complete package would therefore fall within S. 161 of the Contract Act. This was not the case here and the Railway Administration could not be held liable for the short weight, if any, of the 13 bundles which were delivered in a sound condition. There was no material on record to show that the short weight of 2 maunds and 3 seers was the weight of the contents missing from the three bundles which were found in broken state. It is a matter of common knowledge that fresh dates are liable to dry and lose some weight thereby. The extent of this loss depends upon the degree of freshness of the fruit. Plaintiffs could not therefore succeed because they had failed to prove the weight and value of the missing contents of the three bundles in question. The suit was therefore liable to be dismissed on this short ground.

The recitals in the risk note A undoubtedly protected the defendant from liability in the instant case because the articles tendered for carriage were in a bad condition and were liable to leakage in transit as the bundles were insecurely sewn and the contents were dropping. The goods were delivered to the consignee apparently after some leakage in transit due to insecure packing of the three bundles. The Railway Administration was therefore absolved from liability for any loss arising from this condition in which the goods were delivered to the consignee. Risk note A is to be used when the articles tendered for carriage are already in bad condition or so defectively packed as to be liable to damage, leakage, or wastage in transit. If a consignor

fails in his duty to see that his goods are so securely packed as to be protected from the ordinary and inevitable incidents of a journey and the goods are consequently injured, the Administration is not liable. AIR 1951 Punj 383, Rel. on. (Paras 4, 5, 7, 8)

Anno: Railways Act, S. 72 N. 1a, 3, 12.

CASE REFERRED: Paras

(A) (V38) AIR 1951 Punj 383 2, 6

K. V. Tambe, for Applicant; N. S. Nandedkar, for Non-applicants.

ORDER: The application for revision is referred to a Division Bench apparently under R. 9, sub-r. (1) of Chapter 1 of the Rules of this Court as involving a question of law of difficulty or importance. Obviously, R. 9(2) is inapplicable. There is no decision of this Court or of the late Judicial Commissioner's Court which requires reconsideration in this case. Nor does this case involve any question as regards the interpretation of the Constitution. Two courses were therefore open to the learned referring Judge under sub-r. (3) of R. 9: either to refer a stated question, or to refer the whole case. The latter course is followed but the question of law is not indicated. The counsel who appeared before us also appeared before the learned Judge. They are not able to point out the question of law of difficulty or importance. We are ourselves unable to discover any such question. We are therefore of the view that an order of reference would have been of immense help to us to decide the question or questions of law which appeared to the learned referring Judge to be of difficulty or importance.

(2) This application was admitted for hearing parties by one of us (Deo J.) because the decree appeared to be in utter disregard of the agreement between the parties evidenced by risk note A and because the decision reported in — 'Janeshwar Lal v. Dominion of India', AIR 1951 Punj 383 (A) relied on by the trial Court was inapplicable.

(3) The facts of the case are very simple and are not disputed. 16 bundles of fresh dates, whose weight as shown in the railway receipt was 23 maunds and 18 seers, were booked from Wadibundar to Parasia in the Chhindwara district under risk note A. On arrival at the destination it was found that three bundles were in broken condition and some contents were missing. These three bundles were separately weighed and were found to weigh 56, 51 and 54 seers. One unbroken bundle was found to weigh 52 seers. Delivery was taken six days later. The total weight of 16 bundles at the time of delivery was 21 maunds and 15 seers. Plaintiffs therefore claimed damages for the short weight of 2 maunds and 3 seers.

(4) Subject to the provisions of the Indian Railways Act, the responsibility of a Railway Administration for loss, destruction or deterioration of goods is that of a bailee under Ss. 151, 152 and 161, Contract Act. If by the default of the bailee the goods are not delivered at the proper time, it is responsible to the bailor for any loss, destruction or deterioration of the goods bailed from that time. The bailment in the instant case was of 16 bundles. Unexplained failure to return the thing bailed is presumed to be by the bailee's default. An unexplained failure to deliver a complete package would therefore fall within S. 161, Contract Act. This is not the case here and the Railway Administration cannot be held liable for the short weight, if any, of the 13 bundles which were delivered in a sound condition.

There is no material on record to show that the short weight of 2 maunds and 3 seers was the weight of the contents missing from the three bundles which were found in a broken state. That is not even the plaintiff's case. It is a matter of common knowledge that fresh dates are liable to dry and lose some weight thereby. The extent of this loss depends upon the degree of freshness of the fruit. Plaintiffs cannot therefore succeed because they have failed to prove the weight and value of the missing contents of the three bundles in question. The suit was therefore liable to be dismissed on this short ground.

(5) The learned trial Judge seems to hold that the risk note A in the present case is applicable if the dates were delivered in a bad condition but not when they were lost in transit. As stated in the risk note A Exhibit D-2. that form is to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. It is also stated in the document that a consignment of 16 bundles tendered for carriage was in bad condition and/or liable to damage, leakage or wastage in transit as the bundles were insecurely sewn and the contents were dropping. The lower Court has therefore taken an erroneous view of the risk note. Its statement "there is no burden on the plaintiff to prove the misconduct and negligence on the part of the Railway Administration" is not borne out by the decision relied on by him and is contrary to the agreement in the risk note.

(6) As is evident from issue no. 5 reproduced at page 384 of the decision relied on by the lower Court ('Janeshwar Lal v. Dominion of India (A)', cit. sup.), it was a case of non-delivery of one complete bag and it was held that such loss was not protected by risk note A. This case is distinguishable.

(7) The recitals in the risk note A undoubtedly protected the defendant from liability in the instant case because the articles tendered for carriage were in a bad condition and were liable to leakage in transit as the bundles were insecurely sewn and the contents were dropping. The consignor agreed and undertook to hold the Railway Administration harmless and free from all responsibility for the condition in which the goods would be delivered to the consignee at the destination and for any loss arising from the same except upon proof that such loss was due to misconduct on the part of the Railway Administration's servants.

The case of misconduct was not pleaded, not proved and is not relied on in this Court. The goods were delivered to the consignee apparently after some leakage in transit due to insecure packing of the three bundles. The Railway Administration is therefore absolved from liability for any loss arising from this condition in which the goods were delivered to the consignee. The learned trial Judge seems to have assumed that the Railway Administration is exempt from liabi-

lity only for the deterioration of goods. He seems to have overlooked the case of damage due to defective packing.

(8) Risk note A is to be used when the articles tendered for carriage are already in bad condition or so defectively packed as to be liable to damage. leakage, or wastage in transit. If a consignor fails in his duty to see that his goods are so securely packed as to be protected from the ordinary and inevitable incidents of a journey and the goods are consequently injured, the Administration is not liable.

(9) We are therefore satisfied that the defendant is not liable for the plaintiff's claim. Grounds Nos. 1, 2, 3 and 4 of the application for revision were not pressed as the counsel on examination of the record felt satisfied that the notices under Ss. 77 and 80, Railways Act, were not open to any objection. No question of law is involved in these grounds.

(10) The application for revision is therefore allowed and the suit is dismissed with costs. The learned counsel for the non-applicants did not attempt to support the decree of the trial Court and submitted that the firm should not be made liable for the costs, particularly the paper book costs occasioned by this reference. The learned counsel for the applicant submitted that the defendant should not be made liable to pay those costs because it did not seek the reference. It is not necessary to examine these contentions. Costs are in the discretion of the Court, and we direct that the costs in this Court should be borne as incurred.

D.H.Z. Revision allowed.

A.I.R. 1954 NAGPUR 348 (Vol. 41, C.N. 120)

SINHA C. J. AND HIDAYATULLAH J.

(19-2-1954)

Ratansi Agariya Bhate and another, Appellants v. Jaysingh Dinkarrao Rajurkar and others, Respondents.

Letters Patent Appeal No. 25 of 1951, from Order of Deo J., in Misc. Civil Appeal No. 68 of 1948, D/- 17-7-1951.

(a) Civil P. C. (1908), Pre., S. 96 — Right of appeal.

In a partition suit in the family of the respondents, one R obtained a decree. In execution of the decree he asked for possession of certain properties to which objection was raised by the appellants. That objection was overruled and possession was granted to R. The appellants thereupon brought a civil suit under O. 21, R. 103. It was decreed on 29-4-1940. R appealed to the High Court but the appeal was dismissed on 10-12-1946. An appeal against the decree of the High Court was pending before the Supreme Court. An application was made on 8-4-1947 by the appellants for restitution of possession of the property from which they were dispossessed. The application was dismissed on 10-1-1948 and the miscellaneous (first) appeal was filed against the order. During the pendency of the appeal R died on 1-11-1949. On 21-3-1950 two applications were filed. By the first application made under O. 22, R. 4, Civil P. C., the appellants applied for the substitution of the names of the legal representatives of R. By the second application under the ninth rule of the same Order, the appellants requested that the abatement of the appeal be set aside.

Held that according to the Full Bench decision in AIR 1950 Nag 177 all appeals get fixed when the 'lis' commences. The 'lis' commenced when the suit was filed for declaration. The date of the filing of the plaint was presumably sometime in 1931. It is settled law that just as a right of appeal cannot be taken away during the pendency of a civil action, except by a clear provision to that end, so also a new right of appeal cannot be availed of unless that right is given in a manner to apply to a pending case. At all material times a single Judge could deal with an application under O. 22 of the Code of Civil Procedure. Such applications could be dealt with by a single Judge of the High Court including an application for setting aside an abatement under O. 22, R. 9, Civil P. C. That position continued unaltered up to the date when the order was passed by the single Judge of the High Court and the matter was rightly considered by the single Judge. AIR 1950 All 177 (FB), Foll. (Paras 10, 14)

Anno: C. P. C., Pre. N. 3, S. 96 N. 2.

(b) Letters Patent (Nag.), Cl. 10 — Judgment — Order of abatement.

To say that an appeal has abated is to terminate very effectively the entire controversy and the decision in favour of the respondents is tantamount to a decree of dismissal of the appeal as also the action. The order must be treated as a judgment for purposes of Cl. 10. The Letters Patent appeal is competent. AIR 1952 Nag 357 (FB); AIR 1917 PC 156, Foll. (Para 16)

Anno: L. P. (Cal.), Cl. 15 N. 2.

(c) Civil P. C. (1908), O. 22, R. 9 — Sufficient cause — AIR 1924 Pat 126; AIR 1924 Pat 607; AIR 1933 Lah 356 (2); AIR 1941 Oudh 16; AIR 1933 Lah 556; AIR 1951 Simla 257, Dissented from.

Each case must be decided on its own facts and it must be shown to start with that there is no negligence, want of diligence or good faith. If this is established, there is no reason why ignorance of the fact that death has taken place should not be held to be sufficient cause. It is not necessary to set too exacting a standard in these matters. Case law discussed. (Para 18)

Anno: Civ. P. C., O. 22 R. 9 N. 8.

(d) Civil P. C. (1908), O. 22, R. 9 — Sufficient cause.

The principle that the knowledge of agent must be attributed to the principal cannot be extended to a pleader engaged for another case without proof that the pleader was authorised to act in that case. To hold otherwise would introduce much uncertainty in

litigation and neglect of counsel might without justification be attributed to the litigant. 29 Ind App 203 (PC), Distinguished. (Para 31)

Anno: C. P. C., O. 22, R. 9 N. 8.

CASES REFERRED: Paras

(A) (V37) AIR 1950 Nag 177: ILR (1950) Nag 532 (FB) 6, 10
(B) (V39) AIR 1952 Nag 357: ILR (1952) Nag 471 (FB) 16
(C) (V4) AIR 1917 PC 156: 45 Cal 94 (PC) 16
(D) (V13) AIR 1926 Pat 276: 94 Ind Cas 209 17
(E) (V25) AIR 1938 Pat 125: 17 Pat 84 17, 18
(F) (V26) AIR 1939 Pat 623: 185 Ind Cas 498 17
(G) (V36) AIR 1949 Mad 624: 1949-1 Mad LJ 144 17
(H) (V11) AIR 1924 Pat 126: 79 Ind Cas 414 17
(I) (V11) AIR 1924 Pat 607: 75 Ind Cas 909 17
(J) (V20) AIR 1933 Lah 356 (2): 14 Lah 543 17
(K) (V28) AIR 1941 Oudh 16: 15 Luck 580 17
(L) (V20) AIR 1933 Lah 556: 146 Ind Cas 154 17
(M) (V38) AIR 1951 Simla 257 17
(N) (V40) AIR 1953 Cal 367: 87 Cal LJ 23 18
(O) ('02) 29 Ind App 203: 25 All 1 (PC) 31

M. N. Phadke, for Appellants; N. A. Athalay, for Respondents.

ORDER: This is a Letters Patent appeal against an order passed by a learned single Judge of this Court in a miscellaneous (first) appeal. That appeal was from an order passed in proceedings for restitution after a decree. The facts of the case are as follows:

(2) In a partition suit in the family of the respondents, one Rao Bahadur Rajurkar obtained a decree. In execution of the decree he asked for possession of certain properties to which objection was raised by the present appellants. That objection was overruled and possession was granted to Rao Bahadur Rajurkar. The present appellants thereupon brought a civil suit (Transfer Civil Suit No. 36A of 1937). It was decreed on 29-4-1940. Rao Bahadur Rajurkar appealed to the High Court (First Appeal No. 54 of 1940), but the appeal was dismissed on 10-12-1946. An appeal against the decree of the High Court is pending before the Supreme Court.

(3) The present matter arises out of an application made on 8-4-1947 by the decree-holders for restitution of possession of the property from which they were dispossessed. The application was dismissed on 10-1-1948 and the miscellaneous (first) appeal was filed against the order. During the pendency of the appeal, Rao Bahadur Rajurkar died on 1-11-1949. On 21-3-1950 two applications were filed (Applications Nos. 1687 and 1688). By the first application made under O. 22, R. 4, Civil P. C., the appellants applied for the substitution of the names of the legal representatives of Rao Bahadur Rajurkar. By the second application under the ninth rule of the same Order, the appellants requested that the abatement of the appeal be set aside.

(4) In giving the reasons for the delay the appellants stated that they had no movable or immovable property in Berar and hence they had gone and settled at Mapur in Kutch State. They learnt about the death of Rao Bahadur Rajurkar "in about the beginning of March 1950" from the notices which the legal representatives of Rao Bahadur Rajurkar had issued to them in the Miscellaneous Civil Suit No. 3 of 1947 in which Rao Bahadur Rajurkar was the applicant. The appellants stated that till they received these notices they were not aware of the death of Rao Bahadur Rajurkar and 'bona fide' believed that he was alive.

(5) These two applications were strenuously opposed by the legal representatives. The learned single Judge held that the appellants knew of the death of Rao Bahadur Rajurkar from sources other than the one mentioned in the applications. Since the appellants had not disclosed the source of their information truthfully, the learned Judge held that they were not entitled to any indulgence and the abatement could not be set aside. Against that decision the present Letters Patent appeal has been filed.

(6) It may be pointed out that at the hearing the appellants also raised an objection before the learned single Judge that under the rules of the High Court and the decision in — 'Radhakishan v. Shridhar', AIR 1950 Nag 177 (FB) (A) the miscellaneous (first) appeal had to be heard by a Bench of two Judges. The learned single Judge overruled this contention by another order, holding that the appellants had no vested right to have the appeal heard by two Judges when the 'lis' commenced in 1947, inasmuch as the rule was already amended on 26-6-1946. The learned Judge was of opinion that the Full Bench decision on which the learned counsel relied did not support the contention that the amended rule was 'ultra vires'. This contention was also raised before us. We shall first consider whether the appeal was properly heard by a single Judge.

(7) It has already been shown that the learned single Judge is of opinion that the 'lis' commenced in 1947 and the rules as amended in 1946 applied to the appeal. With all due respect to the learned single Judge, this is not the correct position. The decree-holders-appellants were deprived of the property by a summary order passed on 28-8-1930. Possession of the property was given to the other side on 26-9-1930. This gave the present appellants their cause of action to bring the suit. The decree-holders brought their suit under O. 21, R. 103, Civil P. C., for establishing the right to the possession of the property and for setting aside of the summary order. This was Transfer Civil Suit No. 36A of 1937 of the Court of Second Additional District Judge, Akola, and was decreed on 29-4-1940. An appeal was filed by the defendant (Rao Bahadur Rajurkar) and it was dismissed by this Court on 10-12-1946. Thereafter Rao Bahadur Rajurkar applied for leave to appeal to the Privy Council (Miscellaneous Civil Case No. 3 of 1947) and the appeal is now pending before the Supreme Court.

(8) The present application was made to the Court for restitution of the property which was lost to the appellants as a result of the execution of the decree in Civil Suit No. 26 of 1909 and which they unsuccessfully resisted under O. 21,

R. 97, Civil P. C. The 'lis' therefore commenced when the suit was filed for declaration. The date of the filing of the plaint is not available from the record which is before us but must presumably be some time in 1931.

(9) Under S. 144 of the Code, restitution can be claimed when a decree is varied or reversed and under S. 47 the execution of the decree can be obtained. The appellants mentioned both these sections as well as S. 151 of the Code in their application, probably because they were not quite clear which provision of the law would be applicable. But whether it be one or the other, excluding the inherent powers under S. 151, it is clear enough that the present proceedings for getting back possession are a continuation of the original 'lis'. They cannot be regarded as independent proceedings and more so because the appeal is still pending before the Supreme Court. The learned Judge, therefore, with all due respect, erred in considering that for the purposes of the application of the Full Bench case the 'lis' must be taken to have commenced in April 1947 when the application was made.

(10) Now, according to the Full Bench decision, all appeals get fixed when the 'lis' commences. The 'lis' having commenced in 1931, we have to find out what were the rights of the parties in 1931 in respect of appeals to the High Court. It is settled law that just as a right of appeal cannot be taken away during the pendency of a civil action, except by a clear provision to that end, so also a new right of appeal cannot be availed of unless that right is given in a manner to apply to a pending case. (See AIR 1950 Nag 177 (FB) (A) (cit. sup.) at pp. 181, 182).

(11) The earliest rules to which we have to refer were framed under Notification Nos. 1617 and 1618/1366-V, dated 25-8-1926. Those rules provided that only certain matters were to be heard by a Bench of two Judges. Among such rules only one has relevance and it stated that first appeals from decrees or final orders, where the subject-matter of the suit or original proceeding was Rs. 10,000/- or upwards and the amount or value of the subject-matter in dispute on appeal was the same sum or upwards, were to be heard by a Bench of two Judges. This rule continued till 12-8-1932, when the only change made was the deletion of the words "or final orders" (Notification No. 1773-1436-V, dated 12-8-1932).

(12) The rules were again amended in 1935 (Notification No. 6722, dated 6-11-1935) which 'inter alia' provided that a single Judge could hear a first or second appeal from an order under the Civil Procedure Code or from an Order passed in execution of a decree where the value of the appeal did not exceed Rs. 2,000/-. By a separate rule it was provided that a single Judge could hear all applications under O. 22, Civil P. C. In 1936 these rules were again amended, but the rule about appeals from orders under the Code of Civil Procedure or from an order passed in execution of a decree or applications under O. 22 was left intact (Notification No. 2301, dated 17-3-1936). A further amendment took place in August 1936 which concerned the amendment of the first clause of R. 1 which related to a motion for the admission of an appeal from an appellate decree of a District Court. We are not concerned with that amendment (Notification No. 6317, dated 27-8-1936).

In 1942 the rules were again amended but the pertinent rules to which we have referred were not touched. Then came the amendment on 26-6-1946 by which the words "where the value of the appeal does not exceed Rs. 2,000/-" were deleted. This amendment, in the opinion of the learned single Judge, controlled the rights of the parties because it was made prior to the commencement of the 'lis' in 1947.

(13) Looking backwards, we get the following result: After 1946, all appeals from orders, or from an order passed in execution of a decree, could go before a single Judge, as also applications under O. 22, Civil P. C. Prior to this, between 1935 and 1946, there was a limit of Rs. 2,000/- on the jurisdiction of the single Judge, though there was no such restriction in respect of applications under O. 22. Between 1932 and 1935 only first appeals from decrees involving Rs. 10,000/- or upwards were to be heard by two Judges, and between 1926 and 1932, appeals against decrees as well as final orders involving Rs. 10,000/- or upwards had to go before two Judges. There was no provision with regard to applications under O. 22 but presumably on the maxim 'expressio unius est exclusio alterius' all such matters had to be heard by a single Judge.

(14) It would thus appear that at all material times a single Judge could deal with an application under O. 22, Civil P. C. Such applications could be dealt with by a single Judge, including an application for setting aside an abatement under O. 22, R. 9, Civil P. C. That position continued unaltered up to the date when the order was passed by the learned single Judge. We are, therefore, of opinion that the matter was rightly considered by the learned single Judge, though for reasons quite different from the ones given by him.

(15) It was then contended as a preliminary objection that there was no appeal available to the present appellants under the Letters Patent. The short question is whether the decision of the learned Judge is a 'judgment' within cl. 10 of the Letters Patent. Learned counsel for the respondents invokes certain rulings in which it was held that refusal to set aside an abatement is not a judgment within that Clause. He refers to Mulla's Civil Procedure Code, 12th Edn., page 960, and Chitaley's Civil Procedure Code, page 2722.

(16) In — 'Manohar v. Baliram', AIR 1952 Nag 357 (FB) (B) a Full Bench of this Court attempted to lay down a comprehensive definition of the term 'judgment'. The only question is whether the order now passed can be said to be a decision in an action which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action. The action was commenced by the present appellants to obtain possession of the property in respect of which they are asking for restitution. The first Court has held that the application is incompetent and their appeal against the decision has been held to have abated. There is no further re-

medy to them and, in our opinion, this conclusively determines, in so far as this Court is concerned, the controversy which is the subject of the action. To say that an appeal has abated is to terminate very effectively the entire controversy and the decision in favour of the respondents (defendants) is tantamount to a decree of dismissal of the appeal as also the action.

In our opinion, the definition given by the Full Bench covers such a case. This is also clear from a dictum of their Lordships of the Privy Council in — 'Brij Indar Singh v. Kanshi Ram', AIR 1917 PC 156 at p. 160 (C) where their Lordships observed as follows:

> "An order abating the suit, looking to the terms of S. 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant."

This shows that the order must be treated as a judgment for purposes of Cl. 10 of the Letters Patent and thus falls within the definition given by the Full Bench of this Court. We accordingly hold that the Letters Patent appeal is competent.

(17) This brings us to the merits of the controversy. The only reason given for setting aside the abatement is that the appellants were not residents of Akola and they came to know of the death of Rao Bahadur Rajurkar in the beginning of March 1950. Counsel for the appellants contends that this is 'sufficient cause', while the other side contends that it is not. For the former contention reliance is placed on — 'Sadhu Saran v. Nanda Kumar', AIR 1926 Pat 276 (D); — 'Mir Wajid Ali v. Fagoo Mandal', AIR 1938 Pat 125 (E); — 'Ram Ranbijaya v. Madho Turha', AIR 1939 Pat 623 (F); and — 'Ramalingam v. Koteswara Rao', AIR 1949 Mad 624 (G); while for the latter reliance is placed upon — 'Ramperkash Dass v. Kunj Lall', AIR 1924 Pat 126 (H); — 'Phulwati Kumari v. Maheshwari Prasad', AIR 1924 Pat 607 (I); — 'Chuni Lal Tulsi Ram v. Amin Chand', AIR 1933 Lah 356 (2) (J); — 'Jagdish Bahadur v. Mahadeo Prasad', AIR 1941 Oudh 16 (K); — 'Municipal Committee, Gujranwala v. Prabhu Dial', AIR 1933 Lah 556 (L) and — 'Bunga Sarkar v. Sardar Raghubir Singh', AIR 1951 Simla 257 (M).

(18) In our judgment, each case must be decided on its own facts and it must be shown to start with that there is no negligence, want of diligence or good faith. If this is established, there is no reason why ignorance of the fact that death has taken place should not be held to be sufficient cause. We accept the ruling in 'Mir Wajid Ali v. Fagoo Mandal (E)', (cit. sup.) as correct and dissent respectfully from the strict view expressed in the other cases. It was pointed out in — 'Mehtabchand Dhandia v. Shriratan Mohta', AIR 1953 Cal 367 (N) that it is not necessary to set too exacting a standard in these matters and we entirely agree.

(19) It was held by the learned Judge in the present case that the appellants were guilty of suppressing the truth, that they had information from other sources than the ones disclosed, that they had already instructed their counsel to make such application in another case and that they were trying to make out sufficient cause by a false statement that they learnt of the death of Rao Bahadur Rajurkar in the beginning of March 1950.

(20) In reaching this conclusion the learned Judge was primarily influenced by the fact that in the execution proceedings arising out of the decree Shri Oke pleader applied on 19-11-1949 for time to bring the legal representatives on record. Later Shri Phadke (counsel in this appeal) asked for further time on 16-12-1949 and Shri Oke on 14-1-1950 and ultimately the application was made on 23-1-1950.

(21) The learned Judge overlooked the fact that Shri Y. V. Jakatdar was counsel for the appellants in this appeal and neither Shri Oke nor Shri Phadke had anything to do with this appeal. The learned single Judge has also used an affidavit of Shri Oke against the appellants and has interpreted it against its clear tenor. Shri Oke stated there:

> "It was in March 1950 that they (appellants) came to me and then on their further instructions I got an application made in this case also."

It is obvious enough that Shri Oke is stating that his instructions at first were to look after the cases and he acted within those instructions and made an application in the execution case. The instructions were apparently for the execution case and further instructions were needed if Shri Oke was to act in this appeal. The word 'also' in the above sentence escaped the learned single Judge's notice. Shri Phadke stated that he had explained all this even before the learned single Judge. We do not agree with the learned Judge that Shri Oke had instructions to deal with this appeal. There is nothing to show that Shri Phadke had any connection with this appeal before he actually put in his appearance.

(22) This brings us to the question whether the appellants knew of the death of Rao Bahadur Rajurkar before the month of March 1950. In the application for substitution (No. 1687) the appellant stated that "they learnt about the death of the respondent Dinkarrao, in about the beginning of March 1950." In the application for setting aside the abatement they added that

> "they learnt it from the notices which the non-applicants issued against them for bringing the legal representatives on record in Miscellaneous Civil Case No. 3 of 1947 fixed for 10-4-1947 where the late Dinkarrao Rajurkar was the appellant. Till these notices were received the applicants were not aware of the death and 'bona fide' believed that the respondent was alive."

(23) In reply, the son of Rao Bahadur Rajurkar pointed out by affidavit that Rao Bahadur Rajurkar was a well known figure. His death was known by people in Akola. He also stated that Hirji son of Bhimsi (brother of appellant Premji) resided near the house of Rajurkar and the affidavit in support of the application in the execution case was sworn by Hirji and thus the appellant must have known of the death of Rao Bahadur Rajurkar about the same time.

(24) It is necessary to refer to two affidavits sworn by Ratansi and Premji (appellants) respectively. Ratansi said that on 1-11-1949 he was at Mapur in Kutch State. In the first week of March he learnt about the death of Rajurkar and went to Akola on 16-3-1950. He stated that Shri Phadke, Oke and Hirji did not inform him of the death of Rajurkar before March and that there

was no talk or correspondence between Hirji and him as they were not on good terms. Premji stated that he was in Suleman Nagar, Hyderabad State, as a servant. He was on 1-11-1949 at Mapur but did not learn of the death of Shri Rajurkar either at Mapur or Suleman Nagar. He learnt of the death of Rajurkar in the beginning of March 1950 and went to Bombay and thence to Akola on 16-3-1950. He also denied that he was informed about the death by Shri Phadke, Oke or Hirji or that he learnt of this death before March 1950.

(25) These two appellants were cross-examined on their affidavits before the learned single Judge. Ratansi stated that he, his wife and children were residing in Kutch for five or six years prior to his statement (1951). He got a letter from one Bholabhai Mawji of Akola on 4th or 5th of March 1950 that a summons from the Supreme Court was received. Premji's wife and children were then (March 1950) living at Akola. He wrote to Premji at Suleman Nagar and left Mapur on 7th reaching Bombay on 10-3-1950. Premji met him on 13th or 14th March and they went to Akola. He stated that he had not seen the summons from the Supreme Court but Shri Oke had told him on 16th or 17th March 1950 that it was necessary to make applications.

(26) Premji stated that Ratansi had informed him about the summons from the Supreme Court and the letter reached him on 11th or 12th March 1950. His son Mawji had also written from Akola about the summons and he had seen the summons with Shri Oke at Akola. No evidence was adduced by the legal representatives.

(27) The learned single Judge disbelieved this evidence. His reasons can be summarised as follows:

(a) Premji's wife and children were living at Akola.

(b) Premji did not state when he went to Suleman Nagar.

(c) Letters of Bholabhai, Mawji son of Premji and the summons not produced.

(d) Bholabhai, Mawji son of Premji not examined.

(e) The application made in the execution case stated "according to the information received by the decree-holder" and this shows knowledge. If instructions were given by Shri Oke, why did Shri Oke obtain adjournments? Shri Oke must have asked for affidavit from the decree-holders and he had instructions from them as he says that later he obtained 'further' instructions.

(f) Hirjee who swore the affidavit in the execution case is a judgment-debtor.

(g) Premji must have at least known this before March 1950.

(h) The service of the summons took place on 11-3-1950 and thus the information was some source other than the summons if the letter reached in the first week of March.

(28) The list is so long but is not convincing. The fundamental error made is that the knowledge about the summons is said to have come to Bholabhai or Hirji and Oke only (point h) after 11-3-1950. The summonses were issued from the High Court about 1-3-1950 and it is probable there was information before 11-3-1950. The service report shows that Ratansi's house was closed. Premji's house was open but he was not there. Hirji's house was open but he was not there and the service was effected on one Morarji Hirji, probably his son. All this was on 11-3-1950.

(29) Though Bholabhai and Hirji were not examined, the fact remains that the summonses were probably received much earlier than 11-3-1950. Litigants come to know of such summonses in various ways and those present in Akola knew of this long before actual service. Once this fact goes out there is hardly anything which should detain us. Points (a) and (b) lose all force as the knowledge of Premji's wife and children cannot be attributed to Premji. There is nothing to show that Premji's son wrote to Premji at any time prior to the first week of March or that Premji knew of this prior to March 1950 (point g). The action taken in the execution case was on the instructions of Shri Oke.

The reference to the decree-holders is not conclusive as it is the practice for counsel to say so. The use of the word 'further' has been explained by us already and the fact that adjournments were taken may not be due to the fact that an affidavit from Ratansi or Premji was sent for. Ultimately the affidavit was filed by Hirji and this shows that no affidavit was sent for from these two appellants. We find no force in point (e).

(30) It is true that the letters of Bholabhai and Mawji son of Premji were not filed and the summons was not produced. Bholabhai and Premji's son were also not examined. In our judgment, it was not such an omission as was fatal to the case. A party is not required to bring all the evidence on pain of having his evidence, such as it is, disbelieved. The question is whether the appellants should be disbelieved when they say that they learnt of the death only in the first week of March 1950. In our judgment, the material is not sufficient to hold that they have perjured on this point. If they had instructed their lawyers in other cases, they would have assuredly done so in this case as well. The action was taken in the other cases by Shri Oke but he took no action in this appeal till he received 'further' instructions. We do not see any reason to disbelieve Shri Oke and hold that the applicants knew of the death of R. B. Rajurkar before the first week of March 1950.

(31) It was argued on the strength of — 'Raja Rampal Singh v. Balbhadar Singh', 29 Ind App 203 (PC) (O) that the knowledge of the agent (Shri Oke) must be attributed to the principal. We do not wish to extend this doctrine to a pleader engaged for another case without proof that the pleader was authorised to act in this case. To hold otherwise would introduce much uncertainty in litigation and neglect of counsel might without justification be attributed to the litigant. There being no circumstances present justifying the application of the principle to this case, we dismiss it from consideration.

(32) We accordingly reverse the decision of the learned single Judge & set aside the abatement of the appeal. The substitution of the legal representatives shall be made subject to the payment of the entire costs of this proceeding and this appeal by

the appellants as a condition of the setting aside of the abatement. Counsel's fee Rs. 50/-.

D.H.Z. Appeal allowed.

A.I.R. 1954 NAGPUR 353 (Vol. 41, C.N. 121)

MANGALMURTI AND DEO JJ. (22-2-1954)

Ganu Purnaji Marathe and others, Appellants v. Shriram Sadashio Marathe and another, Respondents.

Second Appeal No. 245 of 1946, from Appellate decree of Second Addl. Dist. J., Akola, D/- 2-1-1946.

(a) Hindu Law — Adoption — Widow — Adoption by widow — Question of motive irrelevant.

Where adoption made by a widow who can adopt without the permission of her husband and without the consent of his kindred is otherwise valid, her motive in making it is entirely irrelevant. AIR 1917 Nag 177; 22 Bom 558 (FB) and AIR 1941 Mad 937 (FB), Rel. on. Case law referred. (Para 7)

Held, after taking into consideration all facts, that the widow's motive in making the adoption was not solely to deprive the transferees of the property but also to provide for her husband's spiritual benefit and continuation of his line. (Para 8)

(b) Hindu Law — Widow — Accumulations and after-purchases — When accretion to property.

Under the Hindu law in the absence of proof that a widow intended to make her accumulations or after-purchases as an accretion to her husband's estate, it must be held that they are her absolute property and she has full power of disposal of such property. AIR 1950 Nag 62 and AIR 1943 Nag 253, Ref. (Para 15)

CASES REFERRED: Paras

(A) ('67-69) 12 Moo Ind App 397: 1 Beng LR 1 (PC) 4, 5
(B) ('76-77) 4 Ind App 1: 1 Mad 174 (PC) 4, 5
(C) (V22) AIR 1935 PC 190: 157 Ind Cas 881 (PC) 4, 6
(D) (V28) AIR 1941 Mad 937: ILR (1942) Mad 173 (FB) 4, 7
(E) (V20) AIR 1933 Mad 540 (2): 37 Mad LW 729 4
(F) (V21) AIR 1934 Mad 191: 57 Mad 411 4
(G) (V16) AIR 1929 Mad 577: 52 Mad 620 (FB) 4
(H) ('98) 22 Bom 558 (FB) 5, 7
(I) ('79-80) 7 Ind App 173: 2 Mad 270 (PC) 5
(J) ('68-69) 5 Bom HCR AC 181 5, 6
(K) ('75) 1875 Bom PJ 45 5
(L) ('81-82) 6 Bom 498 (FB) 5
(M) ('71) 8 Bom HCR AC 114 5
(N) ('85) 9 Bom 94 5
(O) ('76) 3 Ind App 154: 1 Mad 69 (PC) 5
(P) ('91) 15 Bom 565 5
(Q) ('98) 22 Bom 206 5
(R) ('98) 22 Bom 199 5
(S) (V4) AIR 1917 Nag 177: 1 Nag LJ 207 5, 7
(T) (V9) AIR 1922 PC 216: 17 Nag LR 145 (PC) 6
(U) (V16) AIR 1929 Nag 60: 25 Nag LR 28 12
(V) (V37) AIR 1950 Nag 62: ILR (1950) Nag 176 15
(W) (V30) AIR 1943 Nag 253: ILR (1943) Nag 779 15

P. R. Padhye and G. B. Shidhye, for Appellants; Y. R. Dongre, for Appellant No. 4; V. L. Oke, for Respondent No. 1.

JUDGMENT: This is a second appeal by defendants 2 to 7 who are transferees from defendant 1 Sm. Gangabai whose husband Sadasheo died on 30-1-1910 leaving behind property including the property in dispute in this suit. Gangabai, who succeeded him, lost all the property by various alienations during the period from 1915 to 1931. She then adopted the plaintiff on 15-2-1944 and he filed this suit on 24-2-1944 claiming possession of the several properties alienated by Gangabai.

(2) There are concurrent findings of fact of the two lower Courts that the plaintiff was adopted by Gangabai and that Sadasheo had not prohibited her from adopting a son to him after his death. These findings were not disputed before us.

(3) The defendants-appellants have, however, challenged the validity of the adoption on the ground that it was not effected with a genuine desire to benefit the soul of the deceased or to continue his line but was effected with the corrupt motive of defrauding the 'bona fide' transferees from Gangabai. The trial Court's finding on this point was in favour of the defendants. The Court of first appeal, however, reversed it and held that the adoption was valid as it was not proved that Gangabai had made it with any corrupt motive. It also held that, where the adoption was otherwise valid, it was irrelevant to enquire into the motive of the widow in making it and it could not be vitiated by any capricious or corrupt motive. The learned counsel for the appellants before us has challenged this view of law as also the finding of the first appellate Court. It would be more convenient to discuss the question of law first.

(4) In support of his argument that an adoption made by a widow capriciously and from a corrupt motive is not valid the learned counsel for the appellants relies on the following passage in the judgment of the Privy Council in the Ramnad case, — 'Collector of Madura v. M. R. Sathupathy', 12 Moo Ind App 397 at pp. 442, 443 (PC) (A):

> "It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive."

These observations which were made in 1868 were considered by the Privy Council eight years later in 1876 in — 'Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmini', 4 Ind App 1 at p. 14 (PC) (B) where it was observed:

> "Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow and that all which this committee in the former case intended to lay down was, that

there should be such proof of assent on the part of the 'sapindas' as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives, or in order to defeat the interest of this or that 'sapinda', but upon a fair consideration, by what may be called a family council, of the expediency of substituting as heir by adoption to the deceased husband."

In quoting from the judgment in the 12 Moo Ind App 397 (PC) (A) Sir James Colvile pointed out that the evidence which was required was evidence of the assent of the kinsmen and not evidence of the widow's motives. In 1935 in — 'Krishnayya Rao v. Surya Rao', AIR 1935 PC 190 at p. 195 Col 2 (C) the Privy Council expressly left open the question whether the motive of the adopting widow is relevant when the consent of the 'sapindas' had been obtained. Their Lordships observed:

"The last objection urged by the respondent is based on the motives of the first defendant. She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the 'sapindas' has been obtained, the motive of the adopting widow is relevant. They do not, however, consider it necessary to decide this question in the present case, as assuming it to be so, they think that there is no ground for imputing a corrupt motive to the lady."

Relying on these observations Leach C. J. held in — 'Kanakaratnam v. Narasimha Rao', AIR 1941 Mad 937 at p. 939 (FB) (D) that the Court could decide the question untrammelled by the observations in 12 Moo Ind App 397 (PC) (A) and observed—

"Bearing in mind that the adoption confers spiritual benefit on the deceased husband and that in the Madras Presidency a widow can only adopt when she has received authority to do so, it seems to us that her motive is entirely irrelevant. However spiteful her action is in no way affected, and the fact that she cannot act without authority makes the position all the more clear. The English law does not inquire into the motive for the exercise of a power when the power exists and we can see no justification for applying a different rule here. Consequently we hold that, when a widow has received valid authority to adopt, her motive in doing so can be ignored."

That Full Bench overruled the decisions in — 'Kandaswamy Goundar v. Chinnammal', AIR 1933 Mad 540 (2) (E) and — 'Murahari Brahma Sastri v. Sumitramma', AIR 1934 Mad 191 (F) and did not give effect to the following observation of the earlier Full Bench in — 'Annapurnamma v. Appayya Sastri', AIR 1929 Mad 577 (G):

"If the circumstances showed that the adoption was made by the widow in the proper and bona fide' performance of a religious duty and the real motive which actuated her was the conferment of spiritual benefit on her husband."

The later Full Bench ('Kanakaratnam v. Narasimha Rao (D)', (supra) held that the adoption of respondent 1 should be regarded as valid as the adoptive mother had received authority from the nearest 'sapinda' notwithstanding that her object was to defeat the appellant who was the junior co-widow.

(5) The question was fully debated by a Bench of two Judges of the Bombay High Court in — 'Ramchandra Bhagavan v. Mulji Nanabhai', 22 Bom 558 (FB) (H). The Court held, one Judge dissenting, that as in the Bombay Presidency a widow had the power to adopt without any extent or permission as a religious benefit was caused to the deceased husband by the adoption any discussion of her motives in making the adoption was irrelevant. Therein Parsons J. observed at p. 566—

"Whenever the widow has this power to adopt, any enquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. Where, however, she has not this full power, but is obliged to obtain the consent of other persons to her action, the case seems to me to be very different. Even in such a case, however, I conceive, motives would be quite irrelevant if the consent of all the persons whose consent was requisite had been obtained. The point only arises where the consent of some has been obtained, and the question is whether that consent is binding on the others. In such a case the Privy Council say: 'There should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and 'bona fide' performance of a religious duty and neither capriciously nor from a corrupt motive', and again 'there should be such proof of assent on the part of the 'sapindas' as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this and that 'sapinda', but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband'. 4 Ind App 1 (PC) (B). These rulings can only apply to the case of an adoption by a widow who is obliged to obtain the assent of her husband's kinsmen but who has obtained the assent of some one or more and not of all of them. In such a case the motives of the assenting kinsman or kinsmen would be relevant and, if fraudulent, would invalidate the adoption. See — 'Karunabdhi Ganesa v. Gopala Ratnamaiyar', 7 Ind App 173 (PC) (I). They cannot be applicable to the case where no consent of kinsmen is required, and where no family council need be called or consulted. I think, therefore, that the learned Judges of this Court wrongly applied the language of the Privy Council in the Ramnad case to the case of a widow who had in herself full and free power to adopt. I think in the latter case her motives in adopting are wholly irrelevant, as irrelevant, in fact, as they would be if the Courts were enquiring into a will disposing of her property made by her under a right vested in her."

In the same case Ranade J. observed at pp. 568-569:

"This freedom of choice, moreover follows as a necessary consequence from the fact, that in Western India, the necessity of express authority from the husband, or of the assent of kin-

dred, is not recognized as essential. The principal case 12 Moo Ind App 397 (PC) (A) in which their Lordships of the Privy Council laid down that the widow's choice must not be influenced by capricious or corrupt motives, came from the province of Madras, where the restrictions on the widow's choice are more strictly enforced. The remarks of their Lordships in 'the Ramnad case (A)' no doubt suggested the observations to the same effect first made in — 'Rakhmabai v. Radhabai', 5 Bom HCR AC 181 (J) and subsequently alluded to in — 'Bhagubai v. Kalo Venkaji', 1875 Bom PJ 45 (K); — 'Ramji v. Ghamau', 6 Bom 498 (FB) (L); — 'Rupchand Hindumal v. Rakhmabai', 8 Bom HCR AC 114 (M); — 'Keshav v. Govind', 9 Bom 94 (N). Following, however, the observations made by their Lordships in more recent judgments — 'Sri Raghunadha v. Sri Brozo Kishoro', 3 Ind App 154 (PC) (O) and 4 Ind App 1 (PC) (B) in which they have stated that their remarks in the Ramnad case were not intended to justify an enquiry into the widow's motives to see if she was moved by caprice in making her choice, this Court has in — 'Patel Vandravan v. Patel Manilal', 15 Bom 565 (P) ruled that when the motives were mixed, the presumption was very strong in favour of the widow having acted from a sense of religious duty, and this view has been further given effect to in — 'Bhimawa v. Sangawa', 22 Bom 206 (Q) and — 'Mahableshwar Fondba v. Durgabai', 22 Bom 199 (R) where improper motives were sought to be established by proof of alleged ill-will or personal advantage. These decisions virtually leave but little scope for an investigation into the motives which may possibly influence the widow to effect an adoption.

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x x x x

On the whole, therefore, both on grounds of analogy and principle, it seems to me that, in Western India, in the case of a widow of a separated Hindu, adopting a son to continue the line of her husband, any discussion of the adopting widow's motives is irrelevant, and that, if the act can be referred to proper religious motives, the Courts sought to presume that she was influenced by these motives and not by caprice."

This is the view taken by a Division Bench in — 'Tukaram Parasram v. Namdeo', AIR 1917 Nag 177 at pp. 180, 181 (S) also.

(6) The learned counsel for the respondent, however, relies on the following statement in the headnote in — 'Yadao v. Namdeo', 17 Nag LR 145 (PC) (T):

"In the Mahratta Country of the Presidency of Bombay a Hindu widow, who is sole or joint heir to her husband's estate, may adopt a son to her deceased husband without authority from her husband and without the consent of his kindred, if the act is done by her in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive nor in ignorance of her rights. But she cannot adopt where her husband has expressly forbidden an adoption."

It is based on an extract quoted by their Lordships from 5 Bom HCR AC 181 at p. 191 (J) to the following effect:

"Upon the review which we have made of the authorities applicable in this part of India we are of opinion that, in the Maratha country wherein the property in question in this suit is situate, a Hindu widow may without the permission of her husband and without the consent of his kindred adopt a son to him if the act is done by her in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive."

Their Lordships of the Privy Council referred to this extract while discussing the question whether the adoption without authority having been given by the husband was valid. They were not discussing the question of motives of the widow in making the adoption, and that question did not arise at all in AIR 1922 PC 216 (T) or in 5 Bom HCR AC 181 (J) and so there could be no decision and there is no decision thereon in those two cases; and as has already been pointed out the Privy Council expressly left that question open in — 'Krishnayya Rao v. Surya Rao (C)' (referred to supra).

(7) In view of the decision in AIR 1917 Nag 177 (S) and for the reasons given in 'Ramchandra Bhagavan v. Mulji Nanabhai (H)', (supra) and in 'Kanakaratnam v. Narasimha Rao (D)' (supra), which have been discussed above, we hold that where adoption made by a widow who can adopt without the permission of her husband and without the consent of his kindred is otherwise valid, her motive in making it is entirely irrelevant.

(8) In view of the above finding it is not really necessary to determine if the adoption was made with a corrupt or improper motive. We, however, proceed to discuss it in order to leave no point that was argued before us undecided. It is not disputed by the learned counsel for the appellants that the burden of proving that the adoption was made with a corrupt or improper motive was on his clients but he contends that the learned Additional District Judge, who decided the first appeal, drew a wrong inference from the facts as to the motive of Gangabai in making the adoption. Those facts are: Sadasheo died in January, 1910. His widow Gangabai alienated all the property left by him by 1931 and went to live with her brother. 13 years later she adopted the plaintiff-respondent on 15-2-1944. The stamp for the plaint was purchased only four days after the adoption i.e. on 19-2-1944, and the suit was filed five days later on 24-2-1944. From these facts the learned Additional District Judge drew the inference that the natural father of the plaintiff Shankar gave the plaintiff in adoption in order to have the alienations made by defendant 1 Gangabai set aside and to get all that property for his son, but refused to draw an inference of improper motive on the part of defendant 1 Gangabai in making the adoption because there was nothing on record to show that there was any agreement between her and the natural father or grandfather of the plaintiff regarding the property, or to show that she was in any way going to be benefited by the adoption or to show what induced her to make the adoption except what has been recited in the adoption deed exhibit P-1.

The objects specified in exhibit P-1 are to provide for her husband's spiritual benefit and to con-

tinue his line and that is also the inference that, according to the learned Additional District Judge, can be properly drawn from the fact of adoption. That may be so, and it may also not be possible to draw an inference of improper motive on the part of Gangabai from the mere fact that the adoption was made about 34 years after the death of her husband. It may also be that many a sinner turns to religion and piety in old age. But we have to take all the other relevant facts also into consideration together with these facts in arriving at a conclusion regarding motive. In this case not only was the adoption made 34 years after the death of her husband but it was made 13 years after the property was alienated by her and when she had nothing to live upon except the charity of her brother. The question certainly is whether she wants the plaintiff to be similarly dependent upon her brother. It cannot be denied that she must have given some thought to the question of maintenance of the plaintiff and that she had done so would be clear from the following statement in the adoption deed, exhibit P-1 :

"Under this document all the rights of a legitimate son of my deceased husband Sadasheo have vested in you all the rights in respect of the property in his name have also accrued to you."

This statement shows that she wanted the minor plaintiff Shriram to get back the property of her husband which she had alienated. It is wrong to say that she was not benefited by the adoption because if the plaintiff gets the property or any part of it she would be entitled to maintenance. It is, therefore, clear that at least one of the motives of Gangabai in making the adoption was that the adoptee should get back the property from her transferees. Had that been, however, her only motive she would have made the adoption soon after 1931. Taking all the circumstances into consideration we are of the opinion that Gangabai's motive in making the adoption was not solely to deprive the transferees of the property but also to provide for her husband's spiritual benefit and continuation of his line.

(9) We now proceed to consider the various alienations. The learned counsel for the appellants could not bring to our notice any ground on which the finding of fact in respect of the alienations made in favour of defendants 2 and 3 could be interfered with, nor could he say how the gifts in favour of defendant 4 made by the widow (defendant 1) were valid. The appeals of defendants 2, 3 and 4 are, therefore, without any merit and must fail.

(10) By the sale deed dated 19-3-1917 (exhibit 7-D-2), executed by Gangabai and her mother-in-law in favour of Nathu Narayan and Yeshwant Sonaji for an alleged consideration of Rs. 2,000/-, one-third joint share in survey No. 31 of mouza Manjri was alienated. The lower appellate Court found that one-half of survey No. 34/2 was purchased on the same day by Gangabai by exhibit 7-D-3 from Malhar Sonaji for a consideration of Rs. 800/- paid out of the sale proceeds of one-third share in survey No. 31. It was alleged by defendants 6 and 7 who have since acquired the joint share in survey No. 31 that the remaining amount was spent by the widow in the construction of a 'dharamashala' at Manjri. Evidence was given that part of this amount was spent for pilgrimage and part for the 'dharamashala'. The lower appellate Court found that it was not proved that the alleged pilgrimage was undertaken for the spiritual benefit of the soul of Sadasheo and that there was no satisfactory evidence that Gangabai built any 'dharamashala' or that it was for the spiritual benefit of her deceased husband. The lower appellate Court further found that there was no convincing evidence that field No. 31 was unproductive and a burden on the estate. The alienation evidenced by exhibit 7-D-2 was therefore set aside.

(11) The only ground on which these findings are attacked is that the lower appellate Court has not understood the meaning of the word "dharamashala" which is used in that area in the special sense of "well and a tank". This appears to have been urged here for the first time. There is nothing to show that the attention of the Courts below was drawn to this special meaning. It is not even pleaded. There is no evidence to prove that the word "dharamshala" has the special meaning in that area. The evidence on record about collection of 25,000 bricks for the purpose of the alleged construction goes against this contention. The evidence is that repairs were made to the 'dharamashala'. Under these circumstances, there is no ground for interference with the finding of fact of the lower appellate Court. The alienation of the one-third share of survey No. 31 does not bind the plaintiff.

(12) The learned counsel for these defendants however contends that the plaintiff is not entitled to possession of this survey No. 31 except on condition of payment of Rs. 800/- utilized by the widow for the purchase of survey No. 34/2. In similar circumstances such a decree was passed in — 'Kamtaprasad v. Madhorao', AIR 1929 Nag 60 (U). There a son brought a suit to set aside the alienation made by his father. It was found that out of the purchase money Rs. 450/- was used for the acquisition of tenancy rights in certain lands. It was held that there was no legal necessity to acquire the lands, but the plaintiff was ordered to make reimbursement before recovering the property sold on the principles of equity.

(13) Survey No. 34/2 is not in the possession of the plaintiff. By the sale deed exhibit 5-D-2 dated 6-7-1922 Gangabai sold this field to Irbhan Pandu, who was a co-occupant of the remaining pot-hissa, for a consideration of Rs. 1,200/-, and took a mortgage from him for the amount. This mortgage was subsequently paid off by Irbhan. Defendant 5 obtained possession of the field in 1934 under a final decree for foreclosure obtained on a mortgage executed by Irbhan in his favour. The lower appellate Court found that there was no legal necessity for the alienation (exhibit 5-D-2) of half share in survey No. 34/2, which was an accretion to the estate of Sadasheo, it having been purchased with the consideration of the sale (exhibit 7-D-2) of survey No. 31. The alienation was, therefore, set aside.

(14) If the decree against defendant 5 stands, the plaintiff cannot get back survey No. 31 unconditionally but can do so only on condition that he refunds Rs. 800/-.

(15) Defendant 5, however, contends that the alienation of survey No. 34/2 must stand on the allegations in the plaint. In paragraph 5 of the

plaint it was alleged that survey No. 34/2 was purchased by Gangabai out of the surplus income from the ancestral estate left by Sadasheo. In answer to this allegation defendant 5 stated that Gangabai purchased survey No. 34/2 by her own funds and it was also treated by her as her 'stridhan' property. Issue No. 13 which runs as follows does not arise on these pleadings:

"13. Did Gangabai purchase F. S. No. 34/2 from Malhar for Rs. 800/- out of the consideration of Rs. 2000/- given by defendants 6 and 7 for better cultivation or did she purchase it out of the income of the property?"

This issue arose on the contest raised by defendants 6 and 7. There is no evidence that the lady had any funds apart from those of the estate. There is also no evidence that she treated survey No. 34/2 as her separate property. Under the Hindu law however in the absence of proof that a widow intended to make her accumulations or after-purchases as an accretion to her husband's estate, it must be held that they are her absolute property and she has full power of disposal of such property: — 'Lalsingh v. Vithalsingh', AIR 1950 Nag 62 (V) and — 'Prabhakar Vithoba v. Sarubai', AIR 1943 Nag 253 (W). In view of the pleadings that the property was acquired from the surplus income, or from her separate funds as the defendant alleges, it becomes the separate property of the widow. The defendant No. 5's case is not proved and on the plaintiff's case in the plaint the plaintiff is not entitled to a decree. The issue cannot be taken to have been raised between the plaintiff and defendant No. 5. The former's suit should therefore have been dismissed as against the latter without proceeding to trial.

(16) We cannot accept the contention of the learned counsel for the plaintiff that the finding on issue No. 13 binds defendant 5. He was not called upon to rebut the evidence of defendants 6 and 7. If the plaintiff wanted to rely on the facts alleged by defendants 6 and 7 even in the alternative, he should have amended the plaint and afforded an opportunity to defendant 5 to meet that case. Under these circumstances, we have no alternative but to dismiss the plaintiff's suit against defendant 5. Defendant 5's appeal is, therefore, allowed.

(17) No doubt, the plaintiff is not now in possession of half share in survey No. 34/2 but he has lost it by his own default. On the facts found it was an accretion to the estate. Therefore, plaintiff cannot get possession of one-third share of survey No. 31 without payment of Rs. 800/- spent for purchase of half share of survey No. 34/2. We therefore modify the decree against defendants 6 and 7 by directing that the plaintiff is entitled to possession to one-third share of survey No. 31 on payment of Rs. 800/- within three months of the date of this decree. In default, his suit shall stand dismissed with costs against defendants 6 and 7.

(18) Subject to these modifications the appeal fails. Since the appellants have incurred a common set of costs, we order that the parties will bear the costs of this appeal as incurred. Defendant 5 will get his costs in the Courts below from the plaintiff. As regards the others, the order of the lower Appellate Court regarding costs shall stand. A decree be drawn up accordingly.

D.R.R. Order accordingly.

A.I.R. 1954 NAGPUR 357 (Vol. 41, C.N. 122)

MANGALMURTI AND DEO JJ. (22-2-1954)

Deorao Amrita and others, Appellants v. Raibhan Sambhaji and others, Respondents.

First Appeal No. 115 of 1946, from decree of Addl. Civil Judge, Ist class, Yeotmal, D/- 18-9-46.

(a) Evidence Act (1872), S. 63 (5) — Oral account of contents of document.

Contents of original will proved by attesting witnesses — Original destroyed with record in previous suit — It is good secondary evidence. (Para 9)

Anno: Evi. Act, S. 63 N. 7.

(b) Succession Act (1925), S. 2 (h) — Will.

Document addressed to debtors of executant requesting them to repay the debts to his daughter S — Repayments if made during life-time of testator to S would have discharged their liabilities to him — Document held not a will but merely purported to authorise the daughter to recover the debts. (Para 10)

Anno: Succession Act S. 2 N. 7.

(c) Contract Act (1872), Ss. 196 and 197 — Ratification by quondam minor — (Hindu Law — Alienation — Father — Mortgage by father — Ratification by minor sons after attaining majority).

Where a case is founded on the ratification, affirmation, or election by a person coming of age, of the act of his guardian during his minority, it must be proved that there was a communication of the ratification, affirmation or election to the person concerned before the act becomes irrevocable. AIR 1938 Nag 476, Rel. on. (Para 15)

A executed a mortgage in B's favour in respect of certain joint family property. At the date of mortgage A had three minor sons. When two of the sons became major they along with their father A as guardian of the third minor son executed a sale deed in respect of a part of the mortgaged property in C's favour with an agreement that C should pay the consideration money directly to the representative of the deceased mortgagee in discharge of B's outstanding mortgage. It was also stated in the sale deed that the balance of the amount payable under the mortgage will be paid by the vendors. According to this agreement the mortgage money was actually paid to the representative of the mortgagee and the mortgage was discharged:

Held that in view of the clear recitals in the sale deed the sons of the mortgagor A must be taken to have elected not to avoid the mortgage and, therefore, they could not dispute the binding character of the mortgage. (Para 15)

Anno: Contract Act S. 196, N. 4; S. 197 N. 1.

(d) Hindu Law — Adoption — Unchaste widow of Shudra — Adoption by — Validity — 5 Beng LR. 362, dissented from.

An unchaste shudra widow can make a valid adoption of a son to her deceased hus-

band even while she is pregnant at the time of adoption as a result of such unchastity. 5 Beng. L. R. 362 dissented from; 19 Suth W. R. 367 Dist. AIR 1946 Mad 308, Rel. on. (Para 19)

(e) **Hindu Law — Adoption — Shudras — Essential ceremonies.**

No religious ceremonies are necessary for an adoption in the case of Shudras. The giving and the taking which are essential for the completion of an adoption are secular acts and can be performed even by Shudras. As they have no gotras, the adoption among the Shudras need not be performed in the presence of 'agni' (god of fire) and, therefore, no 'datta homa' is necessary. AIR 1945 Nag 60 and AIR 1946 Bom 439, Rel. on. (Paras 19, 20)

CASES REFERRED: Paras

(A) (V25) AIR 1938 Nag 476: ILR (1940) Nag 20 15

(B) (V32) AIR 1945 Nag 60: ILR (1944) Nag 796 16, 19

(C) (V8) AIR 1921 Bom 301 (1): 45 Bom 459 16, 19

(D) (V29) AIR 1942 Bom 12: 198 Ind Cas 488 16

(E) (V33) AIR 1946 Bom 123: ILR (1946) Bom 1 16, 17, 19

(F) (V33) AIR 1946 Mad 308: ILR (1946) Mad 755 16, 21

(G) ('70) 5 Beng LR 362: Bourke 189 18, 19, 20

(H) ('73) 19 Suth WR 367: 13 Beng LR 1 (FB) 18

(I) ('80) 5 Cal 776: 7 Ind App 115 (PC) 18

(J) (V33) AIR 1946 Bom 439: 228 Ind Cas 90 20

(K) (V2) AIR 1915 PC 7: 39 Bom 441 (PC) 20

M. Adhikari, for Appellants; N. B. Chandurkar (for No. 1) and S. N. Kherdekar, (for Nos. 2 to 5) for Respondents.

JUDGMENT: This appeal by defendants 5, 6 and 8 is against the preliminary decree for foreclosure on the basis of the mortgage (exhibit 5-8 D. 2), dated 15-5-1926, executed by defendant 1 Rodbaji in favour of the plaintiff's father Sambhaji. Defendants 2 to 4, who were minors on the date of the mortgage, are the sons of the mortgagor. By the sale deed Exhibit 5-8 D. 1, dated 18-5-1934, defendant 5 Deorao & his brother Suryabhan purchased from defendants 1 to 4 part of the mortgaged property for Rs. 2,200/- with an agreement to pay the consideration towards the satisfaction of the mortgage Exhibit 5-8 D. 2. Defendant 1 executed the sale deed as guardian of his minor son defendant 3. Defendants 6 to 8 are the sons of the deceased Suryabhan. Defendant 7 died during the pendency of the suit and defendants 5, 6 and 8 are entitled to his interest by survivorship.

(2) Plaintiff claims to be adopted by Smt. Sonabai, widow of Sambhaji, on 10-5-1932. The defendants disputed the factum and also the legality of the adoption on the ground that Sonabai was leading an incontinent life and was pregnant at the time of adoption.

(3) According to the defendants, defendant 9 Tanabai, who is the married daughter of Sambhaji, was entitled to the mortgage debt under the alleged will Exhibit 1-4 D-1, dated 24-4-1929. Sambhaji died some time later.

(4) Plaintiff pleaded that the mortgage was for legal necessity and that it was not necessary to prove legal necessity as defendants 2 and 4 had ratified the mortgage by acknowledging the liability under the mortgage in the sale deed Exhibit 5-8 D-1 and directing the purchasers to pay the consideration towards the satisfaction of the mortgage.

(5) The lower Court held that the plaintiff was the validly adopted son of Sambhaji, that the mortgage was for legal necessity to the extent of Rs. 554/- only, that the document Exhibit 1-4 D-1 was not a will and did not confer on Tanabai any right to the mortgage debt, and that the payment of Rs. 2,200/- to her did not exonerate the property in the hands of defendants 5 to 8 from the liability for the mortgage claim. Accordingly the claim was decreed in full against defendants 1 to 8. The defendant 3 was given the option to redeem his 1/4th share in the mortgaged property on payment of 1/4th of the debt binding on the family, i.e. on payment of Rs. 277/- and proportionate costs.

(6) Plaintiff and defendants 1 to 4 have not appealed against this decree.

(7) Th following points for decision arise in this appeal:

(i) Whether the document Exhibit 1-4 D-1, dated 24-4-1929, is a will and entitled Mst. Tanabai to the mortgage debt in suit.

(ii) Does the payment of Rs. 2,200/- to her exonerate the defendants or any of them from liability to the plaintiff?

(iii) Whether the defendants 2 and 4 ratified the mortgage, and whether in consequence their liability is co-extensive with that of defendant 1.

(iv) Whether the plaintiff's adoption is invalid because Smt. Sonabai was pregnant at the time of adoption.

(8) Exhibit 1-4 D-1, which is said to be a will, runs thus:

"Ra. Ta. Mata alias Jagannath Motilal Kalal; Dhanoba Kamuji Bhojla.
125 Principal.
1150 Ganpat Kondaji Bhojurkar son of (v.o.) Principal.
Rodba Bapuji Gorle Bhojle.
60 Manji. Principal.
60 Marya Mang. Principal.
These amounts should be paid to Tanabai. Dated 24-4-1929 A. D."

It is executed by Sambhaji and attested by two witnesses. The original was produced by Tanabai in Civil Suit No. 374 of 1930 against one Nathu and was proved in that suit on 9-7-1931. A certified copy was produced by her in Civil Suit No. 187-A of 1935 and the original was proved on 21-7-1936. The original was not taken back and has been eliminated with the record. Exhibit 1-4 D-1 is a certified copy of the certified copy produced in Civil Suit No. 187-A of 1935. That copy was proved by 1-9 D. W. 1 Tanabai. According to her, the whole of the original document was written by Samabhaji and executed by him. It was attested by 1-9 D. W. 3 and D. W. 4, Tukaram

and Vithoba. These witnesses have proved the execution, attestation and contents of the original.

(9) The learned counsel for respondent 1 submits that Exhibit 1-4 D-1 being a certified copy of a certified copy, cannot be secondary evidence of the original. The certified copy produced in Civil Suit No. 187-A of 1935 was undoubtedly a good secondary evidence. It was certified as a true copy of the original. That document was before the lower Court when the suit was decided. It does not appear to be the practice of the subordinate Courts to return the certified copies proved in a case. Any way, that document was not withdrawn and therefore for facility of reference Exhibit 1-4 D-1 was exhibited. As we have already pointed out, the contents are proved by the witnesses. That, at any rate, is a good secondary evidence (S. 63 (5), Evidence Act). This contention fails.

(10) The next contention is whether this document is a will of Sambhaji. As defined in the Indian Succession Act, a will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. The document appears to be addressed to one Mana, or may be taken as addressed to all the debtors stated therein, as submitted by the learned counsel for the appellants, requesting them to repay the debts to defendant 9. Repayments made to her on the strength of this letter during the life-time of Sambhaji would have effectively discharged their liabilities to him. The document therefore does not express the intention of the testator with respect to his property to be carried into effect after his death but during his life-time.

(11) The learned counsel for the appellants submits that oral evidence of the intention of the testator that the document was to take effect after his death is admissible. The learned counsel for the plaintiff submits that a will is required by law to be executed by the testator and attested by at least two witnesses. (S. 63, Succession Act). It must therefore be in writing, and consequently the intention of the testator must appear from the document propounded as a will and that oral evidence of the intention is not admissible. The learned counsel also sumbits that the lower Court should have held that this document was executed by Sambhaji while he was not in a sound disposing state of mind and that it could not take effect as regards the immovable property unless it was registererd.

(12) There is really no substance in the contention that the document was executed by Sambhaji while he was not in a sound disposing state of mind. That document was wholly written by him and the evidence of the two attesting witnesses is very clear that he was in a sound disposing state of mind. We therefore affirm the finding of the lower Court on this point.

(13) In the view of the evidence we are taking, it is not necessary to examine whether oral evidence is admissible to prove the intention and whether the document cannot take effect so far as the mortgage claim in suit is concerned unless it is registered. The appellants examined Tanabai and the two attesting witnesses to prove the intention. This evidence was not believed by the learned Judge of the lower Court who had seen these persons give evidence. It was observed that the evidence was tendered to fill up a lacuna. If Sambhaji had expressed an intention that this daughter would be absolutely entitled to the debts after his death, it was very easy for him to say so. The learned counsel, however, submits that the lower Court has failed to take into account the fact that Sambhaji's only son had died on 21-4-1929 and all his affection was therefore centred on his daughter. If Sambhaji had really wanted to give away all his debts to his daughter, because he had no son, he could have expressed his intention to make the gift by appropriate words. There are no words in the document to show that Tanabai had become absolute owner. The document only purports to authorize her to recover the debts.

(14) Since Tanabai did not get any right to receive the debt after the death of Sambhaji, the payments made by the appellants and the mortgagor to her do not exonerate them or any of them from the liability for the mortgage debt.

(15) The next question for consideration is whether the defendants 2 and 4 made their election not to avoid the mortgage and whether consequently they or their transferees (the appellants) cannot challenge the binding nature of the mortgage. Where a case is founded on the ratification, affirmation or election by a person coming of age, of the act of his guardian during his minority, it must be proved that there was a communication of the ratification, affirmation or election to the person concerned before the act becomes irrevocable. — 'Ganpatrao v. Ishwarsingh', AIR 1938 Nag 476 (A). Reliance was placed by the plaintiff in this connection on the sale deed Exhibit 5-8 D-1 in which it is stated that the vendors had executed the mortgage and that 'havala' was taken by the purchasers to pay the consideration of the sale directly to the representative of the deceased mortgagee. Smt. Tanabai is mentioned as that representative. It is also stated that the balance of the amount payable under the mortgage will be paid by the vendors. In view of these clear recitals, it cannot be disputed that defendants 2 and 4 elected not to dispute the mortgage but to pay it off. This decision was brought to the notice of the other side, i.e., Tanabai, by making payments to her and getting a discharge. The fact that it was not brought to the knowledge of the present plaintiff is inconsequential. At the date of sale the mortgagors did not regard him as a person entitled to the mortgage debt and in their view the real representative was Smt. Tanabai. We therefore affirm the finding of the lower Court that these defendants 2 and 4 and their representative cannot dispute the binding character of the mortgage.

(16) The next question for consideration is whether the plaintiff's adoption is invalid. The learned counsel for the appellants does not dispute the finding as to the factum of adoption, nor does he press the contention that by execution of wills in 1928 and 1929 Sambhaji had impliedly prohibited the adoption. That Smt. Sonabai was pregnant at the time of adoption and that Deorao was responsible for the conception

and it was illegitimate is not disputed by the plaintiff and it is also admitted by the parties that Sambhaji and Sonabai were Shudras. The lower Court accepted the contention of the plaintiff that the adoption was not invalid by reason of the unchastity of Sonabai at the time of adoption as no religious ceremonies were necessary, they being Shudras: — 'Maroti v. Radhabai', AIR 1945 Nag 60 (B). Reliance was also placed on — 'Baswant Mushappa v. Mallappa Kallapya', AIR 1921 Bom 301 (1) (C), — 'Ramu Bala v. Jana Dala', AIR 1942 Bom 12 (D), — 'Partab Bawaji v. Bai Suraj', AIR 1946 Bom 123 (E), and 'S. Annapurnamma v. Manikyamma', AIR 1946 Mad 308 (F), according to which an unchaste widow of a Shudra can validly adopt.

(17) The learned counsel for the appellants does not challenge the well settled proposition that no religious ceremonies are necessary for an adoption in the case of Shudras and admits that on that basis the cases relied upon by the lower Court which lay down that an unchaste widow of a Shudra can validly adopt cannot be challenged. His contention, however, is that the learned Judges who decided those cases lost sight of the fact that unchastity, and specially the pregnancy resulting therefrom, caused an incapacity in the widow to adopt. He admits that there is no text which directly supports his contention but contends that as unchastity at the time of her husband"s death causes incapacity in her to inherit to him, similar incapacity should attach to her in every right or power which she gets on his death. There is no basis for this proposition and the case of inheritance is different from that of adoption. In the former she gets the property and is herself benefited by the event while she makes the adoption for continuing the family line and for the spiritual benefit of her deceased husband. Why should the husband be deprived of the benefit for the widow's unchastity? That he cannot be deprived of the benefit has been held in — 'Partab Bawaji v. Bai Suraj', (E) (cit. sup.).

(18) The learned counsel for the appellants relies upon two cases in support of his contention, namely, — 'Sayamalal Dutt v. Saudamini Dasi', 5 Beng LR 362 (G), and 'Kery Kolitanee v. Monee Ram Kolita', 19 Suth WR 367 (H). The latter is not a case of adoption at all. It only lays down that a widow who has once inherited the estate of her decased husband is not liable to forfeit that estate by reason of unchastity. The learned counsel relies on some texts cited in the minority judgment of Mitter J. As those texts were not interpreted by the majority of the Judges in the way Mitter J. did and because they only deal with the question of inheritance and not of adoption, we do not think any useful purpose will be served by discussing them here. We may only add that the majority view was upheld by their Lordships of the Privy Council in appeal in — 'Moniram Kolita v. Keri Kolitani', 5 Cal 776 (PC) (I).

(19) 'Sayamlal Dutt v. Saudamini Dasi (G) (cit. sup.)' no doubt lays down that a Hindu widow who has become unchaste, is living in concubinage and is in a state of pregnancy resulting from such concubinage is incompetent to receive a son in adoption but the decision is based on a view which is not accepted as the correct view. Therein Norman J. observed:

"In order to constitute a valid adoption even among Shudras, the mere giving and receiving of a child are not sufficient....."

(Page 366).

"The question then is, can a widow living in concubinage offer up the prayer and take part in the sacrifice necessary to be performed by a person adopting a child..... The degraded person is thus disqualified from performing religious offices....."

(Page 367)

"On the whole, I am of opinion that Thakomani, as an unchaste widow, living in concubinage, and being in a state of pregnancy resulting from such concubinage, was incompetent to receive a son in adoption....."

(Page 370).

This argument has been held not to apply where the parties are Shudras: — 'AIR 1921 Bom 301 (1) (C)'. Sayamlal Dutt's case was dissented from in — 'AIR 1946 Bom 123 (E)'. As we have already said, it is now well settled that no religious ceremonies are necessary for an adoption in the case of Shudras: — 'AIR 1945 Nag 60 (B)'.

(20) As has been stated in — 'Govind Dhondo v. Godubai Dhondo', AIR 1946 Bom 439 (J) the giving (दान) and the taking (प्रतिग्रह) which are essential for the completion of an adoption are held to be secular acts and can be performed even by Shudras. As they have no 'gotras', the adoption among the Shudras need not be performed in the presence of 'agni' (god of fire) and therefore no 'datta homa' is necessary. Similarly, even among the three regenerate classes, when the adoptor and the boy to be adopted are of the same 'gotra', the adoption does not involve a change of 'gotra' and the presence of 'agni' is not required: — 'Bal Gangadhar Tilak v. Shrinivas Pandit', AIR 1515 PC 7 (K). It is only when an adoption results in a change of 'gotra' that such change must be made in the presence of 'agni'. In that case (i.e., — 'Govind Dhondo's case (J)') the adoptive mother had given birth to two illegitimate children after her husband's death and so had become a 'patita' (degraded) and as she had not taken 'prayaschita' (expiation) thereafter, she remained a 'patita' till the date of adoption. Yet the adoption was held to be valid. Thus it is not merely an unchaste woman who has taken 'prayaschita' who can adopt but even an unchaste woman who has not taken 'prayaschita' can do so. We, therefore, respectfully differ from the view of law taken in — 'Sayamalal Dutt's case (G)'.

(21) In — 'AIR 1946 Mad 308 (F)' also it is held that a Shudra widow can make a valid adoption of a son to her deceased husband even while she is leading an unchaste life. We respectfully accept this view and hold that the adoption of the plaintiff is valid.

(22) The result is that the appeal fails and is dismissed with costs.

K.S.B. Appeal dismissed.

A.I.R. 1954 NAGPUR 361 (Vol. 41, C.N. 123)

HIDAYATULLAH AND R. KAUSHALENDRA RAO JJ. (28-7-1953)

Dr. Shridhar Damodhar Koshti and others, Appellants v. Martand Yeshwantrao Koshti and others, Respondents.

First Appeal No. 31 of 1945, from decree of Addl. Dist. J., Bhandara, D/- 23-10-1944.

Hindu law — Joint family — Agreement that cost of higher education of member would be saddled on share of the member at time of partition is valid — Agreement is binding on minor when his father was party to it — (Contract Act (1872), S. 23).

The account that is taken at a partition of a Hindu undivided family is not therefore an account into the past transactions but merely on account of the assets existing at the date of the partition. At the time of the partition the parties have no right to look back and claim relief against past inequality of enjoyment of the members. (Para 18)

But it is permissible to the members of an undivided family to regard certain assets of the family or a portion of its income as separate and exclusive while preserving the joint status, and there is no objection in principle to an agreement which provided that a certain item of expenditure was to be treated as individual and not joint, to be debitable at the time of partition to the individual concerned. An agreement that the expediture on secondary and higher education of a member would at the time of a partition be saddled on the share of the member concerned is therefore valid. Case law ref. (Paras 20, 16)

The agreement is not repugnant to the principles of Hindu law. The principle of making an individual coparcener solely liable to what has been incurred specially for his own purpose as distinguished from a family purpose cannot be said to be wholly alien to the ancient Hindu jurisprudence. (Para 22)

The fact that the father of the member concerned was a party to the agreement would be sufficient to bind his son notwithstanding that he was a minor at that time unless it could be shown that the agreement was improper or unfair. (Para 24)

The agreement held neither in its intention nor its result in any way improper or injurious to the interest of the minor. (Para 24)

The agreement was also not opposed to public policy. There is nothing in the agreement which can be said to have a tendency to harm the public. (1853) 10 ER 359, (1824) 130 ER 294, Rel. on. (Para 25)

Anno: Contract Act, S. 23 N. 12.

CASES REFERRED: Paras

(A) (V5) AIR 1918 Mad 258: 44 Ind Cas 428 17
(B) ('70) 5 Beng LR 347: 13 WR 75 (FB) 18
(C) (V3) AIR 1916 Cal 500 (2): 43 Cal 459 18
(D) ('09) 36 Ind App 71: 31 All 412 (PC) 20, 23
(E) (V12) AIR 1925 PC 49: 52 Ind App 83 (PC) 20
(F) (V3) AIR 1916 PC 104: 12 Nag LR 113 (PC) 20, 23
(G) (V32) AIR 1945 Nag 138: ILR (1945) Nag 444 20
(H) ('36) 40 Cal WN 385 (PC) 20
(I) ('46-51) 4 Moo Ind App 137: 7 WR 35 (PC) 20
(J) ('02) 25 Mad 149: 11 Mad LJ 353 20
(K) ('66-67) 11 Moo Ind App 75: 8 WR PC 1 (PC) 20
(L) (V33) AIR 1946 Nag 84: ILR (1945) Nag 892 20
(M) (V33) AIR 1946 Mad 118: ILR (1946) Mad 557 20
(N) (V26) AIR 1939 Mad 911: ILR (1940) Mad 322 20
(O) ('99) 26 Ind App 167: 22 Mad 470 (PC) 21
(P) ('69) 3 Beng LR OC 1: 13 WR 76 (Note) (FB) 21
(Q) ('03) 30 Cal 738: 30 Ind App 139 (PC) 23
(R) (V7) AIR 1920 Oudh 212: 59 Ind Cas 564 23
(S) (V20) AIR 1933 All 138 (2): 144 Ind Cas 33 23
(T) (V23) AIR 1936 Mad 689: 164 Ind Cas 997 23
(U) (V29) AIR 1942 All 254: 203 Ind Cas 9 23
(V) (1853) 10 ER 359: 4 HLC 1 25
(W) (1824) 130 ER 294: 2 Bing 229 25

M. R. Bobde, for Appellants; N. L. Belekar, for Respondents (Nos. 2 to 6).

JUDGMENT: This appeal is by the first six defendants in the suit. Of the appellants, the original first appellant Damodhar and the original third defendant Shamrao have since died and are represented by the other appellants and the widow of Shamrao.

The appeal arises out of a suit for partition filed by one Martand son of Yeshwantrao Dalal against the rest of the joint family. This family consisted of other members besides the parties before 1922, but in 1922 there was a partition in which one branch of the family took its share and went out.

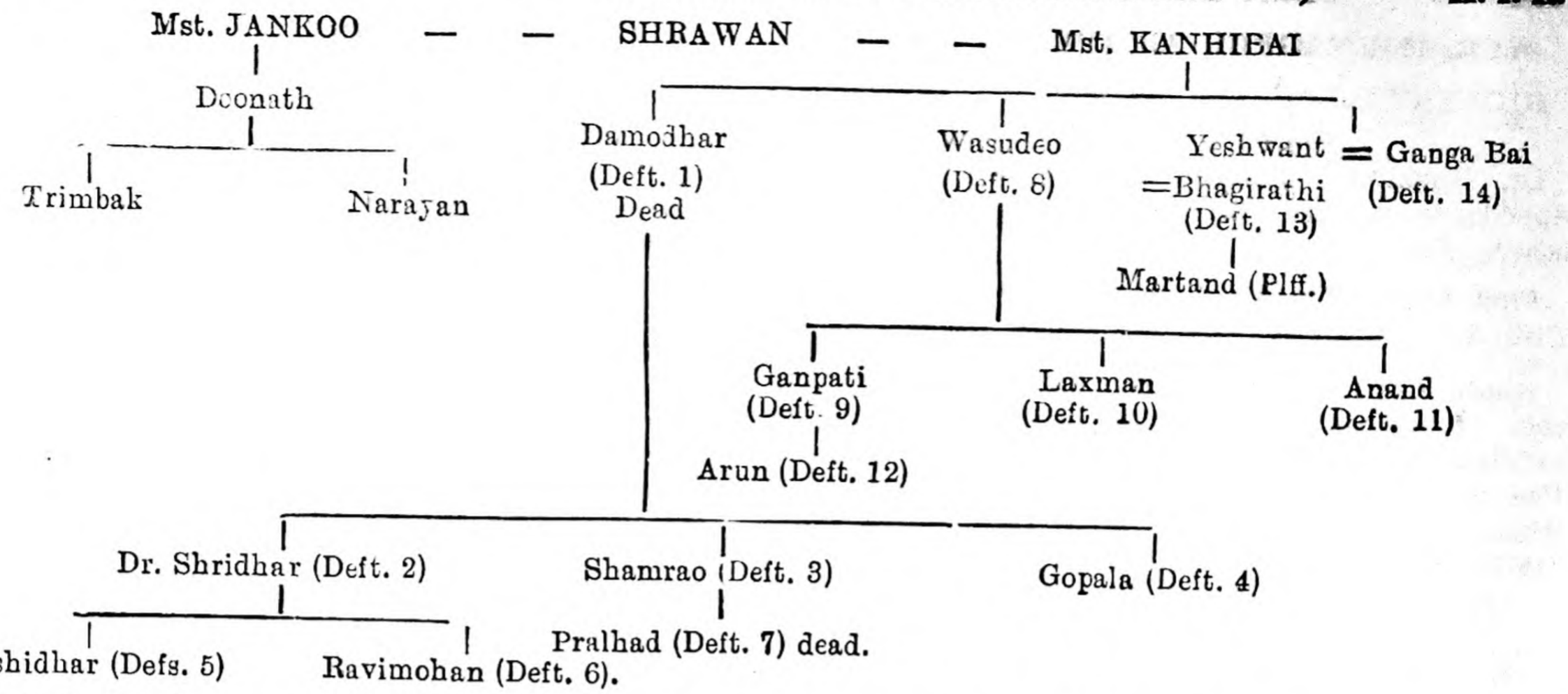
The following genealogy shows the relationship of the parties:

(See genealogy on next page.)

(2) The only question for decision in this appeal is whether in the year 1909 there was an agreement between the four sons of Shrawan that any member of the family requiring education outside their native place Mohadi was to bear the expenses of that education. Rest of the points have been given up by the appellants and only this point was argued before us. Before dealing with this point it is necessary to advert to an order which we passed on.....by which we ordered that the evidence of one Dr. Shridhar Damodhar Dalal be recorded.

(3) On 5-4-1944 an application was made for the examination on commission of Dr. Shridhar Dalal as he was on military service and not able to attend the Court. It was then proposed that he should be examined on interrogatories and parties were ordered to file their interrogatories.

The defendants were ordered to deposit the fee for the issue of commission, which they did. On 27-7-1944 the Court observed that in view of R. 267 of the Rules and Orders of the High Court there were difficulties in issuing a commission and that the matter would be taken up on 21-8-1944 when defendant 2's counsel would also be present. On that date the learned Judge did not pass any



orders about the issue of commission and noted in the order-sheet as follows:

"As to commission to examine defendant 2, Mr. Limsay is asked to acquaint himself with the rules. Case for 23-8-1944."

On 23-8-1944 there was no mention of this matter and suddenly on 25-8-1944 the Court dismissed the application for issue of commission, observing as under:

"As to commission to examine defendant 2, counsel has not yet taken proper steps that were necessary. The result is that a very long time has been wasted and I think without any justification. I, therefore, refuse to issue any commission."

Since the learned counsel for the second defendant had paid the fee for the issue of the commission a long time before the dismissal of the application, it is impossible to think that he had not done what he was required to do. The examination was to be on commission and by interrogatories and it was possible to issue commission even at that stage.

At the hearing it was pointed out to us that this order was defective and an opportunity to examine the second defendant in the case ought to have been given by the lower Court. As this was substantiated from the record and as we were of opinion that the evidence of the second defendant had been wrongly shut out to the prejudice of the second defendant in particular and the present appellants in general, we ordered this evidence to be recorded.

Fortunately for the parties, the second defendant was present in Mohadi on leave at that time and we, therefore, ordered the Additional District Judge, Bhandara, to record his evidence forthwith, reserving the reasons for this additional evidence to be given later. We have now given the reason which impelled us on that date to make the order we did and we record those reasons under O. 41, R. 27, Civil P. C.

(4) As has already been pointed out, the dispute is over the sums expended on the education of Dr. Shridhar Dalal. The pleadings of the parties have to be seen in this connection because they disclose much of their case. The plaintiff in the plaint originally did not give the details of the agreement which was alleged to have taken place between the family members when the education of Dr. Shridhar Damodhar Dalal and Mr. Trimbak Deonath Dalal began. Later he supplied better particulars and the plaint on this part of the case reads as follows:

"When all family was joint, it was agreed amongst all the parties that all the expenses of secondary and higher education, beyond the primary education, should in case of partition be saddled on the share of the member for whom it was incurred. (This agreement took place in the year 1909 or near about the same or in the summer or in the month of April or May or at the time when the consideration of further education at Bhandara was going on about the education of Trimbakrao Deonath Dalal, who is at present Sub-Judge at Pusad in Berar, and Dr. Shridhar Damodhar Dalal, after finishing their education at Mohadi school, amongst the four brothers, i.e. Deonath, Damodhar (Deft-1), Wasudeo (Deft-8) and Yeshwantrao (the plaintiff's father who is dead now) son of Shrawan Dalal.")

The portion within brackets was added when better particulars were supplied.

(5) The first seven defendants denied any such agreement, while the remaining defendants 8 to 14 admitted it. Defendants 1 and 3 pleaded as follows:

"It is emphatically denied that it was agreed between the parties that the expenditure of higher education of any member of the family would be saddled on his share at the time of partition. It is further denied that the expenditure made on the education of Deonath's son named Trimbak Rao was saddled on his 1/4 share at the time of partition in the year 1922. It is true that in the account books the expenditure made over the higher education of a member of the joint family is shown in his separate individual 'khata'. But that was done with a view to know the amount that was spent over the education of the particular member."

The other contesting defendants substantially adopted this statement. As a result of this contest, the lower Court framed two issues. They are issues 1 and 9 and read as follows:

"1. Did the four sons of Shrawan agree that in the event of partition, expenses incurred for any coparcener's education beyond the primary education will be saddled on the share of such a person?

(Finding — Yes.)

9. Is the agreement referred to in issue No. 1 valid? Is it binding on all the members of the family?

(Finding — Yes. Yes)."

These points also arise in this appeal and were the subject of arguments before us. No other point was argued and we shall now deal with these two questions.

(6) The questions involved are essentially of fact. The lower Court held that the agreement was proved in the case. Shri Bobde's argument is that it is unusual for a family to enter into such an agreement and it was unlikely that in the present case, where the junior members were going to school, only a few miles away from Mohadi, such an agreement would be made. He contends that after the passing of the Hindu Gains of Learning Act (30 of 1930), the income of a member educated at the expense of a family was not to be treated as joint family property and the present plea has been raised to get over the disability created by the Act.

On the other side it is contended that the family was not one in which education was quite common and it is quite likely that the members of the family entered into such an agreement because it was not known how much it would cost to educate the various junior members and whether after their education those members would follow the joint family business. It is not necessary to decide the probabilities because much can be said on both sides. The question can only be satisfactorily disposed of in the light of such evidence as has been led in the case.

(7) It is convenient to begin with the evidence of Dr. Shridhar Dalal whose evidence was recorded recently. Dr. Dalal was out to prove a negative and as such his evidence cannot come to much, but he has shown such ignorance about the matter that his evidence really is of no value to the appellants.

He states that he was never informed either by his cousins or by his uncles or by his father that the amount spent on his education would have to be repaid by him to the family. He, however, admits that he does not know to which account in the family account books the expenses of the education were debited and that he took no interest in the account books and no account books were ever shown to him. He has also not deposed to any facts involved in the partition when Deonath's branch went out of the joint family. He says that he does not remember what was written in the partition lists by which the partition was effected.

He admits that the lists were produced before him for signature, but he recalls nothing of the details. He also states that there was no talk with him about the partition and as he was in Bombay at the time, he does not know what led to the separation.

(8) There are only two statements in his deposition which will need consideration later. He states that when he and Shri Trimbak Dalal were educated at Bhandara they were living jointly in the boarding house and money used to be sent for their expenses from Mohadi. His version is that the money was received jointly sometimes by him and sometimes by Shri Trimbak and separate amounts were not received.

He also states that the entry in the account books in 1930 showing that a sum of Rs. 23,300 7/8 was due from him and acknowledged by his father was not made in his presence. He also denies that Rs. 48/-/6 were paid by him on the date of the entry towards the dues from him. His reason is that he joined service on 17-8-1929, and as the entry is within a year of that date, he must not have been present since no leave is granted to anyone during the first year in military service. He states that he learnt of the entry for the first time on the day he was examined.

(9) This evidence merely comes to this that no separate money was sent to him for his education and that he never acknowledged liability either himself or through his father. For the rest, his evidence is most indecisive and he has not thrown any substantial light upon his own case.

(10) This leaves over for consideration the evidence which was before the trial Court. On behalf of the plaintiffs the main witnesses are Shri Trimbak Dalal (P. W. 1), reinforced by the deposition of Shri Wasudeo Dalal (8-12 D. W. 1). On the side of the contesting defendants there is the evidence of Shri Damodhar, father of Dr. Shridhar Dalal. Since the defendants 8 to 12 sided with the plaintiffs in the case, one can well treat those two witnesses together. The evidence of Shri Trimbak Dalal is definite. According to him, his father had told him that such an agreement was in fact made when Dr. Shridhar and Shri Trimbak started their secondary education at Bhandara. He states that the amount required for the education of these two was sent separately from Mohadi.

Thus, at the very start, there is a contradiction between the two cousins and we have to decide which of the two versions is more likely. Shri Trimbak's evidence is borne out by the account books of the joint family because there are separate 'khatas' for all the junior members who were educated outside Mohadi.

(11) Shri Trimbak Dalal goes on to say that the question of this agreement came to the forefront when the partition took place in 1922. According to him, it was then ascertained that the amount spent over his education was Rs. 4,000/- and that was deducted from the share allotted to his father's branch. It is true that Shri Trimbak Dalal has not produced the partition list, which he says he possesses, but we cannot hold that against any of the parties because neither side asked Shri Trimbak Dalal to produce that list.

The evidence of Shri Trimbak Dalal is corroborated by the evidence of Shri Wasudeo. According to him, there was an agreement in 1909 by which it was settled that the expenses of secondary and higher education of any member

of the family should be separately debited against him and in case of his separation it should be deducted from his share. Shri Wasudeo also states that at the time of the partition in which Shri Deonath's branch went out of the family, he share was found to be worth Rs. 44,000/- and Rs. 4,000/- spent on the education of Shri Trimbak Dalal were deducted from that figure.

A question was put to him whether any distinction was made between the expenditure on education and the expenditure on board and lodging, and he was unable to say so. We do not think that the evidence suffers by this admission, and we are inclined to hold that the evidence of Shri Wasudeo supports and confirms the evidence of Shri Trimbak Dalal.

(12) There is, on the other side, the evidence of Shri Damodhar, father of Dr. Shridhar Dalal. In the account books there is an entry dated 12-6-1930 (vide Exh. 8-12 D. 1) in which the following is noted :

"Credit | Debit
Rs. 48-0-6
Dr. Shridhar Damodhar Dalal, Rawalpindi.
Cash in coins. Through self. | x x x
Admitted the khata.
Balance of Rs. 23,300/- are remained due. | x x x
Vadya 12. (dated 23rd June 1930 A.D.)"

(13) Shri Damodhar deposed that at the time of the making of the entry, Dr. Shridhar Dalal was present and it was made in his presence. Dr. Shridhar Dalal has denied this; and it is possible that his father was mistaken about his presence. The father states, rather indefinitely, that the entry shows that Dr. Shridhar Dalal was present.

It may be that Dr. Shridhar Dalal was not present but the entry was made a long time before the present dispute started; and there is no real explanation why there should be a repayment and an admission of liability as far back as 1930. Further, the evidence of Shri Damodhar discloses that there was at the time of the partition of 1922 some discussion about the expenses over the education of the junior members. He stated that when the debts due to the family were divided, they were made into four parts and one part was allotted to Deonath and the others were kept joint. Though he did not remember to whom the amounts due in the 'khatas' of Dr. Shridhar Dalal and Shri Trimbak Dalal were allotted, he had to admit as under:

"The entry at page 3 of the 'khatavani' for the Samvat year 1978 relating to Rs. 3,785/15/9 (shown) shows that this item was allotted to the three brothers, i.e. myself, Wasudeo and Yeshwantrao. This was the expenditure for defendant No. 2's education."

This admission would show that the 'khatas' of education of the junior members were treated as debts due to the family and were pooled with the other debts due to the family and assigned to various branches. If this be so, the story given by the plaintiffs bears support from the only witness who has deposed about the matter with any definiteness on the side of the contesting defendants.

(14) Shri Bobde argued that the expenses of the education of Ganpati (defendant 9) were later on cancelled and were included in the 'ghar kharch khata' when Ganpati stopped his education (vide Exh. 8-12 D. 1). This shows that these expenses were not to be debited to the members but were incurred by the family. The amount involved was petty and we do not know the circumstances under which this change took place. Exh. 8-12 D. 1 is dated 1932-33 and it is obvious that this sum of Rs. 467/1/- was merely squared up in some manner not explained. That, however, does not take away the effect of maintaining separate 'khatas' or the consideration of those 'khatas' in 1922 and the acknowledgment specifically obtained in respect of Dr. Shridhar's education in 1930. The amount spent on the education of Shri Trimbak Dalal and Dr. Shridhar Dalal was considerably more than that spent on Ganpati's education and an adjustment of the entry of Rs. 467/1/- might conceivably be explained on some hypothesis not negativing the case of the plaintiffs.

(15) The evidence of Shri Trimbak and Shri Wasudeo receives support from the entries in the account books. The mere fact that the accounts were kept showing separately the expenditure incurred on the education of Shri Trimbak and Dr. Shridhar need not necessarily lead to the inference that it was agreed that the amounts should be debited to the share of the particular coparcener on a partition of the family. The account might have been so kept only with a view to knowing how much was being spent on the education of each member as suggested by Damodhar (1-4 D. W. 3).

But the two circumstances which in our view make the inference in favour of an agreement as pleaded by the respondents inescapable, are the conduct of the family in 1922 and the entry (Exh. 8-12 D. 1) made by Damodhar, the father of Dr. Shridhar, in 1930. Without an agreement it was unlikely that the sum of Rs. 4,000/-/- should have been debited from the share of Shri Trimbak when he separated from the family.

Secondly, the admission in the 'khata' on 23-6-1930 that "Rs. 23,300/- are remained due" takes the matter beyond a mere mode of keeping separate account about the educational expenses, without any right to have it debited against the coparcener concerned. Unless the expenditure was debitable as alleged by the respondents, there would have been no admission in the accounts written by Shri Damodhar that the balance of Rs. 23,300 "remained due." Having regard to all the circumstances we hold that the appellants have failed to make out a case for disturbing the finding on the first issue. The finding of the learned trial Judge about the agreement is correct and we affirm it.

(16) The question that arises is whether the agreement that the expenditure on secondary and higher education would at the time of the partition be saddled on the share of the member

concerned is valid. The question is an important one, and there is no precedent on all fours with the present case.

The learned counsel for the appellants contended that the agreement ran counter to the rights in and the incidents of a Hindu coparcenary, was opposed to public policy and was invalid. Further, it was submitted that the agreement could not in any case be binding upon Dr. Shridhar because he was a minor at the date of the agreement.

(17) In the present case the right to make the account as pleaded by the respondents is not sought to be deduced by a reference to the Hindu texts but is sought to be justified by reason of a special agreement.

The dicta of Sadasiva Aiyar J. in — 'Vellayappa v. Krishna', AIR 1918 Mad 258 at p. 261 (A) seem to imply that there could be such an agreement. Sadasiva Aiyar J. observed—

> "I think, that, if the advance was made, say, by a father to one of his sons out of the joint family income in the father's hands 'without any intention to make the son liable to account for the advance at division and without any agreement to that effect' between the father and the son it may be an act of partiality on the part of the father, but I do not think that, after three years, the joint family or any of the other sons can call the favoured son to account for the advance."

(The underlining is by us.) (Here in ' ')

(18) It is true that every coparcener has a right to enjoy and possess the joint family property and be maintained at its expense. It is an accepted proposition that no charge can be made against a coparcener because a larger share of the income of the family has been spent on his branch or sub-branch of the family. The reason is well understood under the Hindu law. So long as the family continues joint, no individual coparcener can be said to have a definite share in the joint property or its income. The members of the family have a right to be maintained without reference to the actual share to which the coparcener or his branch might be entitled on partition or to the size of his particular family. See — 'Abhaychandra Roy Chowdhry v. Pyari Mohan Guho', 5 Beng LR 347 at p. 349 (FB) (B).

The account that is taken at a partition of a Hindu undivided family is not therefore an account into the past transactions but merely an account of the assets existing at the date of the partition. At the time of the partition the parties have no right to look back and claim relief against past inequality of enjoyment of the members. See — 'Pormeshwar Dubey v. Gobind Dubey', AIR 1916 Cal 500 (2) at p. 502 (C).

(19) The point then is whether the agreement in the present case can be regarded as invalid because it attempted to modify the normal coparcenary rights and incidents. The agreement in effect meant two things: firstly that the expenditure on education was to be regarded as the expenditure on account of the individual concerned as distinguished from the common expenditure of the family, and secondly that such expenditure was to be debited against the share of the member at the time of partition.

(20) Though a coparcener has certain rights as long as the family remains joint, the status of jointness itself can continue only so long as every coparcener concurs in its maintenance. The joint status may be put an end to by an agreement of all the coparceners. — 'Parbati v. Naunihal Singh', 36 Ind App 71 (PC) (D) and — 'Palani Ammal v. Muthuvenkatachala Moniagar', AIR 1925 PC 49 at pp. 50-51 (E). But the concurrence of everyone is not necessary for bringing about a disruption of the joint status. A single coparcener can by his definite and unambiguous indication of his intention to separate disrupt the joint family. — 'Mt. Girja Bai v. Sadashiv', AIR 1916 PC 104 at p. 109 (F); — 'Shankarsingh v. Gulabchand', AIR 1945 Nag 138 at pp. 139-140 (G); and — 'Babu Ramasray v. Babuyee Radhika', 40 Cal WN 385 at p. 387 (PC) (H).

But it is not obligatory on a coparcener to separate completely with respect to every item of the joint family. It is well settled that a partition under the Hindu law may be partial with respect to properties as well as persons in a family. — 'Rewan Pershad v. Mt. Radha Beeby', 4 Moo Ind App 137 at p. 168 (PC) (I) and — 'Sudarsanam Maistri v. Narasimhulu Maistri', 25 Mad 149 at p. 157 (J).

It is open to the members to make a division and severance of status in respect of a part of the joint estate while retaining their joint status and holding the rest of the property as members of a joint undivided family. See — 'Appovier v. Rama Subba Aiyan', 11 Moo Ind App 75 at p. 90 (PC) (K) and — 'Jagmohan v. Ranchhoddas', AIR 1946 Nag 84 (L).

While continuing in a state of jointness the members can also agree among themselves to enjoy a certain kind of income e.g., only agricultural income, separately. See — 'Appavu v. Manikkam Pillai', AIR 1946 Mad 118 (M). In — 'Ramayya v. Kolanda', AIR 1939 Mad 911 at p. 913 (N) in a suit for partition the Court gave effect to an arrangement in a joint family whereunder the corpus of the property allotted for the maintenance of a member was allowed to remain joint while the income was regarded as belonging exclusively to the member concerned. It was held that the member was not accountable for the income of the property so allotted or the savings therefrom.

If it be permissible to the members of an undivided family to regard certain assets of the family or a portion of its income as separate and exclusive while preserving the joint status, we see no objection in principle to an agreement which provided that a certain item of expenditure was to be treated as individual and not joint, to be debitable at the time of partition to the individual concerned.

(21) There is authority for the view that the normal mode of accounting in an undivided family may be modified by agreement. The 'karta' is not as a rule accountable as an agent

or a trustee and has only to account for the assets existing at the date of the partition. But it has been held that he may render himself liable to a stricter account by reason of a special agreement. See — 'Setrucherla Ramabhadra v. Setrucherla Virabhadra Suryanarayana', 26 Ind App 167 (PC) (O).

In — 'Ranganmani Dasi v. Kasinath Dutt', 3 Beng LR OC 1 (FB) (P) the joint family was carrying on banking not as a common family business but rather on the footing of a partnership upon the understanding that the profits when realized should be divided amongst the individual members in certain proportions. The other profits of the family property and the expenses of each member were also credited and charged in like manner in the name of each member. The question was as to how the account should be taken. Markby J. observed:

"It is not necessary to say that the balance, appearing in the name of each in the accounts kept upon this understanding, became his separate property so long as the family remained joint; but I think it was special arrangement in this family that the accounts should be so kept; and that upon a division, the share of each member should be ascertained upon the footing of such accounts."

(22) The argument that the agreement in question is repugnant to the principles of Hindu law is without force. The principle of making an individual coparcener solely liable to what has been incurred specially for his own purpose as distinguished from a family purpose cannot be said to be wholly alien to the ancient Hindu jurisprudence. Reference may be made to the text of Catyayana—

"What has been given away for the religious purposes of one individual, a friendly gift, and a loan made on his sole account, shall, if discovered, become part of his allotment; for the patrimony cannot be aliened by one parcener on his separate accounts." (Colebrooke, Vol. II, p. 481, placitum 373).

(23) The point that remains for consideration then is whether the agreement is not binding upon Dr. Shridhar because he was a minor at the date of the agreement.

It cannot be disputed that a valid agreement for partition may be made during the minority of one or more of the coparceners. See — 'Balkishen v. Ram Narain', 30 Cal 738 at p. 752 (PC) (Q); — 'Mt. Girja Bai v. Sadashiv (F)', (supra, p. 121) and — 'Parbati v. Naunihal Singh (D)', (supra). The power of a Hindu father to represent his minor sons as the head of his branch in matters connected with partition is well recognized; See — 'Ram Bahadur Singh v. Nirbhai Singh', AIR 1920 Oudh 212 (R); — 'Jamna Prasad v. Mt. Durga Dei', AIR 1933 All 138 (2) (S); — 'Subba Rao v. Subba Rao', AIR 1936 Mad 689 (T) and — 'Gajpati Rikh v. Mrs. May Ida Rikh', AIR 1942 All 254 (U).

(24) So the fact that the father of Dr. Shridhar was a party to the agreement in 1909 would be sufficient to bind his son notwithstanding that he was a minor at that time unless it could be shown that the agreement was improper or unfair.

We do not regard the agreement either in its intention or its result as in any way improper or injurious to the interest of the minor. After all there was no way of compelling the joint family to regard the expenditure in question as common without general concensus. To so insist might have resulted in a disruption of the family. By the agreement the parties preserved the joint status with all the possible benefits that might accrue from the incident of survivorship and at the same time made available the resources of the whole family for what it was not at that time prepared to regard as a family purpose.

The expenditure was to be debitable only if the family separated. In the circumstances the father of the minors might well have preferred the agreement to disruption of the joint family money-lending and cloth business. Besides the agreement was acted upon by the family in 1922 when Shri Trimbak separated from the family. We see no reason now not to enforce the agreement.

(25) There is no merit in the contention that the agreement was opposed to public policy. According to Lord Truro in — 'Egerton v. Brownlow', (1853) 10 ER 359 (V), public policy is a principle of law which holds that no person can lawfully do that which has a tendency to harm the public or is against the good of the public. Burrough J. said in — 'Richardson v. Mellish', (1824) 130 ER 294 (W):

"I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; — it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

We see nothing unnatural or improper in a family, in which there was no prior tradition of higher education and in which none went up for secondary and higher education before the appellant and Shri Trimbak (vide 1-4 D. W. 3 and 8-12 D. W. 1), agreeing that the educational expenditure should be regarded as individual to be debited to the person concerned on partition. There is nothing in the agreement which can be said to have a tendency to harm the public.

(26) There is no case for interference. The decree of the Court below is affirmed. The appeal fails and is dismissed with costs on the appellants.

R.G.D. Appeal dismissed.

A.I.R. 1954 NAGPUR 366 (Vol. 41, C.N. 124)

SINHA C. J. AND HIDAYATULLAH J. (4-3-1954)

Smt. Bari Bahoo w/o S. S. Rajaram and another, Applicants v. Shardaprasad and others, Non-Applicants.

Misc. Civil Case No. 43 of 1952, against order of the High Court in F. A. No. 33 of 1943, D/- 31-10-1947 (Nag).

(a) Civil P. C. (1908), O. 40, R. 4 — Remedy under — When available against legal representatives of receiver.

Rule 4 of O. 40 itself does not apply to a dead receiver and contemplates his continued existence. It is true that if the receiver is alive, an application for accounts lies against him and a suit is not absolutely necessary. The position, however, alters after the receiver is dead. The property in the hands of the legal representatives of the receiver is liable only if loss is occasioned by him or any amount is due from him. (Para 6)

Where therefore an application for taking accounts from the legal representatives of the deceased receiver does not allege that any loss is occasioned or that there is any amount due from the receiver and the applicants only ask for accounts from the legal representatives, such an application is not within O. 40 of the Code. The proper remedy of the applicants is to file a suit, establish loss to them and then seek to enforce it against the estate of the receiver in the hands of the legal representatives. Case law referred. (Para 7)

Anno. Civil P. C., O. 40, R. 4 N. 2, 3.

(b) Civil P. C. (1908), O. 40, R. 4 — Application for accounts against legal representatives by surety ('Quaere').

'Quaere'—The liability of the surety for a receiver is co-extensive with that of the receiver whose honesty he guarantees and it is a question whether he can turn upon the legal representatives to call for accounts for which he is equally responsible, by an application under O. 40, R. 4. (Para 8)

Anno. Civil P. C., O. 40, R. 4 N. 1.

CASES REFERRED: Paras

(A) (1834) 7 Sim 171: 4 LJ Ch 2 4
(B) (1851) 15 Sim 479: 16 LJ Ch 248 4
(C) (V3) AIR 1916 Mad 521: 39 Mad 584 5
(D) (V31) AIR 1944 Mad 392: ILR (1945) Mad 47 5
(E) (V14) AIR 1927 Cal 175 (1): 53 Cal 881 5
(F) (V30) AIR 1943 Cal 244: ILR (1943) 2 Cal 204 5
(G) ('36) 40 Cal WN 479 5
(H) (V40) AIR 1953 Bom 105: 54 Bom LR 708 5

N. B. Chandurkar, for Applicant; M. N. Phadke and A. P. Sen, amicus curiae.

ORDER: In First Appeal No. 33 of 1943, decided on 31-10-1947, one Sadanand son of Chaitram Gontia was appointed Receiver. He took charge of mouze Deori on 8-9-1943 and of mouza Bhidki on 9-9-1943. Sadanand died on 8-4-1948. After his death another receiver was appointed.

(2) The present application is by the plaintiffs (appellants) for taking accounts from the legal representatives of the receiver and for the amount in their hands. An application was made to the Court below to the same effect but it was held that the legal representatives were not accountable. It is pointed out that the receiver presented accounts for the period 25-8-1943 to 29-7-1944 and a sum of Rs. 630/1/- is due from the estate of the receiver. The accounts, however, require scrutiny as they were not passed.

(3) We may mention the fact that the present applicants (appellants) had stood surety for the receiver when he was appointed and are really liable to the same extent as the receiver. Since the non-applicants were not represented at the hearing, we requested Shri M. N. Phadke and Shri A. P. Sen to act as 'amici curiae'. We are indebted to them for their help.

(4) Two questions arise here. The first is whether an application for a suit lies. The view of the English Courts is that once the receiver is dead no application lies but a suit must be filed. In Kerr on Receivers (1952) page 313 it is stated that a suit alone lies. This is based on — 'Jenkins v. Briant', (1834) 7 Sim 171 (A) and — 'Ludgater v. Channell', (1851) 15 Sim 479 (B). These cases do not appear to have been dissented from subsequently.

(5) These cases were not followed in — 'Mullapali Taravathil v. Gopala Menon', AIR 1916 Mad 521 (C), where it was held that there was no reason why an application should not lie. The ruling has become obsolete in Madras as the provisions of R. 4 of O. 40 were re-enacted. 'Somasundaram v. Kannammai', AIR 1944 Mad 392 (D) deals with the amended rule and cannot, therefore, help. In the Calcutta High Court it was decided in — 'Subal Chandra v. Jatindra Mohan', AIR 1927 Cal 175 (1) (E), that a suit is the proper remedy rather than an application. The decision, however, turned upon the practice of the Court. In — 'Chaparaddi v. Kabil Molla', AIR 1943 Cal 244 (F), the first Madras case was followed. But in that case the proceedings had already commenced before the death of the receiver. We have also — 'Suresh Chandra v. A. K. M. Enamel', 40 Cal WN 479 (G) and — 'Jekisondas v. Nanabhai', AIR 1953 Bom 105 (H), but they do not help us to reach any conclusion. The earlier cases before the present Code are not helpful either.

(6) Rule 4 of O. 40 was enacted in 1908 and provides for the enforcement of receiver's duties. It is enacted that:

"4. Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or
(b) fails to pay the amount due from him as the Court directs, or
(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver."

The rule itself does not apply to a dead receiver and contemplates his continued existence. It is

no doubt true that if the receiver were alive, an application would have lain against him & a suit was not absolutely necessary. The position, however, alters after the receiver is dead. The property in the hands of the legal representatives of the receiver is liable only if loss is occasioned by him or any amount is due from him. If this be established then only the property can be attached.

(7) There is no allegation in the application before us that any loss was occasioned or that there is any amount due from the receiver. The applicants only ask for accounts from the legal representatives. We are of opinion that such an application is not within O. 40 of the Code. The proper remedy of the applicants is to file a suit, establish loss to them and then seek to enforce it against the estate of the receiver in the hands of the legal representatives.

(8) There is yet another difficulty in the way of the applicants. They stood surety for the receiver. Their liability is co-extensive with that of the receiver whose honesty they guaranteed. It is a question whether they can now turn upon the legal representatives to call for accounts for which they are equally responsible. We do not decide this point; it is likely to arise hereafter as also the question of limitation.

(9) The application fails and is dismissed. There shall be no order about costs.

D.R.R. Application dismissed.

END

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ORISSA SECTION

ORISSA HIGH COURT

1954

CHIEF JUSTICE :

The Hon'ble Mr. Justice L. Panigrahi, B.A., B.L.

PUISNE JUDGES :

The Hon'ble Mr. Justice R. L. Narasimham, I.C.S.
" " " Souri Prasad Mohapatra, M.A., B.L.
" " " Pitamber Misra, M.A., B.L.
" " " P. V. Balkrishna Rao B.L.

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Orissa High Court

A.I.R. 1954 ORISSA 1 (Vol. 41, C. N. 1)

JAGANNADHADAS C. J. AND
MOHAPATRA J.

State v. Radhagobinda Das and others, Opposite Party.

Original Criminal Misc. Case No. 4 of 1952, D/- 4-2-1953 and 9-2-1953.

(a) Contempt of Courts Act (1952), S. 3 — Contempt of Court, what amounts to — Interference with course of justice.

The letter, expressing the opinion of a superior Officer of the position of the Deputy Secretary to the Government, that it was a spectacular case in which a large quantity of clothes was hoarded by the accused by fabricating a false account of sale, with the endorsement of the District Magistrate "Show this to S. D. M. Sadar for needful", and further containing similar endorsement of the sub-divisional Magistrate, when it reached the Trying Magistrate, was bound to embarrass the Magistrate and had a definite tendency of seriously affecting the fair trial of the case. District Magistrate in having forwarded the letter to the Sub-divisional Magistrate when it is manifest from its contents that the filing of the case was at least imminent, if cognisance had not already been taken, knowing that the Sub-divisional Magistrate was to exercise a judicial discretion under S. 204, Criminal P. C., in taking cognisance of the case and that it is quite likely that the Sub-divisional Magistrate may himself try the case, "has undoubtedly committed the offence of contempt of Court". Held further that the Sub-Divisional Magistrate is also guilty of the offence of contempt of Court in having forwarded the letter to the Trying Magistrate. (Paras 18, 19)

(b) Contempt of Courts Act (1952), S. 3 — Contempt of Court, what amounts to — Interference with course of justice.

For contempt proceedings, the intention or motive of the contemner is not essential if really the writing has a tendency, or, is calculated to impede the fair trial of the case. AIR 1937 Bom 305, Ref. (Para 8)

(c) Contempt of Courts Act (1952), S. 3 — Contempt of Court, what amounts to — Interference with course of justice.

If a person making a publication, or responsible for the act, which is likely to interfere with the fair trial of the case, is aware that a proceeding is imminent, then the offence is complete and it is not essential that the case must be pending. AIR 1939 Mad 257 (SB); AIR 1943 Lah 329 (FB), Foll.; (1903) 2 KB 432; AIR 1947 Cal 414 (FB), Ref. (Para 11)

(d) Contempt of Courts Act (1952), S. 4 — Punishment — Considerations for — (Criminal P. C. (1898), S. 561-A).

If, in spite of repeated instructions from the High Court similar instances come to the notice of the High Court, it would be failing in its responsibility towards the criminal judicial administration of the State, if it took such instances lightly and dropped the proceedings without serious notice or merely accepted the assertion of bona fides and of absence of any deliberate intention. Neither the existence of dualism in common machinery containing both magisterial and executive, nor the inherent difficulty of an officer placed in that situation, can be taken to be an excuse or extenuation. On the other hand, it is a stronger reason for expecting from the executive officers greater discrimination and care, and for the Court to take effective steps to take serious notice of such instances so as to prevent the recurrences thereof. (Para 27)

(e) Contempt of Courts Act (1952), S. 4 — Apology.

Where the contemner said that if the law finds him guilty of contempt he bows down to the judgment of Court, it was not an adequate expression of apology. (Para 31)

M. S. Rao (Amicus curiae), for Petitioner; P. V. B. Rao, for Opposite Party.

CASES REFERRED TO :

(A) ('12) 13 Cri LJ 461 (Bom)
(B) ('37) AIR 1937 Bom 305: 38 Cri LJ 942
(C) (1903) 72 LJKB 839: 1903-2 KB 432
(D) ('39) AIR 1939 Mad 257: 40 Cri LJ 533 (SB)
(E) ('43) AIR 1943 Lah 329: 45 Cri LJ 445 (FB)
(F) (1927) 96 LJKB 352: (1927) 1 KB 845
(G) ('47) AIR 1947 Cal 414: ILR (1948) 1 Cal 441 (FB)
(H) ('41) AIR 1941 Bom 294: 42 Cri LJ 814
(I) ('51) Ori. Cri. Misc. Cases Nos. 3 and 5 of 1951 (Orissa)

MOHAPATRA. J.: (4-2-1953):— The present contempt proceedings arise under the following circumstances:— Sri Sripati Nanda, IPS., Deputy secretary to the Government of Orissa (Enforcement), Cuttack, on 5-4-1952, wrote a demi-official letter to Radhagobinda Das, IAS., District Magistrate, Cuttack. The letter is D. O. No. 12533/Enf. 59/52. The letter runs to the effect:

"Sri S. Nanda, I. P. S.,
Deputy Secretary to Govt.
GOVERNMENT OF ORISSA
(Enforcement), Orissa,
SUPPLY DEPARTMENT
Cuttack.
(ENFORCEMENT & ANTICORRUPTION)
D. O. No. 12533/Enf. 59/52
Dated Cuttack, the 5th April, 52.
Mr. Dear Das,

A prosecution report against M/S. Nathmal Sitaram, cloth dealer of Bakharabad, Cuttack town is being sent to you. This is a spectacular case in which a large quantity of clothes was hoarded by the accused dealer (a Marwari merchant) by fabricating a false account of sale.

I am, therefore, to request you to please ensure speedy trial of this spectacular case and intimate the result.

Yours faithfully,
Sd/- S. Nanda.
4-2-52.
(S. Nanda)

To
Sri R. G. Das, I. A. S.,
District Magistrate, 'Cuttack'.

(2) On that very day, that is, on 5-4-1952, Sri R. G. Das made an endorsement on the letter "Show this to S. D. M. Sadar for needful". Sri S. N. Patnaik, opp. party 3 who was in charge of the duties of the Sub-divisional Magistrate, Sadar, Cuttack, made an endorsement on the letter on 9-4-1952, "Put up after the P. R. received". Again on 28-4-1952 while he was also in charge of the duties of the Sub-divisional Magistrate, Sadar, Cuttack, he made another endorsement "To Trying Magistrate for needful". On that very day, that is, on 28-4-1952, the Criminal Case against Nathmal Jajodia and Sitaram Jajodia under Section 7 of Act 24 of 1946 was transferred to the file of Sri C. V. Murti, Magistrate First Class, for favour of disposal according to law. After several dates, the Trying Magistrate Sri C. V. Murti on 28-7-1952, wrote a letter to the Registrar of our High Court requesting him to place the letter before the Hon'ble Judges of the Court for proper action to be taken for contempt of Court.

On receipt of this letter of Sri Murty, notices were issued, in the first instance to Sri Das, District Magistrate of Cuttack, and to Sri Nanda, Deputy Secretary to the Government of Orissa (Enforcement), Cuttack, to show cause why they should not be punished or suitably dealt with according to law for contempt of Court. It having transpired from the explanation, submitted by Sri Das, that he did not transmit the letter to the Trying Magistrate but only to the Sub-divisional Magistrate and that Sri Patnaik, who was in charge of the duties of the Sub-divisional Magistrate, Cuttack, on the date the case was transferred to the Trying Magistrate, that is, on 28-4-1952, had transmitted the letter to the Trying Magistrate, notice also was issued to Sri Patnaik to show cause why he should not be suitably dealt with according to law for contempt of Court and notice was issued also giving Sri Das a fresh opportunity to produce further explanation, if he so desires.

(3) The written explanation, submitted by Sri Nanda, is to the effect that, he being the Superintendent of Police, Enforcement, and Ex-officio Deputy Secretary to Government, Supply Department, and opp. party 1, Sri Das, being the District Magistrate of Cuttack, he had written the demi-official letter to the District Magistrate, who is the Head of the Criminal as well as Civil Supplies Administration of the District, in due course of discharge of his official duties as Superintendent of Police, Enforcement, for the state. Under Book Circular No. 6 of the Government of Orissa, Home Department, Notification No. 2616-A, the District Magistrate should not concern himself with Court work, whether Criminal or Revenue or Miscellaneous and that he must have time fully to carry out the functions laid down for him in connexion with the execution of Post War Development plans in his District, general matter relating to law and orders, Civil Supplies &c.

The letter was, therefore, written with the full knowledge and belief that he was also not to try the case. It was simply meant to expedite its hearing. He (Sri Nanda) has also referred to R. 19, Orissa Police Manual, that the Superintendent of Police is required to remain in touch and in constant personal communication with the District Magistrate whenever possible. It is also a part of his duty to keep the District Magistrate fully informed of all matters coming to his knowledge affecting the peace of the District. The D. O. letter was never meant to be transmitted to the Trying Magistrate, and, as such, it was never meant to affect the fair trial of the case in any way whatsoever.

(4) Sri Das, in his two explanations, submits that he had no knowledge at the time when he made the endorsement on 5-4-1952, that the case had already been taken cognisance of by the Sub-divisional Magistrate on 29-3-1952. According to the distribution of work made under the rules, cognisance of criminal cases is not taken by the District Magistrate but by the Sub-divisional Magistrate, and, later, when the accused appears, the Sub-divisional Magistrate generally transfers the case to some Magistrate competent to try it; he, in usual course of routine business, made the endorsement "Show this to S. D. M. Sadar for needful"; he never intended that the D. O. letter should be forwarded to the Trying Magistrate; and that he had absolutely no intention to interfere with the fair trial of the case by ordering the letter to be shown to the Sub-divisional Magistrate. His only intention was that the hearing might be expedited.

(5) Sri S. N. Patnaik, in his explanation, submits that he was in charge of the current duties of the Sub-divisional Magistrate on 9-4-1952 and he made the endorsement on the letter on the said date. He was also in charge of the current duties of the Sub-divisional Magistrate on 28-4-1952 and transferred the case to Sri Murty, Magistrate, for favour of disposal according to law. He also forwarded that D. O. letter with the remark "To Trying Magistrate for needful". This, as he states, he did in due course as the District Magistrate had ordered "Show this to S. D. M. for needful". By this endorsement, he explains, he only meant speedy disposal of the case, but he had never meant to influence the fair trial of the case.

(6) Taking up the case of Sri Nanda first, we find that it was a D. O. letter ordinarily meant as "confidential" even though there was no endorsement on the letter as "confidential". We are disposed to take it that he had never meant that the letter would be transmitted to the Trying Magistrate.

From Book Circular No. 6 of the Government of Orissa, Home Department, Notification No. 2616-A, it transpires that the District Magistrate should not concern himself with Court work and that he must have time fully to carry out the functions of Post War Development plans in his District &c. Sri Nanda could have fairly expected that the District Magistrate was not to take cognisance of the case and was not to try it himself. Further, as it appears from Rule 19, Orissa Police Manual, that it is practically a part of his duty to be in constant touch with the District Magistrate who is the Head of the Criminal Administration of the District and of the Civil Supplies Department, he would be writing this letter in due course of discharge of his official duties. We will, therefore, accept the explanation submitted by Sri Nanda and drop the proceedings against him.

(7) But the case of Sri Das and Sri Patnaik stands on a different footing. The passage in the letter "This is a spectacular case in which a large quantity of clothes was hoarded by the accused dealer (a Marwari merchant) by fabricating a false account of sale", in our opinion, has a substantial tendency to interfere with the fair trial of the case, specially when the opinion of a very responsible and superior officer "that the accused has fabricated a false account of sale" reaches the Magistrate trying the case.

(8) The explanation, submitted by Sri Das and Sri Patnaik, that they were not at all actuated by any motive or intention to impede the fair trial of the case and that their only intention was that the trying Magistrate should expedite the hearing, are not very material for the purpose of deciding the present case inasmuch as the position of law is very well settled in India that, for contempt proceedings, the intention or motive of the contemner is not essential if really the writing has a tendency, or, in other words, is calculated to impede the fair trial of the case.

(9) I would first refer to a passage at p. 91 of Oswald on Contempt (3rd Edn.). The passage runs thus:

> "All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempt. Offences of this nature are of three kinds — namely, those which (1) scandalise the court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers, or proceedings; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending."

It appears from this that the writings, which are calculated to prejudice the Court of Justice, will constitute contempt. An intention is not an essential part of it. The matter stands more fully discussed, after review of many decisions of Indian High Courts, by V. G. Ramachandran, in his Book on Contempt of Court. At page 411, he says:

> "Good motive or intention for a publication which is in Contempt of Court does in no way purge the contempt. The test is not if one intended to prejudice the case but if the words themselves tend to interfere with the due course of justice and calculated to prejudice the public or the Court."

He has, for this proposition, very much relied upon a decision of Mr. Justice Dawar of Bombay High Court — 'In re Claridge 13 Cri LJ 461 (Bom) (A). We also get the same view expressed in the case of — 'Demibai Gengji v. Rowji Sojpal', AIR 1937 Bom 305 (B). Wadia J., in that case, held that the intention of the writer might often be of secondary importance, that the question was always what would be the effect of the articles, if they would tend to distract and interfere with due and proper course of administration of justice. The same view also has been taken in the two Full Bench cases we will cite in the next point.

(10) We do not think it necessary to discuss the matter any further and take it to be a settled position of law in India in view of the fact that Mr. P. V. B. Rao concedes before us that the intention to impede fair trial of the case is not essential if the writing is likely, or has a tendency, to so interfere.

(11) Mr. Rao strongly urges that Sri Das has committed no offence inasmuch as he had no knowledge of the pendency of the case which is essential for proceedings in contempt. We are definitely of the view that this position of law is not acceptable. If a person making a publication, or responsible for the act, which is likely to interfere with the fair trial of the case, is aware that a proceeding is imminent, then the offence is complete and it is not essential that the case must be pending. A passage in the case of — 'Rex v. Parke', (1903) 2 KB 432 (C) is very much telling in this connexion. At page 437, Wills J. observes:

> "It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do when the stream has ceased."

(12) This position of law was for examination in two Full Bench decisions in India reported in — 'Tuljaram Rao v. Governor of Reserve Bank of India', AIR 1939 Mad 257 (D) and In re — 'Subrahmanyan Editor, Tribune', AIR 1943 Lah 329 (E). Leach, C. J. in AIR 1939 Mad 257 (D), observes:

> "To comment on a case which is sub-judice or to suggest that the Court should take a certain course in respect of a matter before it undoubtedly constitutes contempt and honesty of motive cannot remove it from this category..... The criterion is not whether the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice."

His Lordship, relying upon the English case, categorically observes:

> "Similarly, to comment on a case which is about to come before the Court with knowledge of the fact is just as much a contempt as comment on a case actually launched."

The matter was more fully discussed and the opinion was more clearly expressed by Harries, C. J. in the Lahore case, referred to above. The pertinent observations are:

> "In the class of cases of contempt of Court where anything is done which is calculated to interfere with the due course of justice or is likely to prejudice the public for or against a party the essence of the matter is the tendency to interfere with the due course of justice..... The offence of contempt may be committed even if there is no proceeding or cause actually pending provided that such a proceeding or cause is imminent and the writer of the offending publication either knew it to be imminent or should have known that it was imminent. The question is discussed by Lord Hewart C. J. in — 'Rex v. Daily Mirror (Editor)', (1927) 1 KB 845 at p 851 (F):
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> "We are not called upon to consider the question whether there may be contempt of Court when proceedings are imminent but have not yet been launched. In the present case the question did

not arise, for there was a charge and there had been an arrest, and proceedings, therefore, had begun. Some day that question may have to be decided, and for the moment I will only refer to a passage in the judgment of the Court, consisting of Lord Alverstone C. J., Wills & Channel JJ., delivered by Wills J. in — '(1903) 2 KB 432 at p 437 (C): Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind — that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen, there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

(13) The point again came up for discussion in the case of — 'Emperor v. Choudhury', AIR 1947 Cal 414 (FB) (G). Their Lordships, in that case, after discussing the position, did not express their opinion inasmuch as it was not necessary for them to dispose of the matter. Respectfully agreeing with the two Full Bench decisions, referred to above we are of the view that pendency of proceedings is not essential if the proceedings are imminent to the knowledge of the contemner.

(14) The letter itself shows that the prosecution report is being sent herewith and there is a request for speedy trial of the spectacular case. From this, it is absolutely clear that Sri Das must have the knowledge that the proceedings were, at least, imminent even though, in fact, he had not till then known that the proceedings were pending, while, in fact, the case had been taken cognisance of by the Sub-divisional Magistrate since 29-3-1952.

(15) Mr. P. V. B. Rao contends that, according to the usual practice, the Sub-divisional Magistrate is simply to transfer and does not ordinarily try cases; as such, it cannot be said, according to him, that the District Magistrate was intending that the contents of the letter should reach the Magistrate, who was put in charge of the case for trial. It is well known here that the Sub-divisional Magistrate. Cuttack, does, in fact, try cases after he finishes his day's work of taking cognisance and transferring cases, and specially when a case is of some importance. The District Magistrate, therefore. ought to expect that the Sub-divisional Magistrate is likely to try this case. Furthermore, as it appears from the contents of the letter, the District Magistrate ought to have expected that the cognisance had not till then been taken of the case & this letter is very likely to influence the Sub-divisional Magistrate in taking cognisance of the case, which act is a judicial act, and, as appears from the provisions of Section 204, Criminal P. C., is discretionary with the Sub-divisional Magistrate.

Mr. Rao contends, in any view of the case, while Sri Das had not the intention of influencing the trial of the case in any manner whatsoever, it was after all a careless act on his part to have transmitted the letter to the Sub-divisional Magistrate with the endorsement "show this to S. D. M. for needful", and that he was not then aware of the far reaching effect of the contents of the letter. While we appreciate the position that the District Magistrate had to pay attention to the multifarious duties arising during the course of his functions as the Executive Head of the District, it is not possible for us to ignore his responsibilities of paying adequate attention and care in the discharge of his functions as the Head of the Judicial Administration of criminal cases of the District. He, being a very experienced officer, must realise that any lapse on his part, in paying due attention to the daily duties in that capacity, may lead to serious complications and repercussions, viewed from the higher standards of judicial administration.

(16) The endorsement, "show this to S. D. M. for needful" on a letter with the contents that the case is a spectacular one in which large quantities of clothes were hoarded by the accused dealer (a Marwari merchant), by fabricating a false account of sale, of course with a request for speedy trial may well mean to the Trying Magistrate that the case ought to end in conviction.

(17) The act of Sri Patnaik, who was in charge of the current duties of the Sub Divisional Magistrate on 28-4-1952, in transmitting this letter to the trying Magistrate, while he was on that very day transferring the case with an endorsement "To Trying Magistrate for needful" is more serious. In usual course, he must have read the letter, and, as is expected, he ought to have realised the implications of the contents and the influence it might exert upon the Magistrate before whom the accused, as recognised by all civilised jurisprudence, is certainly entitled to the fairest trial in a perfectly unbiased atmosphere.

(18) I am, therefore, definitely of the view that the letter expressing the opinion of a superior Officer of the position of the Deputy Secretary to the Government (Enforcement) of Orissa that it is a spectacular case in which a large quantity of clothes was hoarded by the accused by fabricating a false account of sale, with the endorsement of the District Magistrate "Show this to S. D. M. Sadar for needful", and further containing similar endorsement of the Sub-divisional Magistrate, when it reaches the Trying Magistrate, is bound to embarrass him and has a definite tendency of seriously affecting the fair trial of the case. The contemner No. 1, in having forwarded this letter to the Sub-divisional Magistrate when it is manifest from the contents of the letter that the filing of the case was at least imminent if cognisance had not already been taken with the endorsement, as quoted above, knowing that the Sub-divisional Magistrate was to exercise a judicial discretion under S. 204, Criminal P. C., in taking cognisance of the case and that it is quite likely that the Sub-divisional Magistrate may himself try the case, "has undoubtedly committed the offence of contempt of Court."

(19) The contemner no. 3, Sri S. N. Patnaik, is also guilty of the offence of contempt of Court in having forwarded this letter to the Trying Magistrate simultaneously while transferring the case for trial.

(20) This is not the first instance of its kind. We had had the sad experience of several cases during the recent years with such attempt at extra-judicial interference with the administration of justice. This Court had to issue General Letter No. 1 of 1949 (Criminal), dated 26-4-49 giving directions against any such extra-judicial interference. The Home Department of the Government also had issued letter dated 24-8-50 with similar directions. But in spite of our repeated warnings and directions, if such an act comes to our notice which has a definite tendency of interfering with the fair trial, we are definitely of the view that if we do not take any serious notice of such an act we would be failing in our duties if we do not maintain an atmosphere of complete assurance to the public of the State of a fully unbiased and

fair trial of the case free from any extra-judicial interference whatsoever. I, therefore, entirely agree with the order which is being passed by My Lord the Chief Justice.

(21) JAGANNADHADAS, C.J.: (On 4-2-1953) The facts of the case have been fully set out in the judgment of my learned brother, who has also given in extenso the contents of the letter which is alleged to constitute contempt and has summarised the gist of the explanation furnished by the three alleged contemners. It is, therefore, unnecessary to repeat the same. There can be no reasonable doubt that the communication of this letter to the Magistrate who was simultaneously being placed in charge of the then pending criminal case for trial thereof constitutes serious contempt of Court. As the order-sheet in the Criminal case, filed before us, shows that cognizance of the case was taken by the Sub-Divisional Magistrate, Shri K. C. Das, on 29-3-1952, on the report of the Supervisor of Supplies, Enforcement Department, and that on that very day, the summonses to the accused therein were issued for 28-4-1952. It also appears from the order-sheet that on 28-4-1952, the accused persons appeared in Court and that the third contemner Shri S. N. Patnaik, who was in charge on that day of the current duties of the S. D. M., made over the case to Shri C. V. Murty, Magistrate, 1st class, for disposal according to law. On that very day, he also forwarded to the same Magistrate the letter in question with the endorsement "to trying Magistrate for needful".

(22) The mischief of the letter arises from the statement therein that "this is a spectacular case in which large quantity of clothes was hoarded by the accused dealer (a Marwari Merchant), by fabricating false accounts of the sale." Here are two categorical assertions as of fact, viz., (1) that large quantity of clothes was hoarded, and (2) that the modus operandi was the fabrication of false accounts for the sale. Obviously, these two are issues of fact involved in the very case which was sent up to the 1st class Magistrate Shri C. V. Murty, for trial. A communication, therefore, of this letter to him through the channel of superior higher authorities, to whom in his executive capacity he is subordinate, is a course which has the necessary tendency to embarrass and hamper the trying Magistrate in the free and unbiased exercise of his judicial function.

(23) Having regard to the contents of the letter, therefore, it is quite clear that the communication thereof to the trial Magistrate at the very time when the case was to be taken up constitutes a clear contempt of Court. The only question is who out of the three alleged contemners can be said to have been guilty of the contempt.

(24) As regards the second alleged contemner, Shri S. Nanda, Deputy Secretary to the Government, Enforcement Department, I am prepared to accept his explanation that in view of the Book Circular No. 5 of the Government of Orissa, Home Department, marked Ext. A he addressed the letter to the District Magistrate not with reference to his judicial capacity but with reference to his executive capacity and in order to convey the request for a speedy trial having regard to the circumstances. But I am not quite satisfied that it was proper for him to have made the request to the District Magistrate for intimating the result.

In the context of the previous contents of the letter and the statement that it was a 'spectacular case' it might well be taken to convey a hint that the District Magistrate is to keep an eye on the result of the case, though ostensibly, it may pass off as a routine matter, having regard to what he states to be his normal duty to keep in touch with the District Magistrate with reference to his branch of the work. Even the request for a speedy trial emanating from a Deputy Secretary to the Government to the District Magistrate and intended to be communicated to the trial Magistrate, might well be a source of serious embarrassment to the trial Magistrate and affect the judicial discretion that he may be called upon to exercise when one or other of the parties to the case feel the necessity to ask for adjournments.

The proper course to adopt in such situations where a speedy trial was called for, is to instruct the prosecutor to apply in Court openly and formally, rather than to move through the executive machinery. This has been repeatedly pointed out by this Court. On the whole, however, since so far as the main portion of the letter, viz., the intimation of the opinion as regards the merits of the case are concerned, there is nothing to show that Sri Nanda wanted or knew it to be likely that it would be communicated as such to the trying Magistrate, I would give him the benefit of doubt and agree that the proceedings against him should be dropped, and it is ordered accordingly.

(25) As regards the first & the third alleged contemners, the case stands on a different footing. The third alleged contemner is clearly guilty of contempt of Court in forwarding the letter in question to the trial Magistrate. He should have realised that the contents of the letter have a clear tendency seriously to hamper the judicial function of the Magistrate who was to try the case, inasmuch as it conveys the expression of opinion of the Deputy Secretary of the Government as to the alleged truth of the case, and as to the alleged false modus operandi for the commission of the offence. The case of the alleged first contemner the District Magistrate, is sought to be distinguished on the ground that what he did, was only to forward the letter to the Sub-Divisional Magistrate, with the endorsement "for needful" and that it was thereby only intended that the Sub-Divisional Magistrate, who was not ordinarily expected to try the case, should bear the request as to speedy trial in mind, and transfer the case to a Magistrate whose file would not be heavy and who would be able to dispose of the case expeditiously.

But as pointed out by my learned brother, it is the Sub-Divisional Magistrate that takes cognizance of a case and exercises the preliminary function of summoning the accused to appear as, in fact, he has done in this case (vide the order-sheet). Taking cognizance is not a mere routine or ministerial function. Section 204, Cr. P. C., shows that the Magistrate who takes cognizance of an offence is to issue summonses to the accused only if, in his opinion, there is sufficient ground for proceeding. He, therefore, exercises a judicial function even at that stage. As pointed out in — 'Boywalla J. D. v. Sorab Rustomji Engineer', AIR 1941 Bom 294 at p. 295 (H), the wording of S. 204, Cr. P. C., seems to suggest that there may be a case in which a Magistrate has taken cognizance, but in which, in his opinion, there is no sufficient ground for proceeding. It seems to follow by necessary implication that the Magistrate in such a case has the power to discharge the accused. If this view be correct — and I am respectfully inclined to agree with it — it is quite clear that the communication of this letter even to the Sub-Divisional Magistrate himself with the knowledge that in the ordinary course

he is at least bound to take cognizance clearly constitutes contempt of Court.

(26) Both the District Magistrate contemner No. 1 and the Sub-Divisional Magistrate, contemner No. 3 justify their action by suggesting that they forwarded the letter sent by the Deputy Secretary to the Government to the trial Magistrate, as a routine measure, in order to convey the request of the Deputy Secretary for ensuring the speedy trial. They assert that they had no intention of prejudicing the fair trial of the case on its merits. But, as pointed out by my learned brother, it is well settled that it is the clear tendency of the letter and not the intention with which the sender has sent it, that is the determining criterion in such cases. Some further question has been raised that the District Magistrate was not aware at the time that the case was already taken cognizance of by the Sub-Divisional Magistrate. But this clearly is also immaterial as shown by my learned brother. I have, therefore, no hesitation in agreeing with my learned brother in adjudging both the District Magistrate, contemner No. 1 and the Sub-Divisional Magistrate, contemner No. 3, as being guilty of the offence of contempt of Court in respect of the criminal proceeding then pending or at least known to be imminent.

(27) The only question that remains for consideration is, as to the nature of the punishment to be awarded. We are prepared to accept the statements of both the 1st and the 3rd opposite parties that they had no intention of prejudicing the fair trial of the case. But that cannot, by itself, be an extenuating circumstance. This is not the first instance of the kind that has come to the notice of this Court. In 'Original Cr. Misc. case Nos. 3 and 5 of 1951 (Ori) (I)', this Court had occasion to draw up proceedings in contempt against the then District Magistrate of Cuttack, and then Civil Supplies Officer, Cuttack, in connection with (1) a letter dated 24-2-51 addressed by the District Magistrate, Cuttack, to the Sub-Divisional Magistrate, Athagarh, enclosing a complaint by the Assistant Civil Supplies Officer, Cuttack, for prosecution of an accused, and (2) another letter dated 19-3-51, addressed by the Civil Supplies Officer to the same Sub-Divisional Magistrate in connection with the same case. This Court while finding that these letters constituted contempt of Court, accepted the assurance of the respective contemners that they had no intention to prejudice the course of fair trial, and in view of the apology tendered by them, directed the dropping of the proceedings by its order dated 1-8-51. (It may be noticed that in the present case before us any apology is conspicuous by its absence).

Some other instances of the kind have come up to the notice of the Court on its administrative side. In the year 1949, it was brought to the notice of this Court by the judgment of the Additional Sessions Judge, Gangam Nayagarh, dated 14-5-1949, in Cr. Misc. Case No. 20/49 that the Superintendent of Police, Puri, wrote a letter to the District Magistrate, while the criminal case was still pending in the investigation stage on the question whether the bail already granted to the accused was or was not to be cancelled on an application on that behalf. That letter stated as follows:

> "Under the circumstances, I request you to give necessary instructions to the S. D. M. to cancel the bail-bonds of the accused."

On this, the judicial peskar of the District Magistrate put up a note that "the trial Magistrate may be informed to do the needful." The additional District Magistrate appears to have passed on that letter to the trial Magistrate with the order 'Yes'. This matter was brought to the notice of the Court on its administrative side, but it being one of the earliest cases in this Court of such extra-judicial interference with the pending magisterial proceedings, this Court did not initiate any contempt proceedings but thought it sufficient to issue a General Letter No. 1 of 1949 (Criminal dated 26-4-1949) drawing the attention of the District Magistrates in the State to the position which arises in such cases, for their future guidance.

That position was clarified there in the following terms:

> "Any extra-judicial interference whatsoever directed towards influencing the manner of disposal of a pending case amounts to serious contempt of Court. A Court can be approached in one way only, that is, by a judicial application in proper form. Any instance of approach with reference to a pending case in any other manner must be immediately reported to the High Court."

It would appear that thereupon the Government also in the Home Department letter dated 24-8-1950, drew the attention of the Magistrate to the General Letter No. 1 of 1949 (Criminal) of this Court above referred to, and instructed that it should be duly observed. Once again so recently as in June 1952, the Sub-Divisional Officer, P. W. D., Gangpur, Sub-Division, wrote a letter to the 2nd class Magistrate, Panposh, Sundergarh, about a case relating to theft of some Government Telephone Wire during the pendency of that case.

This matter was brought to the notice of this Court on the administrative side, and once again this Court did not take notice of it to the extent of initiating proceedings in contempt. The Court contented itself with bringing the same to the notice of the State Government. If, in spite of such repeated instructions from the Court and of a previous instance when assurances of bona fide intention and apology were accepted, once again similar instances come to the notice of the Court, this Court would be failing in its responsibility towards the criminal judicial administration of the State, if it took such instances lightly and dropped the proceedings without serious notice or merely accepted the assertion of bona fides and of absence of any deliberate intention. Indeed the very absence of deliberate intention pleaded which means the absence of deliberation, is the most insidious and disquieting feature in cases of this kind, and only shows a deplorable mental attitude on the part of the Magistrates who are responsible for such instances. They do not seem to realise that whenever in the course of their official duties they have to send a communication to a subordinate Magistrate relating to a criminal case pending before him, it is their primary responsibility to make sure that nothing is conveyed which may have a tendency to embarrass such subordinate Magistrate in the discharge of any part of his judicial function.

This Court realises that so long as there is a common machinery combining both the magisterial and executive functions the position of officers in that dual situation is one of very great difficulty. But this difficulty itself calls for greater vigilance on their part and on the part of the Government so long as the dualism is permitted to continue. Neither the existence of this dualism, nor the inherent difficulty of an officer

placed in that situation, can be taken to be an excuse or extenuation. On the other hand, it is a stronger reason for expecting from the executive officers concerned greater discrimination and care, in such cases, and for the Court to take effective steps to take serious notice of such instances so as to prevent the recurrence thereof.

(28) In the present case, we recognize that unlike in some of the instances previously noticed the letter concerned does not contain any direct instructions to the trial Magistrate as to any part of the judicial function which he has to discharge, but as already pointed out, it has the clear tendency seriously to affect the impartial trial of the case. There has been some attempt to show that the trial Magistrate was not in fact affected by the result in the discharge of his judicial function, but that is absolutely an irrelevant consideration in such cases. In the circumstances, above noticed, we consider that we should give the contemners an opportunity of making their representation as regards the sentence to be awarded.

(29) We accordingly adjudge both opposite party No. 1 and No. 3 guilty of contempt of Court, and have decided to direct them to appear in person before this Court to submit what they have to represent as regards the nature of the punishment to be awarded and to receive the judgment of this Court in so far as the sentences are concerned.

(30) This will be posted on the 9th instant, for personal appearance and for passing of the sentence. Issue notices for personal appearance at once. (On appearance of party No. 1 and party No. 3 on 9-2-1953 the Court ordered the following:)

(31) JAGANNADHADAS C. J.: Mr. Das and Mr. Patnaik, the Court had ajudged both of you as having been guilty of contempt. The considerations which have led us to the conclusion that a serious view thereof must be taken, have been fully set out in our judgment delivered last week. The Court will be failing in its duty towards the subordinate Courts, if it did not strive effectively to prevent the pollution of the stream of justice in those courts. We have accordingly thought it right to call upon you to explain why you should not be punished by a sentence of imprisonment. We have heard the Advocate-General on your behalf, & we have heard both of you personally. We do not find, however, that any adequate expression of regret has been expressed either by the Advocate-General on your behalf or by yourself. You have both only said in effect that if the law finds you to be guilty of contempt, you bow down to the judgment of the Court. We do not consider that to be any adequate expression of apology.

In the circumstances, we have felt constrained to take a serious view of what has been done. We have accepted your explanation that it was unintentional and in the course we propose to take, we do not wish to be understood as finding any of you guilty of any personal blemish or moral turpitude. The serious view we take, however, is due to our feeling that the gravity of such an offence is not sufficiently appreciated in general. In order, therefore, to quicken the conscience and ensure the diligence of persons to whose lot it falls to discharge such functions but without sufficient deliberation, a sentence of imprisonment appears to be the only appropriate course. We wish, however, to make it a token punishment in this case. Hence we sentence each of you to simple imprisonment till the rising of the Court, and we rise now.

(32) MOHAPATRA J.: I agree.

B/H.G.P. Order accordingly.

A. I. R. 1954 ORISSA 7 (Vol. 41, C. N. 2)

JAGANNADHADAS C. J.

H. Naik, Official Liquidator, Puri Bank, Petitioner v. Panchanon Das, Opposite Party.

Money Suit No. 16 of 1951, D/- 27-3-1952.

(a) Provincial Insolvency Act (1920), S. 46 — "Mutual dealings" — Interpretation of — Set-off — Suit by Official Liquidator of Bank against depositor on overdraft account — Overdraft allowed on security of fixed deposits of depositor — Claim of set-off by depositor — Companies Act (1913), S. 229.

Mutual credit or mutual dealings simply mean reciprocal demands which must be naturally terminated in a debt. Where there are reciprocal demands available by one party against the other in the same capacity, it is a clear case in which a set-off is a matter of course. (Para 15)

A suit was filed by an Official Liquidator of a Bank against a depositor for recovery of overdraft amount due in respect of current, mutual and open account. The overdraft facilities were allowed on the security of the depositor's fixed deposits with the bank. The depositor claimed a set-off in respect of the amounts payable to him under the fixed deposits.

Held (1) that the case must be taken to be one of mutual dealings between the parties, since there were reciprocal demands, which must in the normal course terminate in a debt owing by one party to the other. The depositor was entitled to a set-off as claimed inasmuch as S. 46, Provincial Insolvency Act is applicable to winding up proceedings by virtue of S. 229, Companies Act; Case law Ref. (Para 15)

(2) the fact that the fixed deposits had not matured by the date of the application for winding up did not affect the character of the fixed deposit as a debt payable by the bank to the depositor, and could not deprive the depositor of the equitable relief by way of set-off in respect of the fixed deposits. (Para 16)

Anno: Provincial Insolvency Act, S. 46 N. 1; Companies Act, S. 229 N. 12.

(b) Civil P. C. (1908), O. 6, R. 2 — Matter depending on legal view to be taken on certain undisputed facts — Mere allegations and cross-allegations in the pleadings should not be treated as sufficient to deprive the party to a right to relief if otherwise made out.

(Para 15)

Anno: C. P. C., O. 6, R. 2 N. 9.

(c) Limitation Act (1908), Art. 85 — Open, mutual and current account — Test.

(Quaere): Whether the criterion of shifting balances is the test for an open, mutual and current account, as that term is used under Art. 85. (Para 15)

Anno: Lim. Act, Art. 85 N. 3, 13.

G. Jena and U. N. Rath, for Petitioner; R. N. Sinha, for Opposite Party.

CASES REFERRED TO:
(A) (1818) 8 Taunt 499: 129 ER 477
(B) (1868) 37 LJ CP 221: 3 CP 444
(C) (1895) 64 LJ QB 807: (1895) 2 QB 618
(D) ('22) AIR 1922 Lah 222: 3 Lah 274
(E) ('27) AIR 1927 Lah 228: 8 Lah 105
(F) ('40) AIR 1940 Mad 436: 190 Ind Cas 711
(G) ('41) AIR 1941 Mad 622: 198 Ind Cas 578
(H) ('40) AIR 1940 Mad 266: 1939 Mad WN 1231
(I) ('14) AIR 1914 Lah 317: 23 Ind Cas 927
(J) (1920) 89 LJ KB 912: (1920) 2 KB 322
(K) (1835) 1 Bing (NC) 743: 131 ER 1303
(L) (1843) 12 M & W 751: 152 ER 1402

JUDGMENT: This is a suit filed by the Official Liquidator of the Puri Bank for recovery of an amount of Rs. 7988-5-0 from the defendant alleged to have been due in respect of the current, mutual and open account No. 202 of the defendant in the Balasore Branch of the Puri Bank. The defendant was admittedly a person having a current account with the said branch of the Puri Bank. In addition to having a current account, he made certain fixed deposits and was allowed overdraft facilities for double the amount thereof, on the security of the said deposits. The two fixed deposits are evidenced by Exts. B and B-1 and are for Rs. 2000/- each. Ext. B is dated 17-10-1944, and Ext. B-1 is dated 21-9-45. That they were pledged as security for the overdraft account is evidenced by Ext. C dated 23-10-45. These facts are not disputed. The amount now sued for is what is due in respect of the said overdraft account with interest without any adjustment of the fixed deposits. The defendant does not dispute the correctness of the principal amount shown in the account as having been advanced to him, nor does he dispute that the claim is in time. His defence is two-fold: (1) That the interest should have been calculated at 7½ per cent and not at 9 per cent as has been claimed in the plaint: (2) That the moneys due to him under the fixed deposit receipts, Exts. B and B-1 have in fact been adjusted as against his overdraft account and that he is liable to pay only the balance. (3) That even if the adjustment is found not to be a fact or not to be valid and binding on the liquidator, he is entitled as a matter of law to a set-off in respect of the amounts payable to him under the said fixed deposit receipts.

(2) So far as the dispute regarding interest is concerned, the defendant relied upon a letter Ext. A dated 18-9-45 written by the Secretary of the Bank to the defendant which shows that in respect of the fixed deposit amount, the defendant will get 7 per cent and that in respect of his over-draft account, he will pay 7½ per cent. The advocate for the plaintiff-liquidator accepts the genuineness of this letter and states that he is willing to have the interest as from the date of this letter recalculated with reference to the terms of this letter, Ext. A and to reduce the claim in the plaint accordingly. Before therefore passing a decree in this case this recalculation will have to be made as above.

(3) The main question raised in this case is about the truth of the factum of adjustment pleaded by the defendant. On behalf of the Bank, learned counsel for the liquidator does not accept this adjustment as true. He also raises the plea that the adjustment is not valid and binding for two reasons. (a) By the date of the alleged adjustment, neither of the fixed deposits under Exts. B and B-1 had matured and the Secretary, who is said to have made the adjustment of the unmatured deposits had no authority to do so, without the orders of the Managing Director. Therefore the said adjustment is not valid and binding on him; (b) The application for winding up of the Bank was admittedly made on 24-7-47 and the adjustment is alleged by the defendant to have been made by the Secretary on 25-7-47. Hence the same is not valid and binding, unless the Court sanctions it.

(4) As regards the truth of the alleged adjustment, the parties have gone to trial and the defendant on whom the burden of proof lies has in the first instance examined himself as D. W. 1 and has marked Exts. A to K. The plaintiff has examined P. W. 1 and P. W. 2 and has marked Ext. I.

(5) Broadly stated the defendant's evidence is to the following effect. The two fixed deposits evidenced by Exts. B and B-1 covering Rs. 4,000/- and another fixed deposit of Rs. 1000/- which he had with the Bank of Calcutta, were all given as security for the overdraft account in the Puri Bank which the defendant required for his business. He stopped his business in the year 1947. He received the demand Ext. K and wrote a letter to the Secretary of the Bank, Ext. D dated 24-7-47 informing him that he cannot any longer run his business and requesting him to adjust his fixed deposits against the overdraft accounts and to let him know what further money remained to be paid by him. To this he received a reply from the Secretary, Ext. D-1 of the same date, informing him that he was busy at the moment and would send him a reply in a few days. He therefore went in person to the Bank on 25-7-47. The Secretary attended to him and made the necessary adjustments between the overdraft account and the fixed deposits. The Secretary noted all the adjustments in the pass-book of the defendant relating to his overdraft account. The defendant also says (in cross-examination) that to the best of his recollection, endorsements were also made on the back of the fixed deposit receipts showing the adjustment. The Secretary who has been examined as P. W. 1 while accepting that the letter Ext. D dated 24-7-47 was received by him and that he sent his reply, Ext. D-1, of the same date, denies that the defendant came to him on the 25th or that he made any adjustments of the fixed deposits, as against the over-draft account, on the 25th or on any other date.

The best evidence of this adjustment would naturally have been (1) the pass-book of the defendant for the defendant's over-draft account in which according to him all the adjustment entries have been made and also (2) the original fixed deposit receipts which according to him would contain endorsements of discharge presumably signed by him. It must be noted at this stage that it is the plaintiff who in the normal course would have the custody of the fixed deposit receipts on either footing, i.e., on the accepted footing that the fixed deposits were security, or on the disputed footing that the fixed deposits had been adjusted and discharged. The plaintiff has accordingly produced these documents marked as Exts. B and B-1. Exts. B and B-1 do not show any endorsements of discharge. The defendant has not produced the pass-book relating to his current over-draft account, which in the nor-

mal course should have been with him. To account therefore for these two circumstances, which would prima facie go against him, the defendant challenges the genuineness of Exts. B and B-1 and comes out with a definite case that on a subsequent date, viz., in March, 1948, he went to the Bank to pay a sum of Rs. 80/- towards his debt and that the pass-book was then handed over to the Secretary for making necessary entries therein. His case is that the pass-book has ever since remained with the Bank and that it has not been returned and is now being suppressed. Thus, the two subsidiary questions of fact that have been raised with reference to the plea of adjustment are (1) Are the two documents, Exts. B and B-1 genuine? and (2) Does the pass-book of the defendant remain with the plaintiff, who does not produce it.

(6-11) (After considering the evidence his Lordship proceeded :) In view of the above circumstances, and particularly having regard to the fact that the pass-book relating to the overdraft account has not been produced by the defendant and the fact that his case as to the retention of that pass-book by the bank has not been made out, and also in view of the fact that the fixed deposit receipts, Exts. B and B-1 do not bear any endorsements of discharge and the defendant has not made out his plea that Exts. B and B-1 are not the original receipts, I have come to the definite conclusion that the plea of adjustment as a fact raised by the defendant cannot be accepted as true.

(12) The next question that arises is whether even if the adjustment pleaded is true, it is valid and binding. The two fixed deposits which were for three years each, matured admittedly on 7-8-1947, and 21-9-1948. The alleged date of adjustment is 25-7-47, i.e., clearly before the dates of maturity. It is the case of the plaintiff that the amounts payable under the fixed deposits were not available to be paid or adjusted before the maturity, except on the specific sanction of the Managing Director. He says so in his chief-examination. Though there has been some kind of cross-examination, on the point, it has not been specifically and clinchingly directed towards it. Neither side has called for or produced the rules of the Bank to show whether or not the Secretary had independent authority in this behalf. But Ext. A, the letter filed on behalf of the defendant and relied upon by him as regards the variation of the interest, indicates that even for that variation, the Managing Director's sanction was required. I am, therefore, prepared to accept the evidence of P. W. 1 that the fixed deposits could not be adjusted before the maturity without the specific sanction of the Managing Director. Indeed, this may also be taken to have been realised by the defendant, because he has given evidence that when he met the Managing Director on one occasion at Balasore, he had a talk with him in the presence of the Secretary which resulted in the letter, Ext. A granting reduction of interest on the overdraft account. According to him, it was on that very occasion that he proposed to the Managing Director to permit him to adjust the fixed deposits whenever required even before maturity and he says that the Managing Director agreed to it. This portion of the story cannot be believed, because, if that is true, there is no reason why the letter, Ext. A which relates to the same conversation, does not in terms, refer to this matter also which was equally important. I would, therefore, hold that the authority of the Managing Director was required for adjusting the fixed deposits under Exts. B and B-1 before maturity and that such authority has not been made out in this case. Therefore the adjustment made by the Secretary even if true, is not valid and binding on the liquidator.

(13) The further point raised for the plaintiff is that under S. 168, Companies Act, the order of winding up dates back to the date of the application and that no transaction subsequent to that date is binding on the liquidator, except with the specific sanction of the Court. As has been already stated, the application for winding up in this case was made on 24-7-47 and the alleged adjustment was effected on 25-7-47. The adjustment therefore, if true, cannot be valid and binding unless the Court sanctions the same. The defendant suggests that the sanction should now be granted. But there is absolutely no reason in this case, why this adjustment, even if true, should be sanctioned at this stage. Obviously having regard to the proximity of the dates, such an adjustment, if true would be open to the suspicion that it is some hasty and collusive attempt to defeat the general body of creditors by a fraudulent preference.

(14) I am therefore definitely of the opinion that the adjustment pleaded was not true as a fact and that even if true, it is unauthorised and cannot be sanctioned by the Court.

(15) The next question however remains as to whether or not in spite of the absence of any adjustment, the defendant is entitled to a set-off against his dues, for the amount due to him under the fixed deposit receipts, Exts. B and B-1. The defendant's advocate relies on S. 229, Companies Act read with S. 46, Provincial Insolvency Act. Section 229, Companies Act is as follows:

> "In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

Section 46, Provincial Insolvency Act is as follows:

> "Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the other party and the balance of the account, and no more, shall be claimed or paid on either side respectively."

The argument on behalf of the defendant is that the debt due by the defendant to the Bank and the amount due by the Bank to the defendant in respect of the fixed deposits are mutual dealings between the insolvent Bank and the defendant in his capacity as debtor as

well as creditor and that therefore he is entitled to a set-off in respect of the two inasmuch as S. 46, Provincial Insolvency Act is applicable to winding up proceedings by virtue of S. 229, Companies Act above quoted. It is contended on behalf of the plaintiff that there is here no question of any mutual dealings, but only the case of moneys advanced on the security of fixed deposits.

He also relies on the fact that while the plaint in terms was based on the allegation that there was a mutual open and current account between the bank and the defendant, the defendant in his written statement repudiated it. So far as this last argument is concerned, I do not think that in a matter like this, which depends on the legal view to be taken on certain undisputed facts, mere allegations and cross-allegations in the pleadings should be treated as sufficient to deprive the party to a right to relief if otherwise made out. In fact, if the plaintiff relies on the denial of the defendant in his statement, the defendant can equally rely upon the affirmance of the plaintiff in his plaint. It has also been attempted to be argued on behalf of the plaintiff that there can be no question of mutual accounts, unless the transactions between the two are such as to result in shifting balances. It appears to me that it is unnecessary to go into the question whether or not the criterion of shifting balances is the test for an open mutual and current account, as that term is used under Art. 85, Limitation Act. What is necessary for the present purpose is whether or not dealings between the plaintiff and the defendant in this case fall within the category of the phrase "mutual dealings" under S. 46, Provincial Insolvency Act. The leading case on the subject is — 'Rose v. Hart', (1818) 129 ER 477 (A) to be found also in the II Volume of Smith's Leading Cases, p. 271, 12th Edition. It would appear from a consideration of that case and the cases following the same, for instance — 'Naoroji v. Chartered Bank of India', (1868) 3 C.P. 444 (B) and — 'Palmer v. Day', (1895) 2 QB 618 (C), that mutual credit or mutual dealings simply mean reciprocal demands which must be naturally terminated in a debt. There can be no doubt that with reference to that test the present case must be taken to be one of mutual dealings between the parties, since there are reciprocal demands, which must in the normal course terminate in a debt owing by one party to the other.

The present is a simple case which is not in any way complicated by considerations whether the debt on one side is an individual debt and on the other side either a joint debt or a debt in the representative capacity or of some other different character. See for instance, — 'Nur Husan v. Mt. Ghulam Zohra', AIR 1922 Lah 222 (D); — 'Alliance Bank of Simla v. Mohan Lal', AIR 1927 Lah 228 (E); — 'Verappa Chettiar v. J. V. Pirrie', AIR 1940 Mad 436 (F) and — 'Travancore N. & Q. Bank Ltd. v. Cyril Gill and John Stanley Goodwin', AIR 1941 Mad 622 (G). In fact, the above cases themselves clearly show that in a case where there are reciprocal demands available by one party against the other in the same capacity, it is a clear case of mutual dealings in which a set-off is a matter of course. The case in — 'Sundaravaradan v. R. Narasimha Chari', AIR 1940 Mad 266 (H) is also a clear authority in favour of this position.

(16) The only point about which I have had some doubt on this portion of the case is whether the fact that at the date when the application for winding up has in fact been made, viz., 24-7-47, the two fixed deposits had not matured and were not therefore payable on that date, would make any difference. The leading case in — '(1818) 129 ER 477' (A), relies on the English statutory provision which refers to "mutual debts between the bankrupt and any other person 'at any time before' such person becomes bankrupt" indicating that the date of becoming bankrupt which in the present case must be taken to be the date of application for winding up order, would be the material date. That the date of the insolvency would be material for the purpose of set off would also appear from a case in — 'Radha Kishen v. Gangaram Radha Kishen', AIR 1914 Lah 317 (I), where an assignment of a debt after the commencement of the insolvency, though the debt itself was one which arose before the insolvency, was not recognised as being available for set off. It appears to me however that the principle as to the right to set off being determined with reference to the date of the bankruptcy, does not stand in the way of the defendant in this case. The fact that the fixed deposits had not matured by the date of the application for winding up does not affect the character of the fixed deposit as a debt payable by the bank to the defendant. It may be only a future debt and not a present debt by that date, but it is a debt none-the-less at the date of the bankruptcy and there is no reason why it should not still be available for set off as a debt. All that the leading case in — '(1818) 129 ER 477 (A)' requires is that there must be credits on each side, which must in their nature terminate in debts. On this principle, a delivery of property with directions to turn it into money has been considered as a credit available for set off though in fact the property had not been so converted by the date of the bankruptcy. See — '(1895) 2 QB 618 (C). A future but ascertained debt cannot stand on a worse footing.

I can see therefore no reason for depriving the defendant of the equitable relief by way of set off in respect of the fixed deposits though in fact, the deposits had not matured. Indeed, it appears to me that the case in — 'Baker v. Lloyd's Bank Ltd.', (1920) 2 KB 322 (J) is a case where a set-off was allowed in respect of a debt which may be called a future debt by the relevant date. Similarly the case in — 'Gibson v. Bell', (1835) 131 ER 1303 (K) and also the case in — 'Alsager v. Currie', (1843) 152 ER 1402 (L) would also on facts appear to be cases where the set-off was allowed in respect of debts which by the date of the bankruptcy must be considered to be future debts. I am therefore of the opinion that in the present case, the defendant would be entitled to a set-off in respect of the fixed deposit amounts under Exts. B and B-1, though they had not matured by the date of the application for winding up. and though the factum of adjustment pleaded by him is found not to have been proved.

(17) Having regard to the letter, Ext. A dated 18-9-1945, interest payable on the fixed deposit amounts would be 7 per cent. as from the date of that letter, but no interest will run from the date of the application for winding up.

(18) In the result, therefore, the plaintiff will have a decree for an amount to be recalculated on the basis of my findings above as regards the right to a set-off and the interest payable on the overdraft account and on the fixed deposit amounts with reference to Ext. A dated 18-9-1945. Since the defendant has set up a plea of adjustment, which has not been substantiated on facts, and which has occasioned the trial he will pay the costs of the plaintiff in the suit, though he has succeeded on the point of law raised.

B/G.M.J. Order accordingly.

A. I. R. 1954 ORISSA 11 (Vol. 41, C. N. 3)

NARASIMHAM AND MOHAPATRA JJ.

Artatran Alekhagadi Brahma and others, Plaintiffs-Appellants v. Sudersan Mohapatra and others, Defendants-Respondents.

Second Appeal No. 203 of 1948, D/- 29-7-1953, against the judgment of Sub-J., Puri, D/- 4-3-1948.

(a) Civil P. C. (1908), S. 92 — Suit against alienees — (Religious endowment — Alienation) — AIR 1934 Pat 584, Dissented from.

In the case of a public endowment, it is the sebait alone who can represent the deity to bring a suit for recovery of possession of the properties improperly alienated by a sebait; other members of the public have got only the remedy under the provisions of S. 92, Civil P. C. or under S. 54, Orissa Hindu Religious Endowments Act for removal of the trustee guilty of mal-administration and for the appointment of a new trustee who alone can represent the deity. Any other person, however interested he may be in the endowment, is not entitled to represent the deity in such a suit. Case law discussed.

(Paras 5, 9)

Anno: C. P. C., S. 92 N. 2, 9, 28.

(b) Civil P. C. (1908), S. 92, O. 1, R. 8 — Suit against third parties.

A suit by persons representing all the villagers under O. 1, R. 8 in their capacity as worshippers of a public deity in the village, to set aside the alienation made by the 'marfatdar' in favour of third persons is maintainable. But plaintiffs are not entitled to possession of the property in dispute; only the 'marfatdar' is entitled to possession of the property on behalf of the deity. AIR 1917 Mad 112 (FB); AIR 1940 Mad 81, Ref. (Paras 11, 12, 13)

Anno: C. P. C., S. 92 N. 2, 28, O. 1, R. 8 N. 6.

B. N. Das and C. B. Mohanty, for Appellants; B. Mohapatra and S. Misra, for Respondents.

CASES REFERRED TO :

(A) ('05) 32 Cal 129: 31 Ind App 203 (PC)
(B) ('27) AIR 1927 Cal 244: 99 Ind Cas 917
(C) ('38) AIR 1938 Pat 394: 175 Ind Cas 218
(D) ('31) AIR 1931 Cal 776: 135 Ind Cas 273
(E) ('34) AIR 1934 Pat 584: 152 Ind Cas 302
(F) ('28) AIR 1928 PC 16: 55 Cal 519 (PC)
(G) ('42) AIR 1942 Cal 99: ILR (1941) 2 Cal 477
(H) ('49) AIR 1949 Cal 199
(I) ('17) AIR 1917 Mad 112: 40 Mad 212 (FB)
(J) ('40) AIR 1940 Mad 81: 189 Ind Cas 749
(K) ('10) 5 Ind Cas 901: 20 Mad LJ 151

MOHAPATRA J.: This is a plaintiff's Second Appeal against the judgment and decree dated 4-3-48, of Sri B. K. Patra, Subordinate Judge of Puri in Title Appeal No. 10/47. Admittedly the deity (plaintiff 1) Artatran Alekhagadi Bramha is the owner of the property in dispute. Plaintiffs 2 to 19 are the villagers of the village in which the deity is situate. The suit is for a declaration that the sale deed dated 4-1-44, executed by defendant 3 in favour of defendants 1 and 2 is invalid as not being for justifying necessity of the deity. The plaintiffs have prayed for confirmation of plaintiff's possession in respect of the property in suit. The plaintiffs allege that the deity is a public one and that the villagers had founded the deity and are marfatdars. For performing Sebapuja of the deity they have brought defendant 3 from mouza Benupada.

According to the plaintiffs, therefore, it is the villagers who are the marfatdars of the deity and defendant 3 is merely in the position of a servant. The present suit was brought on behalf of all the villagers represented by plaintiffs 2 to 19 under the provisions of Order 1, Rule 8, Civil P. C., and the permission of the Court under the said rule was also obtained.

(2) The defence plea was that it was defendant 3 who founded the deity and he is the marfatdar; plaintiffs 2 to 19 have no right to represent the deity and the suit must fail as being not maintainable and the transaction dated 4-1-44 is for justifying necessity of the deity.

(3) The case had a chequered career and it will not be out of place to give a short history of the case. The learned Munsif who first tried the case held the deity to be a public one and that there was no legal necessity for executing the transaction in favour of defendants 1 and 2. The learned Munsif decreed the suit even though he did not come to a definite finding as to whether defendant 3 or the villagers were the marfatdars. His judgment was based on the position that plaintiffs 2 to 19, even though they are mere worshippers, can maintain the suit as defendant 3, by his own conduct, made himself unfit to bring the present suit.

In appeal, it was found that it was only a marfatdar who could maintain a suit of this nature to set aside an alienation; the villagers cannot effectively represent the deity and as such, the suit is to fail if plaintiffs 2 to 19 are not marfatdars. In this view, therefore, he remanded the entire case for disposal in accordance with law and directed the Munsif to come to a clear finding as to whether plaintiffs 2 to 19 are the marfatdars of the deity.

The learned Munsif, after remand, found that the villagers are the marfatdars and even went on to find as a position of law that any worshipper, interested in an endowment, is entitled to maintain a suit of this nature. The learned lower appellate Court in his judgment, which is under appeal before us, has found as a matter of fact that it is defendant 3 who is the marfatdar and plaintiffs 2 to 19 are not. On the position of law on a review of many cases he has come to the decision that the marfatdar alone can maintain the suit and, as such, he has dismissed the plaintiff's suit.

(4) It is to be mentioned here that the two findings remain unchallenged and final, that the deity is a public deity and that the transaction was for

no legal necessity. Mr. B. N. Das, appearing on behalf of the plaintiffs-appellants, has taken up two points: (i) that the learned lower appellate Court has gone wrong in coming to the finding that defendant 3 alone is the marfatdar; and (ii) that even the villagers as worshippers of the deity have got the right to represent the deity as defendant 3 has by his own conduct disqualified himself to bring the suit.

The first point seems to be a question of fact which is concluded by the finding of the lower appellate Court. In the Current Settlement record of rights in respect of the properties standing in the name of the deity, defendant 3 has been recorded as the marfatdar. Defendant 3 is also recorded as the marfatdar of the deity in the Revisional Settlement Khatian. These two records of rights raise a strong presumption that defendant 3 is the marfatdar. The lower appellate Court was also impressed with the position that the Kabalas in respect of the lands purchased by the deity stand in the name of defendant 3 as marfatdar. This directly militates against the theory set up by the plaintiffs that defendant 3 was merely a servant.

Mr. Das very strongly relies upon the position that the Bijesthali (Seat) of the deity stands recorded in the name of the deity through the villagers as marfatdars in the Current Settlement. In the Revisional Settlement Bijesthali is recorded in the name of Gangadhar Mohapatra, the Zamindar of the village. The learned lower appellate Court has considered this aspect of the case and has come to a definite finding that

> "In these circumstances the explanation offered by defendant 3 regarding the circumstances under which the Bijesthali of the deity was not recorded in his name either in the R. S. or C. S. Khatian appears to me to be satisfactory".

In the face of these findings, therefore, the first point taken up by Mr. Das fails.

(5) But the second point seems to have considerable force and requires closer scrutiny. I will first of all refer to a decision of their Lordships of the Privy Council reported in — Jagadindra Nath v. Rani Hemanta Kumari Debi', 31 Ind App 203 (PC) (A). There the sebait, being a minor at the time when the cause of action for the suit arose, brought the suit within 3 years after his attaining majority and wanted to rely upon the provisions of Section 7, Limitation Act; the defence plea taken in the case was that the idol being the plaintiff, the suit was barred by limitation and the minority of the sebait was immaterial.

Their Lordships made a very categorical observation which is as follows:

> "But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property.. 'Every such right of suit is vested in the sebait, not in the idol."'

In this view of the matter, their Lordships allowed the plaintiff protection under Section 7 of the said Act as the sebait was a minor when the cause of action arose. This observation is a strong support for the contention that it is the marfatdar and marfatdar alone in whom the right to sue vests who can bring a suit on behalf of the deity; and any other person, however interested he may be in the endowment, is not entitled to represent the deity in a suit.

(6) A similar case came up before Chotzner J. in — 'Kalimata Debi v. Nagendra Nath', AIR 1927 Cal 244 (B), where a suit was instituted by Sri Sri Kalimata Debi, the public deity, by her next friend, Srimati Basant Kumari Debi, one of the worshippers of the said deity, for declaration that the deed of alienation executed by the marfatdar is not binding on idol. His Lordship relied on the observation made by their Lordships of the Privy Council to come to the conclusion that it was the sebait alone and no one else who could institute a suit on behalf of the deity.

He, however, made some observations to the effect that:

> "Had the position been that Nagendra in his capacity of shebait had definitely declined to institute the suit, it might perhaps have been Basant as the next friend of the idol to have taken his place, but in the absence of any such refusal it seems to me that neither Basanta nor the idol are competent."

It is clear from the above observation of Chotzner J. that he entertained doubt about the position when the real shebait would refuse to institute a suit.

(7) But a very categorical and emphatical pronouncement has been made by Agarwala J. in — 'Kunj Behari v. Shyam Chand' AIR 1938 Pat 394 (C). The reasons given by his Lordship in support of his decision seem to carry much force. This was a case of public endowment in a suit for recovery of a part of the trust property which had been alienated by the sebait. The suit was instituted not by sebait Radhagovinda but by one Jyoti Lal Goswami describing himself as the future sebait and the son of Radhagobinda. Sebait Radhagobinda was made a party as defendant 4. His Lordship observed that in the case of religious endowment it was the sebait alone representing the deity who could bring a suit for recovery of the part of the trust property from the hands of a stranger-alienee from the sebait. The only remedy of the public is to bring a suit under Section 92, Civil P. C., for the removal of the trustee who effected the alienation.

His Lordship distinguished the case of — 'Girish Chandra v. Upendra Nath', AIR 1931 Cal 776 (D), wherein it was held that the worshippers or the other members of the public who are interested in the endowment could maintain such a suit on the ground that the case was in respect of a private endowment. Mr. Das, appearing on behalf of the appellants, has drawn our attention to a Division Bench case of the Patna High Court reported in —'Radha Krishnaji v. Rameshwar', AIR 1934 Pat 584 (E). He argues that this Division Bench case, to which Agarwala J. was also a party, was not placed before his Lordship while deciding the case reported in — 'A. I. R. 1938 Pat 394 (C). In the Division Bench case, the endowment was a private one and the person who brought the suit on behalf of the idol was the de facto manager of the public endowment though he was not appointed manager in accordance with the terms of the endowment.

Their Lordships decided that in such a case the de facto manager was competent to bring a suit against a lessee on the ground that the lease was illegal. In that case, their Lordships went further to make an observation relying upon the decision reported in —'Abdur Rahim v. Mahomed Barkat Ali', AIR 1928 PC 16 (F) that in the case of public and charitable endowment any person who was interested in the trust was entitled to maintain a suit for a declaration that alienations made by the trustee are not binding on the trust. With great respect, we would observe that the case before their Lordships of the Privy Council was entirely of a different nature and the quotation of the above observation of their Lordships was not fitting in with

the case before their Lordships in the Division Bench case.

The Privy Council case was not whether any other member of the public or worshippers could effectively represent the deity, or in a suit to set aside alienation by marfatdar the deity could be represented only by a marfatdar. In that case 5 members of the Mohammedan public prayed for recovery of the wakf property from the alienees on the ground that the alienation was illeagl. The defence contention that such a suit was barred under the provisions of Section 92, Civil P. C. was negatived and the suit was held maintainable. The case reported in '31 Ind App 203 (PC) (A)' was not placed before their Lordships for the obvious reason that the suit was not by any deity.

In our view, the case reported in — 'AIR 1934 Pat 584 (E)' does not give us any assistance for the decision of the present case on account of two reasons (1) that the case before them was a private endowment and (2) that the suit was brought by the de facto manager on behalf of the deity. Exactly the same view was taken by a Division Bench of the Calcutta High Court in the case reported in — 'AIR 1931 Cal 776 (D). There their Lordships observed that a person interested in a private trust as a member of the family for whose spiritual benefit the worship of the idol was established and who had further the prospect of holding the office of sebait could maintain a suit challenging the alienations of debuttar property by a sebait.

Their Lordships also referred to the decision reported in — 'AIR 1928 PC 16 (F)'. We would distinguish that case also on the same ground that it was in respect of a private endowment and the suit was brought by the members of the family for whose spiritual benefit the worship of the idol was established and further that they were also in the line of succession of the office of the sebait. To our mind, as it appears, in cases of this nature a distinction has got to be made between the public endowment and the private endowment. The private endowments are established primarily, if not solely, for the spiritual benefit and worship of the members of the family who are deeply interested in the deity.

In such a case the worshippers are quite limited in number. And furthermore in the case of private endowments the remedy provided under Section 92, Civil P. C., or as a matter of that, under Section 54 of the Orissa Hindu Religious Endowments Act, for the removal of the trustees on account of maladministration of the Endowment properties, is not available. But in the case of a public endowment, the persons interested in the worship are usually too numerous. To allow such a right to any member of the public interested in the endowment to bring a 'suit on behalf of the deity' as representing the deity and thereby making the deity bound by such action will be, in our opinion, too dangerous.

Moreover, another specific remedy is open to the members of the public interested in the institution to bring a suit under the provisions of Section 92, Civil P. C. for the removal of the trustee and appointment of a new trustee who can effectively bring a suit on behalf of the deity and bind the deity by the result of such a suit.

(8) We would, in this connexion, refer to another decision of the Calcutta High Court reported in — 'Tarit Bhusan v. Sridhar Salagram', A. I. R. 1942 Cal 99 (G) arising out of a case in respect of private endowment wherein the same question also cropped up for decision, that is, whether the deity can be represented by the sebait alone or any other member of the public. This was a case brought by the deity represented by the sebait wherein the defence taken was that the suit was barred under the provisions of Order 9, Rule 9, Civil P. C., on account of the reason that there was a previous suit on the same cause of action brought by the deity represented by any other member of the family interested in the endowment which was dismissed for default.

Pal J. in an elaborate judgment after review of decisions on the subject, enunciated the principle that ordinarily a sebait alone could represent the deity; but if the sebait persistently refuses to bring a suit to set aside an alienation or that by his own conduct he had made himself unfit for bringing such a suit any other person interested in the deity can bring such suit only by appointment of Court on the analogy of the provisions of next friend under Order 32, Civil P. C. In that case, there being no such appointment by Court, the plea under O. 9, Rule 9 was negatived on the ground that the previous suit will not bind the deity. Nasim Ali J. who was also a member of the Bench, in a separate judgment, did not go so far as to observe that any other member of the family could represent the deity by appointment of Court, but he negatived the plea in defence under Order 9, R. 9, on the ground that in the previous suit the deity was not represented.

The view of Pal J. was, however, confirmed in a subsequent decision of the Calcutta High Court reported in — 'Manamohan Haldar v. Dibendu Prosad', AIR 1949 Cal 199 (H) wherein their Lordships have laid down the principle that:

"Where there is a shebait in existence, right of suit is in the shebait and no one else can bring a suit on behalf of the idol. The idol is a juridical person and has the right to sue, but it is a person in an ideal sense, and the suit has to be brought through some representative.

Where there is a proper representative, namely, the shebait, in existence, he is the only person competent to sue on behalf of the idol, unless his interest is adverse to that of the idol, or because of quarrels and conflicts between the different shebaits, or because the wishes of the deity with respect to a particular course of action have to be separately ascertained, some other person is to be appointed by the Court to represent the idol. Where there is no shebait, it is open to any person interested in the religious foundation to bring a suit as the next friend of the idol with the permission of the Court."

This again was a case of private endowment.

(9) On a review of the above decisions & for the reasons given above in our view, in the case of a public endowment, it is the sebait alone who can represent the deity to bring such a suit for recovery of possession of the properties improperly alienated by a sebait, and other members of the public have got the remedy under the provisions of Section 92, Civil P. C. or under Section 54, Orissa Hindu Religious Endowments Act for removal of the trustee guilty of mal-administration and for the appointment of a new trustee who alone can represent the deity; and in the case of a private endowment, we would, with great respect, accept the view expressed in the decision quoted above of — 'AIR 1949 Cal 199 (H)'. In this view of the matter, therefore we find that plaintiffs 2 to 19 are not entitled to represent the deity (plaintiff 1) in the present suit as they are not marfatdars of the public endowment. But this does not dispose of the case.

(10) We are further to examine whether plaintiffs 2 to 19 have any other independent rights as worshippers, apart from representing the deity, to bring such a suit in their own name and on their own behalf for challenging the illegal alienation by the sebait.

In this connexion, we will quote a passage from the judgment of Pal J. in the case reported in — 'AIR 1942 Cal 99 (G)' which has clearly brought a distinction between the nature of those two classes of suits:

> "In my judgment there is a very substantial distinction between a suit by certain interested persons as such in their own name, and, at least in form, on their own behalf, and a suit by a person in the name of the idol and as its next friend. In the former case the consequences of the suit will be binding only on the persons suing or on the persons whom they represented in form (O. 1, R. 8, Civil P. C.). In the latter case the idol itself will be affected as a juristic person and it is therefore a question frought with grave consequences demanding serious consideration as to who should be allowed to represent the idol in such a suit."

There is thus a clear distinction that in one set of case where the worshippers come in the capacity of merely as worshippers and not representing the deity, the decision will not be binding on the deity, but in another case where the deity is properly represented through sebait the decision is binding against the deity.

(11) Let us examine the decisions on the point as to any other worshipper to bring a suit challenging such an alienation. We will first of all refer to a decision of the Full Bench of the Madras High Court reported in — 'Venkata Ramana Ayyangar v. Kasturiranga', AIR 1917 Mad 112 (I), wherein two of the worshippers of the public temple purporting to sue on behalf of themselves and others under O. 1, R. 8, Civil P. C. instituted a suit for declaring invalidity as against the temple of a perpetual lease granted by the committee to the archakas. The nature of the case seems to be exactly similar as in the present. Their Lordships held that such a suit was maintainable. Indeed, the only plea taken against the maintainability of the suit was that the suit was barred under the provisions of S. 92, Civil P. C.

The suit was brought not on behalf of the deity but by the worshippers in their capacity as well. Manifestly, therefore, no such plea of representation of the deity could be raised. The only plea of bar under S. 92, Civil P. C., having been negatived it was decided that the worshippers had the right to bring suit challenging the right of alienation in respect of the public endowment. But we will with great respect, quote some observations made by Seshagiri Ayyar J. in his referring judgment appearing at page 117 of the report:

> "The provisions which bear on the questions are: (a) O. 1, R. 8, Civil P. C. (b) S. 92 of the same Code, & (c) Ss. 14 and 18, of Act 20 of 1863. In my opinion, these provisions are mutually exclusive. An individual may have a right of suit irrespective of any of these provisions, when his civil right in relation to a trust is interfered with.
>
> If a man is denied access to a temple or mosque for purposes of worship, he can resort to a Court to establish his right. 'If the property of the institution is wasted or alienated, prima facie the collective body of worshippers can sue on behalf of the trust'. Order 1, R. 8 is designed to consolidate this right of action and to confer the position of 'dominus litis' on a few who obtain the sanction of the Court to represent others equally interested."

The observation made by a very eminent Judge of India is entitled to great weight. This decision has been uniformly followed in the Madras High Court in cases of this nature where some of the worshippers having obtained an order under O. 1, R. 8 are allowed to maintain a suit for declaration of the invalidity of the improper alienation of public debuttar property. A similar case came up before Patanjali Shastri J. (as he then was) in — 'Subramania Ayyar v. Maya Kone', AIR 1940 Mad 81 (J), Patanjali Shastri J. (as he then was) the eminent Judge, relying upon the aforesaid decision observed:

> "A suit by certain persons on behalf of all the villagers for a declaration that the suit property belongs to the temple in that village; that certain alienations thereof by the pujaries are void and not binding on the institution is maintainable apart from the provisions of S. 92."

In agreement to the views expressed by their Lordships of the Madras High Court in the aforesaid cases, we find that the present suit brought by plaintiffs 2 to 19 in their capacity as belonging to the same village and as worshippers of the deity for declaring the alienation to be null and void is maintainable. This view of ours gains much support by reference to the Privy Council decision reported in — 'AIR 1928 PC 16 (F)', referred to above. As we have already observed, 5 members of the Mohammedan public were allowed to maintain a suit challenging the alienation made by the Mutwalli of wakf property. Indeed the only plea taken before their Lordships was a plea of bar under S. 92, Civil P. C., but nevertheless no other plea of maintainability of the suit on the ground that the worshippers have no 'locus standi' to maintain such a suit was taken and we may safely take it as it was accepted by the counsel appearing for the parties and by their Lordships of the Privy Council that such a plea could not be entertained.

(12) In conclusion, therefore, we find that the suit by plaintiffs 2 to 19 in representing all the villagers under O. 1, R. 8 in their capacity as worshippers of the public deity Sri Artatran Alekhagadi Bramha to set aside the alienation made by the marfatdar (defendant 3) on 4-1-44 in favour of defendants 1 and 2 is maintainable. As we have already mentioned that the finding that the transaction is not supported by justifying legal necessity of the deity remained unchallenged and final, the sale deed dated 4-1-44 executed by defendant 3 in favour of defendants 1 & 2 is therefore declared as invalid and not binding on the deity.

(13) But as to the form of the decree on our finding that defendant 3 is the marfatdar and plaintiffs 2 to 19 are only worshippers of the deity, plaintiffs 2 to 19 are not entitled to possession of the property in dispute; defendant 3 is entitled to possession of the property on behalf of the deity, (Vide — 'Subramania Aiyar v. Nagarathna Naicker', 20 Mad LJ 151 (K). If defendant 3 is not in possession of the disputed property he will be entitled to recover possession by virtue of this decree if the possession be with defendants 1 and 2 or plaintiffs 2 to 19, defendant 3 on recovery of possession will possess the property on behalf of the deity and for the benefit of the deity merely as a marfatdar.

(14) The appeal is, therefore, allowed and the judgment and decree of the lower appellate Court

are set aside. Plaintiffs 2 to 19 will be entitled to costs throughout as against defendants 1 and 2.

(15) NARASIMHAM J.: I agree.

B/D.H.Z. Appeal allowed.

A. I. R. 1954 ORISSA 15 (Vol. 41, C. N. 4)

PANIGRAHI C. J. AND MOHAPATRA J.

Imdad Ali Khan and others, Defendants-Appellants v. Sardar Khan and others, Plaintiffs-Respondents.

First Appeal No. 3 of 1948, D/- 10-3-1953, from a decision of Dist. J., Cuttack, D/- 10-12-1947.

(a) Civil P. C. (1908), S. 92 — Trust for public purposes.

On ceremonial occasions Mahommedan public of adjoining villages collecting to say their prayers in the mosque — Registered deed of Ekararnama executed in favour of Mahommedan public at large — Mosque located in a Kutcha House, executant being unable to bear the expenses of reconstructing the mosque into a Pucca one allowing the Mahommedan public at large to rebuild the mosque at their own expenses and agreeing in the document itself that the public at large would be entitled to manage the affairs of the mosque — The Mahommedan public at large making the mosque Pucca at their expense by raising subscriptions from the public — Held that the mosque, in question, was a public institution, and endowment of land was real Wakf in favour of this public institution. (Para 3)

Anno: Civil P. C., S. 92 N. 5.

(b) Muhammadan Law — Wakf — Vesting of property.

Once the Wakf is validly created, the properties vest in the Almighty. AIR 1922 PC 123; AIR 1923 PC 44 (2), Rel. on. (Para 3)

A. S. Khan and L. K. Dasgupta, for Appellants; M. S. Rao, for Respondents.

CASES REFERRED TO:

(A) ('22) AIR 1922 PC 123: 44 Mad 831 (PC)
(B) ('23) AIR 1923 PC 44 (2): 50 Cal 329 (PC)

MOHAPATRA J.: This is a defendants' First Appeal against the judgment dated 10-12-1947, of Sri C. C. Coari, District Judge, of Cuttack in a suit brought under Section 92, Civil P. C., by 3 Mahommedans representing the public for the reliefs of removing the defendants from the mutwalliship of the endowment alleged to be a public endowment and of settling a scheme for the management of the affairs of the alleged endowment. Defendants 2 and 3 are minors represented by their father defendant 1. The grounds for removal of the defendants from the mutwalliship and for settlement of a scheme are that the defendants have committed several acts of mal-administration and mismanagement of the affairs of the mosque and the properties attached to it with an area of 10.25 acres of land which were also endowed to the mosque.

(2) The defence, in short, is that the ancestors of the defendants had constructed the mosque and another nearer ancestor of the defendants also made an endowment of the aforesaid 10.25 acres of land to the mosque; the mosque being a private endowment, the suit, as such, is not maintainable; and that they are not liable to be removed nor are they liable to render accounts.

(3) Ex. A is a wakfnama executed by Rahemudad Khan, ancestor of defendants, on 28-10-1891 in respect of the aforesaid 10.25 acres of land in favour of the mosque. Relying upon the recitals in Ex. A, the learned Court below has found that it is Dost Muhammad, an ancestor of the defendants, who was the founder of the mosque, and that Rahemudad Khan, another nearer ancestor of the defendants, also had endowed this 10.25 acres of land to the mosque. The learned Court below has rightly concentrated his attention at the first instance on the question whether the mosque itself is a public institution or merely a private mosque constructed by the forefathers of the defendants. In addition to his reliance upon the evidence adduced on behalf of the plaintiffs, the learned Court below was much impressed with the evidence adduced on behalf of the defendants to the effect that previously the villagers of 5 adjoining villages used to collect to say their prayers in this mosque; and some years ago the villagers of 2 villages had constructed their own mosque and the villagers of another village are now constructing a mosque; & on ceremonial occasions Mahommedan public of 2 or 3 villages assembled in this mosque to say their prayers.

It has to be observed also that the mosque is not constructed in the founder's house. Another important piece of evidence in this connexion is Ex. 4 of the year 1925, which is a registered deed of ekararnama executed by Mahamamd Ali Khan, husband of Majidunnisa in favour of Mahommedan public at large. We get it from the recitals of this document that the mosque till then was located in a Kutcha house, and the executant being unable to bear the expenses of reconstructing the mosque into a Pucca one allowed the Mahommedan public at large to rebuild the mosque at their own expenses and agreed in the document itself that the public at large would be entitled to manage the affairs of the mosque. The evidence also is very clear that it is the Mahommedan public at large who made the mosque Pucca at their expenses by raising subscriptions from the public.

The books of account (Exs. 5 and 6) have been tendered in evidence to clarify how the subscriptions were collected and how the expenses were met for reconstructing the mosque. From this convincing piece of evidence the learned Court below was right in coming to the conclusion that in fact the mosque, in question, was a public institution, and further that the endowment of ten acres and twenty-five decimals of land was a real Wakfnama in favour of this public institution. Relying upon the two decisions of their Lordships of the Privy Council reported in — 'Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar', AIR 1922 PC 123 (A) and—'Abdur Rahim v. Naraya Das', AIR 1923 PC 44 (2) (B), the learned Court below has rightly come to the conclusion that once the Wakf is validly created, the properties vest in the Almighty.

(4) Indeed the defendants are denying the public rights of the institution and of the properties and asserting their own. Furthermore they deny of being guilty of not having kept any accounts at all. But the learned Court below, finding that defendants 2 and 3 are minors, has disallowed the prayer of the plaintiffs for removal of the Mutwallis, but

he has passed a decree for settling a scheme for the purpose of administration of the trust and has invited the parties to submit their own respective schemes. We do not find any reason to disagree with this view of the learned Court below. But we should observe that on a careful reading of Ex. A (Wakfnama) of the year 1891 by which Rahemudad Khan has endowed the properties in favour of the mosque, we are clearly of opinion that by the terms "the usufruct of the property would meet the necessary expenses of annual thatching and repairs", the original author of the endowment never meant that the heavy expenses of the costly festivities of the Mahommedan public would also be met out of the usufruct.

We construe the necessary expenses, as indicated by the executant, to mean "the annual repairs, the daily lighting of the mosque and the expenses of Pesh Imam." The executant also intended to make provision for the maintenance of the Mutwallis from out of the balance of the usufruct after defraying the expenses essential for the upkeep of the institution. This he manifestly meant by way of paying the remuneration of the Mutwallis. We would, therefore, direct the learned District Judge, while settling the scheme, to bear in mind that he should make some provision for the remuneration of the Mutwallis from the balance of the usufruct after defraying the necessary expenses, such as, daily lighting, annual repairs and the costs for engaging a Pesh Imam. He should also consider that if the costs for maintaining the Pesh Imam will become too heavy to leave sufficient balance towards the remuneration of the Mutwallis, he should direct the public to contribute by way of subscriptions towards some portion of the expenses for the maintenance of Pesh Imam. With these observations, therefore, we dismiss the appeal but without costs.

(5) PANIGRAHI C. J.: I agree.

C/D.H.Z. Appeal dismissed.

A. I. R. 1954 ORISSA 16 (Vol. 41, C. N. 5)

PANIGRAHI C. J.

Sidheswar Panda (Accused), Petitioner v. The State.

Criminal Revn. No. 223 of 1952, D/- 18-3-53, from order of Magistrate, 1st Class, Hindol, D/- 28-2-1952.

Forest Act (1927), Ss. 26 (f) and (g) and 69 — Hindol (Assam) Forest Rules, R. 97 — (Evidence Act (1872), S. 114).

The Hindol Forest rules at best raise a presumption that in the absence of evidence, it shall be presumed that they are Government property; but this is only a rule of evidence and the accused cannot be convicted on a mere presumption. In cases under Forest Act it is the duty of the prosecution to establish that some timbers had been felled and removed from the Government forest, and that the timbers in possession of the accused corresponded to the logs illegally removed from the Government forest. The failure of the accused to explain satisfactorily does not relieve the prosecution of the burden to prove that the logs constituted Government property and had been illegally removed. (Para 2)

Anno: Forest Act, S. 26 N. 4, 5; Evidence Act, S. 114 N. 7.

R. Das, for Petitioner; Govt. Advocate, for Opposite Party.

ORDER: The petitioner has been convicted under R. 97 of the Hindol Forest Rules read with S. 26 (f) and (g), Forest Act and sentenced to pay a fine of Rs. 50/- in default to undergo R. I. for one week. The facts proved against him in brief are that he was found in possession of 31 pieces of sal timber on 17-7-51. The forester Paramananda Das suspected that these might have been removed from the Government forest and demanded the production of permit from the accused. The accused said that he had got the timber logs from one Mr. Naylor under a permit and that the logs had borne hammer marks. No permit was produced and the prosecution evidence is that there were no hammer marks. On these facts, the petitioner, along with 4 others, was prosecuted for a forest-offence but the other persons have been acquitted by the Magistrate and the petitioner alone was found guilty of being in possession of forest produce without a permit.

(2) The trial court itself remarks "there is absolutely no evidence on record to show that the seized timbers were felled or removed from any Government Forest by any one of the accused persons." In the absence of any evidence that these logs were Government property, I fail to understand how the conviction of the petitioner can stand for illegal removal of forest produce from a reserved area. The rules at best raise a presumption that in the absence of evidence, it shall be presumed that they are Government property, but this is only a rule of evidence and the accused cannot be convicted on a mere presumption. It was the duty of the prosecution to establish that some timbers had been felled and removed from the Government forest, and that the timbers in possession of the accused corresponded to the logs illegally removed from the Government forest. I am not satisfied that the prosecution has established any connection between the logs seized and the Government forest logs. It may well be that the accused may have obtained these logs from elsewhere outside the Hindol area. It may also be that he had failed to explain wherefrom he had obtained them. It does not therefore follow that the failure of the accused to explain satisfactorily relieves the prosecution of the burden to prove that these constituted Government property and had been illegally removed. I would therefore hold that the offence has not been brought home to the accused and that his conviction cannot stand.

This revision is accordingly allowed and the conviction and the sentence of the petitioner must be set aside, and the fines if paid must be refunded; and the sale-proceeds of the logs shall be paid over to the petitioner.

C/H.G.P. Revision allowed.

A. I. R. 1954 ORISSA 17 (Vol. 41, C. N. 6)

PANIGRAHI C. J. AND MOHANTY J.

Gopi Tihadi, Plaintiff, Appellant v. Gokhei Panda and another, Defendants, Respondents.

Second Appeal No. 177 of 1948, D/- 4-8-1953, from the decision of Dist. J., Cuttack, D/- 28-1-1948.

(a) Civil P. C. (1908), Ss. 100 and 107 — Appreciation of evidence by the appellate Court.

It is not correct to say that in all cases the view of the trial Court should be regarded as infallible. But if the evidence, taken as a whole supports the view taken by the trial Court, the appellate court should not, except for very compelling reasons, set aside that finding even if it takes a different view of the evidence. The reason is that the Judge of the first instance has the advantage of seeing the witnesses and observing the manner in which they give their evidence, which is not revealed by the written record of that evidence. (Para 8)

Where the view taken by the trial Court approximates nearer the truth and is more in accord with the probabilities, the High Court in second appeal will not disturb the finding of the trial Court where the lower appellate Court has fallen into an error of record and has reversed that finding on a wrong estimate of the oral evidence. (Para 8)

Anno: C.P.C., S. 100 N. 13; S. 107 N. 14.

(b) Contract Act (1872), S. 23 — Public policy.

A Court cannot invent a new head of 'public policy'. A contract may be declared unlawful on the ground that it is contrary to public policy, because it has been either enacted or assumed to be, by common law, unlawful and not because a judge or a court had a right to declare that it is, in his or their view, contrary to public policy. He must find the facts and he must decide whether the facts so found do or do not come within the principles of public policy, recognised by the law, which the suggested contract is infringing or is supposed to infringe. What is contrary to public policy must be determined by well-established principles of law and not by the fine-spun speculations of social reformers or visionary theorists. (Para 11)

Anno: Contract Act, S. 23 N. 12, 13.

(c) Hindu Law — Marriage — Presumption — Payment of bride price if affects validity — (Contract Act (1872), Ss. 23 and 65) — (Evidence Act (1872), Ss. 101 to 103).

(i) A marriage is presumed to be in the Brahma form until the contrary is proved; and the party alleging it to be in the Asura form has to prove that there was a sale of the bride.

(ii) Even if a bride-price is paid the marriage itself does not become invalid.

(iii) The injunctions of the Smritis against the acceptance of a bride price are only directory, and an infringement of the texts does not render the marriage invalid.

(iv) The custom of receiving bride-price has been so well established throughout the country that it is too late in the day to invalidate a marriage on the ground of public policy, nor can such marriage contracts be held to be immoral or illegal in the absence of a statutory enactment expressly prohibiting the custom.

(v) If a marriage has been solemnised the Courts will not help a suitor to recover back the money paid by him under such a contract, but if the agreement remains executory the Court will direct the recovery of the amount paid as bride price, though no suit for specific performance of the contract will be entertained. Case law discussed. (Para 22)

Anno: Contract Act, S. 23 N. 16, 32; S. 65 N. 1; Evidence Act, Ss. 101 to 103 N. 41.

M. S. Rao, for Appellant; B. Mohapatra, for Respondents.

CASES REFERRED TO:

(A) (1875) 44 LJ Ch 705: 19 Eq 462
(B) ('99) 22 Mad 398: 26 Ind App 113 (PC)
(C) ('70) 5 Beng LR 395: 14 WR 154
(D) ('84) 10 Cal 1054
(E) ('05) 1 Cal LJ 261
(F) ('18) AIR 1918 Cal 457: 27 Cal LJ 451
(G) ('11) 9 Ind Cas 161: 15 Cal WN 408
(H) ('19) AIR 1919 Pat 316: 4 Pat LJ 542
(I) (1905) 74 LJKB 620: (1905) 2 KB 123
(J) ('26) AIR 1926 Pat 582: 5 Pat 646
(K) ('37) AIR 1937 Pat 330: 169 Ind Cas 901
(L) ('49) AIR 1949 Pat 250: 27 Pat 287
(M) ('09) 3 Ind Cas 554: 32 Mad 185
(N) ('18) AIR 1918 Mad 444: 41 Mad 197
(O) ('24) AIR 1924 Mad 692: 78 Ind Cas 572
(P) ('70) 7 Bom HCR 122
(Q) ('87) 11 Bom 412
(R) ('98) 22 Bom 658
(S) ('09) 3 Ind Cas 748: 33 Bom 411
(T) ('20) AIR 1920 Bom 225: 44 Bom 446
(U) ('10) 6 Ind Cas 465: 32 All 575
(V) ('33) AIR 1933 Lah 849 (2): 149 Ind Cas 1028
(W) ('20) AIR 1920 All 167: 42 All 449
(X) ('77) 2 Bom 9

PANIGRAHI C. J.: This appeal arises out of a simple suit for recovery of a sum of money but raises an interesting question of law.

(2) The plaintiff was on the look out for a bride for his brother, Manu Tihadi, and defendant 2 who is distantly related to him, brought forward a proposal for getting the daughter of defendant 1 married to the plaintiff's brother. On 6-3-44 both the defendants approached the plaintiff who accepted the proposal and it was settled that the plaintiff should pay Rs. 650/- to defendant 1 for the marriage expenses in consideration of defendant 1's giving his daughter in marriage to plaintiff's brother. The Maha-prasad Nirbandha or betrothal took place at the village temple on 11-3-44 and the plaintiff paid the stipulated sum of Rs. 650/- to defendant 1.

It was agreed that on the next day defendant 1 would send his daughter to the plaintiff's house for the marriage ceremony. The plaintiff also sent a 'palki' the next day for bringing the bride. Defendant 1, however, refused to send his daughter and demanded Rs. 800/- as there were better offers. The contract was terminated and the defendant promised to return the sum of Rs. 650/- taken from the plaintiff four days later. When the demand was made again on 16-3-

44, the defendant refused to pay back the money taken by him. The plaintiff filed a criminal case under S. 420, I. P. C., but it was thrown out as being of a civil nature. The plaintiff, therefore, brought this suit for the recovery of Rs. 650/- advanced by him together with Rs. 72/- as compensation and damages for the loss and expenses incurred by him.

(3) Defendant 1 denied the betrothal as well as the advance of money and pleaded that the suit was a sequel to previous enmity. His further plea was that the plaintiff was not entitled to enforce the contract and recover the advance made as the alleged contract was illegal. Defendant 2 has remained ex parte throughout.

(4) The learned Munsif held that the plaintiff's case had been amply proved by the evidence of his witnesses P. Ws. 2 to 8. He also held that the money has been paid as 'kanya suna' or bride-price and not for meeting the marriage expenses. He further held that the money had been advanced as consideration for obtaining the consent of defendant 1 to give his daughter in marriage to the plaintiff's brother. He overruled the contention of the defendant that the agreement with the plaintiff was illegal on the ground of its being opposed to public policy. He accordingly gave a decree to the plaintiff for Rs. 650/-, the amount actually advanced by him but disallowed his claim to recover the damages and compensation.

(5) On appeal by the contesting defendant, the learned District Judge set aside both the finding of the trial court and held that the contract put forward by the plaintiff was unenforceable, as it was immoral since it amounted to the sale of a bride for a price and that it was not for the welfare of the bride. He also disbelieved the story of payment of Rs. 650/- on the ground that P. Ws. 2 and 7 were not mentioned as witnesses by the plaintiff in the complaint which he had filed in the criminal court prior to the filing of the present civil suit. He disbelieved P. W. 3 for the reason that he was an ex-tenant of the defendant. In the result, the appeal filed by defendant 1 was allowed and the plaintiff's suit was dismissed. It is against this reversing judgment of the learned District Judge that the plaintiff has come up in appeal.

(6) Mr. M. S. Rao, appearing for the appellant, contends that the lower appellate court has not attached due importance to the findings of the trial court and has itself gone wrong in its appreciation of the evidence. He further contends that the lower appellate court has fallen into an error in holding that the suit was to enforce an agreement to contract a marriage with defendant 1's daughter while, in fact, the suit was one merely for the recovery of money received by the defendant for a purpose which did not materialise.

(7) On behalf of the respondent it is submitted that the contract is both opposed to public policy and to good morals and the plaintiff should, therefore, be non-suited.

(8) We were referred to the oral evidence of the witnesses who were disbelieved by the lower appellate court. I have myself gone through the entire evidence on the record. (After discussing the evidence of plaintiff's witnesses His Lordship proceeded:) I am unable to see any reason why all these witnesses should come and depose against the defendant.

The view taken by the learned munsif who examined these witnesses and saw them is more in accord with the probabilities and is entitled to respect. I do not mean to suggest that in all cases the view of the trial court should be regarded as infallible. But if the evidence, taken as a whole supports the view taken by the trial court, the appellate court should not, except for very compelling reasons, set aside that finding even if it takes a different view of the evidence. The reason is that the judge of first instance has the advantage of seeing the witnesses and observing the manner in which they give their evidence, which is not revealed by the written record of that evidence. On going through the evidence myself I am satisfied that the view taken by the trial court approximates nearer the truth, and I do not see adequate justification for disturbing its finding. The lower appellate court has fallen into an error of record and its estimate of the oral evidence appears to have been largely coloured by the view it took of the nature of the contract which it discusses in the earlier part of its judgment. I would, therefore, in agreement with the trial court hold that the defendant gave his word of assurance — the certa verba — called the Nirbandha and received money consideration from the plaintiff.

(9) The plaintiff's claim is resisted mainly on the ground that the contract is opposed to public policy as such transactions, if upheld by courts, would lead to sale of girls for a price; and secondly on the ground that it is opposed to good morals as it is clear that there was a disparity in age between the bride and the bridegroom. A number of decisions were cited before us in support of the respondent's contention that a marriage brokerage contract is illegal. The appellant's counsel also has cited several cases in support of his contention that the contract in question is not a brokerage contract and is not illegal on either ground.

(10) The consideration or object of an agreement is lawful unless it is expressly forbidden by law, or the Court regards it as immoral or opposed to public policy. Under the English law of contract, a contract whereby a marriage is brought about in consideration of money payment is held to be illegal as marriage should be free union of the couple. But even in England money paid under such a contract is recoverable by the party paying it, before the execution of the contract. In India, marriage is not the subject-matter of a contract. It is brought about by the parents of the parties. It is a sacrament and is a necessary "Sanskara". Without a son, the Sradhdha cannot be performed and pinda offered to the males, and to have sons marriage is both a duty and a necessity. Manu, describing the status of a woman says in Chapter 9:

> "Her father protects her in childhood; her husband protects her in youth; and her sons protect her in old age. A woman is never fit for independence."

Again.

> "Reprehensible is the father who gives not his daughter in marriage at the proper time."

The father is, therefore, under a duty to give his daughter in marriage at the proper time. The question of consent on the part of the girl does not arise having regard to the customs prevailing in this country and marriages are invariably brought about by the father, or other male relations of the girl. The custom of receiving money consideration by the father of the bride or the bridegroom, either at the time of betrothal or at the time of marriage, is well-established throughout India. In one case it is called 'sulka', in the other, it is called dowry. The money paid by the groom to the father of the bride intended as a dower is known

as 'kanya sulka' while the consideration paid by the father of the bride either in the form of jewellery or cash, is designated as dowry.

The money paid to the father of the bride was originally intended to be retained by the bride as her separate property, but it would appear that in course of time the father of the bride received the amount, freely used either a part or the whole of it, either for the marriage ceremony or for his own purposes. Dr. Banerjee quotes a passage from Sir Henry Mayne's Remarks on Stridhan at page 398 of his Tagore Law Lectures on Marriage and stridhan:

"Among the Aryan communities as a whole, we find the earliest traces of the separate property of women in the widely diffused ancient institution known as 'bride price." Part of this price which was paid by the bride-groom either at the wedding or, on the day after it, went to the bride's father as compensation for the patriarchal or family authority which was transferred to her husband but another part went to the bride herself, and was generally enjoyed by her separately, and kept apart from her husband's property..... ..... The custom of paying a bride price had its origin in its being regarded as compensation to the bride's father for transfer of his patriarchal authority to the husband, and this custom is not peculiar to the Hindus alone."

Later, the Romans adopted this custom and matured and improved it. Originally, there were only two forms of marriage, Brahma and Sulka, mentioned in the Griha Sutra.

One was priestly, the other contractual. Originally Sulka implied and latterly meant a tax or a fee, which was a fixed amount. Kaikeyi's Sulka, at the time of her marriage with Dasaratha was that her son was to succeed to the throne. It was originally nominal and symbolical. The sale of a girl is certainly prohibited but the receipt of a sulka had been long established even before Manu's Code. It is referred as the "price of a bride" and forms no part of the Vedic ritual. Where the parent took a large amount from the bridegroom, the marriage was called 'Asura or Manusha' meaning popular or human. This is of course condemned by Manu' as it amounts to sale of a bride but a marriage performed in this form is not declared illegal. It is followed by Vedic rites and Manu allows inheritance to the son born out of an Asuric marriage. Yagnayavalkya also does not make the Asura marriage illegal. The old law, therefore, has survived to the present day. In his Tagore Law lectures Jayaswal makes the following interesting observations on the present position of Asura marriage:

"Asura marriage has continued to this day and the people do not think for a moment that they are doing anything blameworthy. No one can say that the provision of Manu is against it, as a Vidhi, when he himself recognised it later and in inheritance. The later Codes, the Mitakshara, and all later authorities tacitly accept it as legal. Under such conditions it would be wrong to look at the Asura marriage from the point of view of the English law and apply the principles of marriage brokerage to it. Unless by legislation the Asura marriage is declared illegal, the courts ought to uphold transactions connected with it. The Hindu law does not abolish it. The disabilities it places on the nuptial rights are sufficiently penal, and no other penalty, without express legislation, would be fair."

Manu's injunction against the receipt of bride-price is as follows:

"No father who knows the law, must take even the smallest gratuity for his daughter, for a man who, through force, takes a gratuity is a seller of his offspring" — Ch. III — 51."

This injunction is directory and is not to be understood as a Vidhi or mandatory injunction. In the same Chapter, Section 31, the Asura form of marriage is described as follows:

"When the bridegroom receives a maiden after having given as much wealth as he can afford to the kinsmen of the bride herself, according to his own will, that is called the Asura rite."

In verse 54 he says:

"When the relatives do not appropriate (for their use) the gratuity given, it is not a sale: In that case the gift is only a token of respect and of kindness towards the maiden".

It is clear, therefore, that while marriage in the Asura form is perfectly valid, the sale of the bride as such is prohibited. Moreover, there are Vedic passages in favour of the custom of purchasing a woman and the Smritis, therefore, find it all the more difficult in opposing this practice. The Manava Griha Sutra and the Kathakas contain the ceremonials for the purchase of women, known as "Soulka Dharma". Here it appears to be the usual form of marriage in which the father of the bride receives the price of the bride in gold. Like the Smritis the Maha Bharat condemns the purchase of women in principle, but allows it in practice — See Jolly's Hindu Law and Custom — p. 114.

In modern times the practice is so widely prevalent that the opposition of the Brahmins appears to have been only partially successful. It prevails in Bengal, though chiefly among the low castes. In Bombay presidency, however, it is very much in vogue even among the higher castes. In Gujerat, the sale of girls is said to take place even now secretly, even among people who publicly denounce it, and in the City of Bombay often earnest money is paid by depositing valuable objects. (West and Buhler). Among the Sama Vedis a respectable and strictly religious sect of Brahmins in Thana, the father of the bride gets from Rs. 200/- to Rs. 1000/- as the price of bride — Bombay Gazetteer. Also in the Madras Presidency the payment of price for brides is customary in various castes (Madras Census Reports — 13 Madras 83.) The same is the case in the Punjab.

In Assam the marriages are effected almost only by purchase; it is common even among Brahmins. It is clear, however, that receipt of money by the father of a bride does not make it a sale if he does not appropriate it to himself and the validity of the marriage itself is not affected by the agreement to receive money from the bridegroom. Where money is received under a marriage contract entered into on behalf of minors, the Courts have generally awarded refund of the money received, or awarded damages for breach of contract though a suit for specific performance of contract is not entertained. Such contracts should be distinguished from a marriage brokerage contract as it is ordinarily understood. A marriage brokerage contract is a contract to remunerate a third person in consideration of his negotiating a marriage & as such is contrary to public policy and cannot be enforced. But there is no authority for saying that receipt of money by the parent of a bride in consideration of his giving his daughter in marriage amounts to sale per se — or that it is otherwise opposed to public policy.

(11) The expression 'public policy' has nowhere been defined & its meaning varies from judge to

judge and depends upon the facts and circumstances of each case. It has been said that public policy is always an unsafe and a treacherous ground for legal decisions. As Sir George Jessel remarked in — the Printing and Numerical Registering Co., Ltd. v. Sampson', (1875) 19 Eq. 462 (A).

"the paramount public policy to consider is that you are not lightly to interfere with freedom of contract. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy."

A court cannot invent a new head of 'public policy'. A contract may be declared unlawful on the ground that it is contrary to public policy, because it has been either enacted or assumed to be, by common law, unlawful and not because a Judge or a Court had a right to declare that it is, in his or their view, contrary to public policy. He must find the facts and he must decide whether the facts so found do or do not come within the principles of public policy, recognised by the law, which the suggested contract is infringing or is supposed to infringe. What is contrary to public policy must be determined by well-established principles of law and not by the fine-spun speculations of social reformers or visionary theorists.

(12) If, as I have endeavoured to show there has been an ancient custom in this country of receiving a bride price by the father of the girl in consideration of his giving his daughter in marriage, it cannot be said that it is not consonant with public policy or that it is opposed to the common weal. In the absence of any express statutory enactment abrogating such practices, Courts are not free to indulge in speculations as to whether such practices should be allowed to continue, merely on the ground of public policy. I am not, therefore, disposed to yield to arguments based on 'public policy'. If the defendant seeks to base his case on a contravention of public policy, it must be clear, unquestionable, and not clouded by doubt or speculation. It should not be resorted to when all other arguments fail.

(13) The learned Munsif was of opinion that the agreement was not opposed to public policy, to which opinion the learned District Judge gives his silent approval, but he denounced the contract as immoral as there was a great disparity in age between the bridegroom and the bride. I am not convinced by this reasoning of the District Judge. Such marriages are not rare and are to be found all over the world and at all times. Even Manu says (Ch. 9 Verse 94.):

"A person aged thirty may marry a maiden pleasing to his heart who is aged twelve; or a person aged twenty-four, a maiden aged eight."

Mere disparity in age does not offend good morals even according to the sages. A contract is said to be immoral if it is such as to shock one's sense of decency and good taste, such as a contract to let out a girl for prostitution or concubinage, or to get a murder committed. The purpose should be one which is bound to meet with universal disapproval. But the point which appears to have been missed by the lower appellate court is, assuming that the contract was opposed to public morals, is the plaintiff debarred from recovering the amount which he had advanced under an illegal contract which never matured? We have to start with the presumption that every marriage is in the Brahma form, and the onus is upon him who seeks to prove that it is in the Asura form. The defendant has failed to prove that the money was paid as a bride-price.

The evidence on the side of the plaintiff consistently is that it was paid to defendant 1 to meet the marriage expenses. I am unable to see anything in this transaction which is opposed to pulic morals. The plaintiff was in the position of the oppressed party and the defendant in that of the oppressor. There is an inequality of situation between the parties and the delictum is not par. It is only in cases where the two parties are equally at fault that the Court refuses to lend its aid to one who founds his cause of action upon an immoral or illegal contract 'ex dolo malo non oritur actio'. But courts of equity have not always followed this stringent common law rule and have given relief to the oppressed party. The rigours of Manu's injunction were considerably softened by later commentators and the receipt of bride price is recognised by Yagnyavalkya as a well-recognised custom for the Mitakshara says (Ch II, 21-28).

"Whatever has been expended on account of espousals by the intended bridegroom or by his father or guardian for the gratification of his own or of the damsel's relations, must be repaid in full, with interest by the 'affaincer' to the bridegroom."

The ancient texts of Manu are mixture of morality, religion and law. It does not follow that because an act has been prohibited by Manu it should therefore be considered illegal. Manu says, in Ch. 3 (8) that one should not marry a maiden with reddish hair, nor one who has a redundant member, nor one who is sickly nor one either with no hair or too much, nor one who is garrulous or has red eyes. Yet no one would seriously contend that the marriage of a garrulous woman is invalid. As Sir William Macnaughten observes in his valuable book on Hindu Law.

"the distinction between the vinculum juris and the vinculum pudoris is not always discernible."

A parent, in disregard of his filial duty may violate the plainest dictates of religion, he may prefer an unworthy man as a suitable bridegroom for his daughter, and yet he may be within his legal rights. The mere fact that the receipt of money in consideration of marriage is discouraged in the Smritis does not necessarily make it immoral or illegal at the present day. More than one text cited from the Smritis has been interpreted by the courts of law as merely directory and not as mandatory. The rule of interpretation in such cases is that a precept supported by the assignment of reasons is to be taken as a recommendation only. If the rule is not couched in unambiguous terms of absolute command, its appeal is to the moral sense rather than to our duty of implicit obedience. As their Lordships of the Privy Council observed in — 'Sri Balusu Gurulingaswamy v. Sri Balusu-wamy Ramalakshmamma', 26 IA 113 (PC) (B):

Where a practice has grown up, without being followed by hatred or social penalties, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families and which allows individual freedom of choice.

We have therefore to rely upon judicial decisions to see how such transactions have been interpreted rather than be guided by obsolete texts which reflect the temper and mood of a by-gone age.

(14) The earliest case brought to our notice is — 'Jogeswar v. Panch Kauri', 14 WR 154 (C). In that case the plaintiff sued the defendant for recovery of a sum of money paid to him in consideration of a promise made by the defendant that the latter would give the plaintiff his sister in marriage. The contract was broken and the girl

was married to another. The referring judge doubted whether the English law on the subject can be considered applicable to this country and observed:

"It appears to be a common practice not only to remunerate makers or ghataks for their services, but also for the husband to pay a certain sum called 'pan' to the relatives of the wife, previous to the marriage".

The Court decided that action for recovery of the money paid to the defendant would lie.

In — 'Ramchand Sen v. Andaito Sen', 10 Cal 1054 (D) the defendant, in consideration of Rs. 100/- promised to give his minor daughter in marriage to the plaintiff. The defendant failed to fulfil his part of the contract, and the plaintiff brought a suit to recover money paid as consideration for the promise. It was held that such a suit would lie: and Beverley J., said:

"There is nothing immoral in the contract so far as I can see. No doubt the purchase or hire of a minor girl for purposes of prostitution or concubinage is immoral, but where a legal marriage is in contemplation, payment of money as consideration is in accordance with the customs of the country and is therefore in my opinion not opposed to public policy."

In — 'Bakshi Das v. Naidu Das', 1 Cal LJ 261 (E) Mookerji J. had occasion to refer to several reported cases and laid down certain principles which should govern the decision of such cases. In that case two brothers agreed to give their sister in marriage to the plaintiff upon his agreeing to pay them Rs. 190/- as pan money out of which Rs. 135/- was paid in cash and the balance was to be paid on the day of marriage. The defendants broke the contract and the plaintiff brought a suit for recovery of the money paid by him and damages for expenses incurred. The lower courts gave a decree to the plaintiff.

Mookerji J. affirming the judgment of the trial court held, in second appeal, that an agreement to pay money to the parents or guardians of the bride or bridegroom in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy, and that it will be enforced and damages also will be awarded for breach of it. The onus of proving that the agreement was opposed to public policy is upon the party who alleges it to be so.

In a later case reported in — 'Anadi Ram v. Goza Kachori', A. I. R. 1918 Cal 457 (F) the Court went further and their Lordships observed, that a contract for service, though incapable of being specifically enforced as being opposed to public policy the plaintiff may be entitled to restitution to the whole or some part of the money advanced by him on the equitable principles embodied in Sections 38 and 41, Specific Relief Act. The principle underlying these decisions, as far as I can understand, is that the plaintiff in suing to recover money advanced by him is not carrying out an illegal contract but is seeking to put everyone as far as possible, in the same position as they were in, before that transaction was determined upon. It is the defendant who is relying on the supposed immorality of the contract, and despite his endeavour to uphold morals, the Court will not permit him to take advantage of his own immoral act.

Learned counsel for the respondent drew our attention to a case reported in — 'Nathu Khan v. Sewak Koeri', 15 Cal WN 408 (G). In that case the plaintiff sued for recovery of Rs. 800/- being the consideration money stated in a certain kebala by which he had sold certain property to the defendant. The defence set up was that the consideration stated in the kebala was fictitious and the real consideration was for payment to the defendant for his services in inducing his employer over whom he had influence, to sell some villages to the plaintiff. The Court held that the parties were in 'pari delicto' and no relief could be granted. It will be noticed that this was a case of an executed contract and the suit was for relief after the contract had been executed. The decision of that case turned on the interpretation of the words "declared to be void" in Section 65 of the Contract Act, and has no application to a case like the one before us.

(15) The view of the Calcutta High Court as indicated in the cases cited above has been consistently followed by the High Court of Patna, and I shall now briefly refer to a few of the reported decisions of that Court.

In — 'Raghubar Das v. Nataber Singh', A. I. R. 1919 Pat 316 (H) Dawson-Miller, C. J. said, referring to the Calcutta decisions:

"I think it is now too late to question the validity and propriety of those rulings".

His Lordship, however, held that if the contract involves anything in the nature of criminality or is one of moral turpitude, such as the Courts on that ground would refuse to enforce, then, not only will the Court refuse to enforce the contract, but it will not assist either party to recover back anything paid under the contract. Even if such a contract remains only executory, the Courts of this country will not assist a party to recover back his money paid under the contract. With great respect to the learned Chief Justice, I am not prepared to go so far at present. Where the contract remains executory, the Courts would allow either party to rescind it and be placed in the same position as if there was no contract at all.

In that case the plaintiff brought a suit seeking to recover Rs. 5000/- paid to the defendant in consideration of an agreement by the defendant, who was the spiritual guru of the Rani Sheba of Kaur, to bring about an adoption by the lady, of one of the plaintiff's sons. His Lordship expressed himself very strongly on the nature of this species of contracts and said:

"Speaking for myself, it seems to me that this is just one of that class of cases which the Court will refuse to have anything to do with at all, because it is, in my view, a grossly immoral act, to endeavour to bribe a priest to use his spiritual influence with his chela in the interest of the person bribing him".

Roe, J., relying on the decision in — 'Hermann v. Charlesworth', (1905) 2 KB 123 (I) (to which I shall advert later), held that money paid as consideration for bringing about a marriage may be recovered but this is subject to the rule of 'ex turpi causa'. This case is an instance of a contract tainted with gross immorality, and, in the circumstances of that case the plaintiff was rightly non-suited. The suit was for damages for breach of one of the conditions of the contract, and not for recovery of money on the ground that the contract was illegal or contrary to public policy 'ab initio'.

In — 'Ramsumran Prasad v. Gobind Das', AIR 1926 Pat 582 (J) Jwala Prasad J. held that if the marriage is solemnised, no suit will lie to recover back the gift actually made, whether to the bridegroom, or the bride or the father of the bridegroom. Referring to the conduct of the donor of the gift in that case, His Lordship said:

"After having attained the object and having fulfilled the promise, I do not think that she can

avail herself of the provisions of Section 23 and recover back the property in question. Far less could the plaintiffs who had succeeded as reversioners of her husband, recover it back on that ground."

In — 'Mt. Sonphula v. Gansuri', A. I. R. 1937 Pat 330 (K) where A advanced a certain amount to B in consideration of his arranging the marriage of A's brother with the niece of B, it was held that the arrangement between A and B was neither immoral nor criminal, and A was entitled therefore to get a refund of the money advanced. In that case there was a great disparity between the ages of the plaintiff's brother and the girl, but it was observed that such marriages do take place with the approval of those who are interested in the welfare of the girls. In a later case, — 'Dharanidhar v. Kanhji', AIR 1949 Pat 250 (L), the Court held that such a contract of marriage is not per se illegal or immoral, though one of the learned Judges struck a note of dissent. But the plaintiff was granted a decree on the ground that the contract had not been carried out.

(16) Strong reliance was placed on the Full Bench decision of the Madras High Court reported in — 'Kalavagunta Venkata v. Kalavagunta Lakshmi Narayan', 32 Mad 185 (M). That case is clearly distinguishable. The only point decided in that case was that if the money had been paid and the marriage solemnised, it cannot be recovered back, nor can a suit lie to enforce an agreement to pay money to the father of the bride.

On the other hand, in a later case of the same High Court, — 'Srinivasa Iyer v. Sesha Iyer', AIR 1918 Mad 444 (N) where the plaintiff paid the defendant Rs. 400/- as remuneration to bring about a marriage and the contract failed, the plaintiff was granted a decree for recovery of the amount advanced by him on the ground that the effect of such a course was to put everybody in the same situation as they were, before it was determined upon. The plea that the agreement was unlawful was not put forward by the plaintiff, but by the defendant. The defendant could not complain of plaintiff's default, relying on the illegality of the contract, though, if the unlawful agreement or a part of it had been performed, such a plea would be available to him.

Schwabe C. J. held, on a review of the authorities in — 'Kandaswami v. Kannaiah Naidu', AIR 1924 Mad 692 (O) that the plaintiff was entitled to recover money actually thrown away and also to claim damages to credit and reputation suffered by reason of the refusal of the defendant. That was an action for damages for breach of promise of marriage brought out by the brother of the proposed bridegroom against the father of the proposed bride.

(17) The Bombay High Court also has taken the same view in a number of decisions.

The earliest case was — 'Umedkika v. Nagindas', 7 Bom HCR 122 (P). Westropp C. J. held in that case that the plaintiff who had advanced money under an illegal agreement is entitled to recover it besides damages to his credit and reputation by reason of the defendant's refusal to fulfil the agreement.

In — 'Mulji Thackersay v. Gomti', 11 Bom 412 (Q) a sum of Rs. 700/- paid to the father of the intended bride, as also ornaments & clothes were held to be recoverable.

In — 'Dholidas Ishvar v. Fulchand Chhagan', 22 Bom 658 (R) Tyabji J. held that payments under such agreements as these may be recovered if the marriage had not taken place.

In — 'Gulab Chand v. Fulbai Harichand', 33 Bom 411 (S), the plaintiff had promised to pay Rs. 1800/- to the defendant and had actually made a payment of Rs. 750/- when the marriage contract was terminated. Their Lordships held that the transaction between the paries had not proceeded beyond the stage of agreement and that a suit would lie as the defendant was obliged by ties of natural justice and equity to refund the money when no material part of the illegal purpose had been carried into effect.

In a later case, — 'Balubhai v. Nanalal', AIR 1920 Bom 225 (T), where the defendants contended that the retraction of the proposal was inevitable on account of the ill-health of the bridegroom, the Court held that though the defendants could not be fined if there was good cause for retraction, yet they were liable to pay the expenses incurred by the bridegroom or his father during the betrothal.

(18) The Allahabad and Lahore High Courts also have adopted the view taken by the Calcutta High Court.

In — 'Bhagirathi v. Jokhu Ram', 32 All 575 (U), it was held that an alienation of family property for raising sulka or bride-price was held to be binding on the sons of the alienor; see also — 'Bhan Singh v. Kaka Singh', AIR 1933 Lah 849 (2) (V); and — 'Chhanga Mal v. Sheo Prasad', AIR 1920 All 167 (W).

(19) There is thus a catena of decisions in support of the appellant's contention and I have not been referred to any authority where such an action is held to be not maintainable.

(20) It has also been held that the mere fact that a present of money called 'pahni' is given, does not make the marriage an asura marriage. See — 'Jai Kissondas Gopaldas v. Harikishondas', 2 Bom 9 (X). This practice is not confined to the lower classes, but even among Guzerati Brahmins presents of money are made to the parents of the bride. But however reprehensible may be the practice, the marriage is valid and there is nothing in the transaction which can be said to be contrary to public policy or the law of the land.

(21) Even in England it has been held that money paid under such an agreement is recoverable when the contract fails. In — '(1905) 2 K.B. 123 (I)', there was a contract by a lady (who was desirous of getting married) with the defendant (who was a marriage advertising agent) for paying him a reward if the defendant undertook to assist her in getting married by means of introductions to gentlemen. The plaintiff terminated the contract and sued for recovery of the amount advanced by her. It was found that the defendant had taken certain steps and incurred some expenses towards carrying out his part of the agreement. Nevertheless. the Court held that money paid under such a contract had not been fully executed.

(22) To sum up, the following principles may be taken as well established:

(i) A marriage is presumed to be in the Brahma form until the contrary is proved; and the party alleging it to be in the Asura form has to prove that there was a sale of the bride.

(ii) Even if a bride-price is paid, the marriage itself does not become invalid.

(iii) The injunctions of the Smritis against the acceptance of a bride-price are only directory, and an infringement of the texts does not render the marriage invalid.

(iv) The custom of receiving bride-price has been so well-established throughout the country that it

is too late in the day to invalidate marriage on the ground of public policy, nor can such marriage contracts be held to be immoral or illegal in the absence of a statutory enactment expressly prohibiting the custom.

(v) If a marriage has been solemnised the Courts will not help a suitor to recover back the money paid by him under such a contract, but if the agreement remains executory the Court will direct the recovery of the amount paid as bride price, though no suit for specific performance of the contract will be entertained.

(23) Having these principles in mind, I have arrived at the conclusion that the suit by the plaintiff is maintainable and that he is entitled to our judgment. I would, therefore, set aside the judgment under appeal, restore that of the trial court and decree the plaintiff's suit as directed by the learned munsif. The plaintiff will also have his costs of this litigation throughout.

(24) MOHANTY J.: I agree.

A/K.S.B. Appeal allowed.

A. I. R. 1954 ORISSA 23 (Vol. 41, C. N. 7)

NARASIMHAM AND MOHAPATRA JJ.

Balabhadra Misra, Appellant v. Srimati Nirmala Sundari Devi and others, Respondents.

Second Appeal No. 303 of 1948, D/- 13-7-53, from a decision of Addl. Sub-J., Cuttack, D/- 30-4-1948.

(a) Deed — Construction — Intention of parties.

The intention of the parties should primarily be gathered from the sale-deed itself. But where the terms of the sale-deed are not clear and decisive the surrounding circumstances and the conduct of the parties may be looked into. AIR 1947 Pat 1, Foll. (Para 5)

(b) Deed — Construction — Passing of consideration — Condition precedent to transfer of title.

Where a sale deed expressly states that from the date of its execution the vendee shall be entitled to all the rights in the property sold and that the entire consideration money also passed on that day, but this portion of the recital in the deed is incorrect, from this circumstance alone it cannot be inferred that the intention of the parties was that passing of the consideration was a condition precedent to the transfer of the title. (Para 5)

(c) Evidence Act (1872), Ss. 145 and 157 — Previous statement — Contents of letter written by witness — Use as substantive evidence.

Where the writer of a letter appears as a witness in Court, the contents of that letter would amount to a previous statement of a witness and can also be used for the purpose of corroborating his testimony in Court under S. 157. But it cannot be used as substantive evidence and for that purpose one must scrutinise the nature of the evidence given in Court by the writer himself. (Para 9)

Anno: Evidence Act, S. 145 N. 1; S. 157 N. 1.

(d) Evidence Act (1872), S. 10 — Common intention.

After the common intention of the conspirators had been achieved any statement made by any of the conspirators would not be admissible under S. 10. AIR 1940 PC 176, Foll. (Para 12)

Anno: Evidence Act, S. 10 N. 5.

(e) Trusts Act (1882), S. 90 — Co-sharer purchasing property in revenue sale.

For granting equitable relief under S. 90 a co-sharer who purchased the property in the revenue sale must be guilty of some kind of sharp practice which would be inconsistent with any relation of mutual confidence between co-sharers. Where there can be no question of one co-sharer being misled by the other and the latter is not guilty of any sharp practice the equitable principles of S. 90 cannot be invoked. (Para 17)

Anno: Trusts Act, S. 90 N. 9.

S. N. Sengupta, U. N. Rath, M. S. Rao and P. Misra, for Appellant; D. Mohanty, M. Mohanty and S. C. Palit, for Respondents.

CASES REFERRED TO:

(A) ('47) AIR 1947 Pat 1: 223 Ind Cas 126
(B) ('32) AIR 1932 Bom 56: 33 Cri LJ 76
(C) ('40) AIR 1940 PC 176: 41 Cri LJ 871 (PC)
(D) ('16) AIR 1916 PC 227: 44 Cal 573 (PC)
(E) ('89) 16 Cal 194
(F) ('19) AIR 1919 Cal 431: 49 Ind Cas 802
(G) ('32) AIR 1932 Cal 434: 59 Cal 180
(H) ('39) AIR 1939 PC 86: ILR (1939) Kar 149 (PC)

NARASIMHAM J.: 'Touzi' No. 2717/3 of Cuttack Collectorate, bearing a 'Sadarzama' of Rs. 2, 701/3/-, originally belonged to Gajarajpur Choudhuries represented by defendants 3 to 8 in this litigation. In that 'touzi' were included two villages known as Korkar and Erada bearing a 'Sadarzama' of Rs. 846/-. The said two villages had been previously mortgaged by the Choudhuries with Sri M. S. Rao, an Advocate of Cuttack. On 2-3-40 the Choudhuries registred a 'Kabala' (Ext. 6-a) purporting to convey their entire interest in the said two villages in favour of the plaintiff for a consideration of Rs. 1, 205/-. On the same day the said vendors registered another sale deed (Ext. 6) transferring to the plaintiff for a sum of Rs. 975/- their right to recover arrear rental in the said two 'mouzas' In the second sale-deed (Ext. 6) it was stated that the vendors had transferred their proprietary interest in the two villages to the plaintiff & that they were, therefore, transferring their right to recover arrear rental from the tenants of the villages in favour of the new proprietor.

On 5-3-40 the entire consideration of the second 'Kabala' (Rs. 975/-) was received by defendant 3 on behalf of the Choudhuries and the original 'Kabala' (Ext. 6) was handed over to the plaintiff along with a receipt Ext. 1. The original of the main 'Kabala' (Ext. 6-a) relating to the transfer of the proprietary interest in the two villages, however, remained with the vendors as some differences arose between the parties regarding the procedure to be adopted for payment of the money to the mortgagee, namely, Sri M. S. Rao, before obtaining delivery of the document. On 15-6-1940 a notice was issued by the Advocate of the Choudhuries calling upon the plaintiff to pay the entire consideration money of the 'Kabala' within seven days. The plaintiff also sent a reply notice through her Advocate (Ext. 5) on 31-8-40 expressing her readiness and willingness to pay the con-

sideration to the mortgagee and obtain custody of the document.

There was exchange of telegram and letters between the parties on 3-8-40, and 5-8-40. On 5-8-40 the Choudhuries executed a 'Nadavi' deed (Ext. B) cancelling the previous sale-deed executed by them in favour of the plaintiff and on the same day executed another sale-deed (Ext. A) conveying their proprietary interest in the two villages to defendant 1. This led to a dispute between the plaintiff and defendant 1 as to whose title to the villages should prevail. As is to be expected, the dispute was first fought in the mutation proceedings before the Collector under the Bengal Land Registration Act.

Defendant 1, however, succeeded in getting his name mutated on 29-10-41. He paid his quota of the Government revenue; but his co-sharers in the 'touzi' namely, the Choudhuries (defendants 3 to 8) defaulted in payment of their quota and on 13-3-42 'touzi' No. 2717/3 was put up for revenue sale for arrears of revenue and purchased by defendant 2, Dewan Bahadur Lakshmidhar Mohanty, who is a senior Advocate of Cuttack Bar. On 13-10-42 he conveyed the proprietary interest in the two villages in favour of defendant 1. Subsequently, in December 1942 and January 1943 he conveyed other portions of the said 'touzi' in favour of defendants 3 to 8 and also in favour of defendants 10 and 11 retaining a small portion of the 'touzi' for himself.

(2) The plaintiff's case was that the title to the two 'mouzas', namely, Korkar and Erada had been completely transferred to her by the Choudhuries as soon as the first 'Kabala' (Ext. 6-a) was registered on 2-3-40. The Choudhuries had, therefore, no right to cancel the 'Kabala' and re-transfer the said two villages in favour of defendant 1 by their second 'Kabala' (Ext. A) and that no title passed by that 'Kabala'. The plaintiff further urged that defendant 2 entered into a fraudulent conspiracy with defendant 1 and the Choudhuries for the purpose of extinguishing the rights of the plaintiff and that in pursuance of this fraud there was a deliberate default in payment of Government revenue by defendants 3 to 8 and that the purchase by defendant 2 in the revenue sale was 'benami' on behalf of defendant 1 himself. She, therefore, claimed that she was entitled to a reconveyance of the disputed property by defendant 1.

Though S. 90, Trusts Act, was not expressly mentioned in the plaint it appears from a fair reading of paras 13 and 16 of the plaint that the plaintiff's case all along was that defendant 1 was in the position of a trustee of the plaintiff and inasmuch as he gained an advantage by availing himself of his position as that trustee he should reconvey the property to the plaintiff by way of equitable relief. The suit was not brought for the purpose of annulling the revenue sale under S. 33. Bengal Land Revenue Sales Act (Act 11 of 1859) and there was not even an allegation that there was any fraud in publishing and conducting the sale or else that the processes were fraudulently suppressed.

It appears from the judgment of the trial Court that this position was not disputed by the learned Advocate for the plaintiff who clearly stated before the trial Court that he did not want the revenue sale to be set aside but only prayed for a decree for reconveyance of the suit property in favour of the plaintiff by defendant 1. No relief was asked for either against defendant 2 or against the other defendants in whose favour portions of the 'touzi' had been transferred by defendant 2 after his purchase in the revenue sale. Consequently, the only contesting defendant was defendant 1.

(3) The trial Court (2nd Munsif of Cuttack) and the lower appellate Court (Addl. Subordinate Judge, Cuttack) both held that the title to the suit property passed to the plaintiff by virtue of the first 'Kabala' (Ext. 6-a) dated 2-3-40 and that it was not the intention of the parties that the title should pass only after payment of the consideration of the 'Kabala'. But they concurrently held that the revenue sale and purchase of the 'touzi' by defendant 2 were brought about in pursuance of a fraudulent conspiracy on the part of defendants 1 and 2 and the Choudhuries (defendants 3 to 8) with a view to extinguish the plaintiff's right in the suit property and that the equitable principles of S. 90, Trusts Act, would apply to the present case.

The main motive for such a fraudulent conspiracy was said to be the bitter enmity between the plaintiff's husband on the one hand and defendant 2 on the other in an adoption suit which was then pending. Defendant 1 had deposed on behalf of defendant 2 in that adoption suit and the Courts accepted the plaintiff's evidence to the effect that defendant 1 was an intimate friend and practically a tool in the hands of defendant 2, one of the senior Advocates of Cuttack Bar. Defendant 1 has preferred this second appeal against the concurrent decisions of the two Courts.

(4) Two important questions arise for consideration in this second appeal.

(i) Did the plaintiff acquire title to the suit property by virtue of her 'Kabala' (Ext. 6-a) dated 2-3-40?

(ii) Is the plaintiff entitled to any relief under the equitable principles of S. 90, Trusts Act, on the ground that the revenue sale was brought about by fraud practised by a co-sharer proprietor?

(5) As regards the first question, I think both the lower Courts have taken the correct view. Doubtless, the 'Kabala' was registered on 2-3-40; but the original document remained in the custody of the vendors and admittedly due to some dispute regarding mode of payment of the mortgage dues of Sri M. S. Rao the consideration of the 'Kabala' was not paid at all. The main question for decision was whether the intention of the parties was that title to the disputed property should not pass until payment of the consideration or else whether the intention was that title should pass on the registration of the document irrespective of the date of payment of the consideration.

As pointed out in — 'Pritam Singh v. Jagannath', AIR 1947 Pat 1 (A), reviewing the previous decisions on the subject. the intention of the parties should primarily be gathered from the sale-deed itself. But where the terms of the sale-deed are not clear and decisive the surrounding circumstances and the conduct of the parties may be looked into. On a scrutiny of the sale-deed it would appear that there is

nothing in it from which it can be inferred either expressly or by implication that the intention of the parties was that title should remain with the vendors until the passing of the consideration. The relevant portion may be translated as follows :

"But being in need of money to make part payment of the mortgage dues of Sri Babu M. Subba Rao we of our own accord and free will sell the 'zamindari' consisting of the undermentioned villages to the above-mentioned vendee for Rs. 1,205/- as the consideration for the said 'zamindari' and we have counted the said money and received it from the vendee out of her 'Stridhan' (which she got from her mother) through her father in one instalment and acknowledge that 'from this day' the vendee will be entitled to possess all rights including land, water, trees, stones, property underground, idols and temples, 'dhanda', 'sirepa' well and 'bamphi' tank, river, 'nala', 'machhadia', 'banakar', 'phalakar', gardens, etc., all rights and after her sons and grand-sons for all time to come and they will deposit the 'Sadarzama' of the property sold in the Government Treasury and get recorded in the Land Registration Department her own name in B and D Registers and deposit the revenue and procure challans according to rules and will do anything she likes regarding the said 'zamindari' and we or our successors will have no claim or interest whatsoever and if we make any such claim that will be rejected."

It expressly says that from the date of the execution of the document the vendee shall be entitled to all the rights in the suit property. Doubtless it was stated in the document that the entire consideration money also passed on that day. It is admitted by both parties that this portion of the recital in the document is incorrect. But from this circumstance alone it cannot be inferred that the intention of the parties was that passing of the consideration was a condition precedent to the transfer of the title. On the very same day another document (Ext. 6) was registered by the vendors transferring their right to realise arrear rental in favour of the plaintiff. In that document it was expressly mentioned that the proprietary interest in the villages had been transferred to the plaintiff.

The original of that sale-deed was delivered to the plaintiff on 5-3-40. If the intention of the parties was that the proprietary interest would not pass to the vendee until the date of payment of the consideration it is inexplicable how they would transfer their right to recover arrear rental in favour of the plaintiff on the same day and also deliver custody of that sale-deed on 5-3-40. Doubtless the position would have been slightly different if the transfer of the right to recover arrear rental by Ext. 6 was made in favour of a third party like the transfer of an ordinary money claim. But in Ext. 6 as well as in the receipt (Ext. 1) it was clearly stated that the right to recover arrear rental was being transferred to the plaintiff as proprietor of the villages.

Moreover, even in the notice (Ext. 3) dated 15-6-40 sent by the lawyer of the Choudhuries to the plaintiff it was not stated that the title to the property remained with the vendors due to the failure of the plaintiff to pay the consideration. I would, therefore, affirm the view taken by the two lower Courts that payment of the consideration was not a condition precedent to the transfer of the title and that the plaintiff obtained good title to the disputed property by virtue of her first 'Kabala' (Ext. 6-a) dated 2-3-40. The 'Kabala' in favour of defendant 1 (Ext. A) being of a subsequent date cannot prevail against the earlier 'Kabala'.

(6) The second question, however, presents considerable difficulty. Certain broad facts admit of no doubt. At all relevant times, the plaintiff's husband Sri Bhagabat Charan Mohanty was on terms of bitter enmity with defendant 2 Dewan Bahadur Lakshmidhar Mohanty. Bhagabat Charan Mohanty's own brother Narsingh was the son-in-law of Dewan Bahadur Lakshmidhar Mohanty. After Narsingh's death a son of the Dewan Bahadur claimed to be his adopted son. This adoption was challenged by Bhagabat Charan Mohanty and during the years 1940-42 the adoption suit was being bitterly fought out. Defendant 1 admits that he deposed on behalf of defendant 2 in that adoption suit.

It is proved by Sri M. S. Rao himself (D. W. 2) that Lakshmidhar Babu (defendant 2) approached him sometime after the execution of the first 'Kabala' by the Choudhuries in favour of the plaintiff suggesting that a sale-deed may be executed in respect of the same property in favour of defendant 1. On behalf of the plaintiff it was urged that this conduct of defendant 2 indicated unusual interest on his part in favour of defendant 1 with the object of harassing the plaintiff's husband. This circumstance, however, is capable of an innocent explanation. Defendant 2 is an Advocate and if approached by defendant 1 'bona fide' for the purchase of the two villages he might consult the previous mortgagee on the subject.

Doubtless his conduct in selling the same property to defendant 1 within seven months of the revenue sale lends some support to the view that the purchase in the revenue sale by defendant 2 was perhaps pre-arranged between him and defendant 1. He did not get his name mutated in the land registration records after his purchase in the revenue sale. Defendant 1 is the 'Mukaddam' of the two villages and if the plaintiff became the proprietor of the villages, it may be reasonably anticipated that her husband would exert pressure on defendant 1 either to give up supporting defendant 2 in the adoption suit, or to harass him for having taken the side of defendant 2 in the adoption suit. There is thus a strong motive for the 'benami' purchase so as to extinguish the plaintiff's right.

(7) Both the lower Courts relied to a great extent on a letter Ext. 7 written by defendant 2 to one Pranadhan Babu on 16-11-42 in which he disclosed his intention as to what he proposed to do with the property purchased in the revenue sale. That letter was written eight months after the revenue sale (13-3-42) and more than a month after the sale-deed (Ext. A-1) was executed by him in favour of defendant 1 transferring the disputed property to the latter. The letter deals mainly with his proposal to transfer the remaining villages in the said 'touzi' to the Choudhuries (defendants 3 to 8) and one Tripathy. The

letter opens with a quotation from a telegram sent by defendant 1 to defendant 2 containing his suggestions for the transfer of the remaining portions of the 'touzi' which defendant 2 accepted by telegram.

Then he informs Pranadhan Babu that he has no intention to cause any harm to the Choudhuries, that he was anxious for their welfare and that he (defendant 2) was bound by the word given by Misra (meaning defendant 1). He further admits that for the sake of Misra he (defendant 2) got entangled with the property and that Bhagabat (meaning the husband of the plaintiff) was trying to keep defendant 1 under his control. There is also an admission that the revenue sale was brought about by fraud 'sadajantra' though it is not clearly stated as to who were the perpetrators of that fraud. The suggestion, however, in the letter seems to be that defendants 3 to 8 were mainly responsible for the fraudulent sale.

(8) The admissibility of this document against defendant 1 was strenuously contested both in the lower Courts and before us. The writer of the document was examined as a witness (P. W. 6) by the plaintiff. In his examination-in-chief he admitted that he wrote that letter but he was not specifically asked as to whether he admitted the contents of that letter to be true. When cross-exmained by defendant 1, however, he made some statements in his favour denying the suggestion that his purchase of the property in the revenue sale was 'benami' for defendant 1. He was cross-examined by the plaintiff under S. 154, Evidence Act, but both parties scrupulously refrained from putting any question to him regarding the truth of the contents of that letter.

Mr. Misra on behalf of the appellant urged that the answers given by this witness during his cross-examination by defendant 1 amounted, in substance, to a contradiction of the contents of the letter and that consequently his attention should have been specifically drawn to those contradictions as required by S. 145, Evidence Act, before the contents of the letter could be used against him. In my opinion S. 145, Evidence Act, has no application to the present case. There is no question of contradicting defendant 2 (P. W. 6) by any previous statement made by him in writing. The letter was proved by him in his examination-in-chief and at that time there was no question of any contradiction because he had not stated anything in evidence contradictory to the contents of the letter. Similarly, during his cross-examination by defendant 1 though he made certain admissions in his favour he did not make any statement which would amount to a contradiction of the contents of the letter.

(9) As the writer of the letter (Ext. 7) has appeared as a witness in Court, the contents of that letter would amount to a previous statement of a witness and can also be used for the purpose of corroborating his testimony in Court under S. 157, Evidence Act. But it cannot be used as substantive evidence and for that purpose one must scrutinise the nature of the evidence given in Court by the writer himself. Doubtless if he had said in a general way in his examination-in-chief that the contents of the letter were true there may be substantive evidence regarding its contents and it would then be open to the other side to discredit his evidence during cross-examination. But, for reasons best known to the parties the plaintiff's lawyer would not venture to specifically ask this witness (P. W. 6) either in his examination-in-chief or during his cross-examination under S. 154, Evidence Act, as to whether the contents of the letter were true or not.

Consequently, the contents of Ext. 7 have not been proved as substantive evidence in Court except the first part which is a quotation from a telegram received by P. W. 6 from defendant 1 himself. The contents of that telegram have been practically admitted not only by P. W. 6 but also by the sender of the telegram, namely, defendant 1 (D. W. 3) and they may, therefore, be used as evidence against the defendants. But the latter portion of the letter in which defendant 2 admitted that he entangled himself with this property for the sake of defendant 1 and that the auction sale was brought about by 'sadajantra' (fraud) has not been admitted by him in Court and cannot be used as substantive evidence unless it can be brought within the scope of some other section of the Evidence Act.

(10) It was then urged that the aforesaid portion of Ext. 7 would amount to an admission against interest and would thus be admissible under S. 21, Evidence Act. Doubtless it is admissible against defendant 2 himself; but as he is a mere 'pro forma' defendant in this case, evidence as against him does not materially affect the case. Its admissibility against defendant 1 (who is the only contesting defendant) depends on whether at the time of making the aforesaid admission defendant 2 had any interest in the disputed property or else whether he was acting as an agent of defendant 1. The letter was written on 16-11-42 more than a month after defendant 2 had sold the disputed property to defendant 1. He had, therefore, no subsisting interest in it at the time of making the admission.

It cannot also be seriously urged that defendant 2 was acting as an agent on behalf of defendant 1 when he wrote the letter Ext. 7. Doubtless the telegram quoted in the first part of the letter shows that there was some understanding between the two to the effect that the property purchased in the revenue sale should be resold to various persons; but so far as the disputed property was concerned it had already been sold to defendant 1 and the contents of the telegram do not justify the inference that defendant 1 either expressly or by implication authorised defendant 2 to make any admission against his interest in respect of the disputed property.

(11) It was then urged that the contents of Ext. 7 would, in any case, be admissible under S. 10, Evidence Act, inasmuch as the conspiracy as alleged by the plaintiff was entered into by defendant 2 with defendant 1 and defendants 3 to 8 for the purpose of bringing about the revenue sale so as to extinguish the plaintiff's rights without in any way jeopardising the rights of defendant 1 and defendants 3 to 8. It was urged that the common intention of the conspirators was not completely achieved until reconveyance of the

disputed property to defendant 1 by defendant 2 and the further reconveyance of most of the remaining property to defendants 3 to 8. This reconveyance took place on 5-1-43 and 6-1-43 (vide para 12 of the plaint) and it was, therefore, urged that the conspiracy continued to be operative till then and that any statement in writing made by one of the fellow conspirators with reference to the common intention of all of them was admissible under S. 10, Evidence Act.

Against this argument Mr. Misra on behalf of the appellant-defendant 1 urged that the object of the conspiracy as alleged by the plaintiff was to extinguish the title of the plaintiff in respect of the disputed property and confer full title to defendant 1. This object was achieved when defendant 2 reconveyed the disputed property to defendant 1 on 13-10-42 and any subsequent statement made by defendant 2 would not come within the scope of S. 10, Evidence Act. In support of this argument reliance was placed on — 'Emperor v. G. V. Vaishampayan', AIR 1932 Bom 56 (B) and — 'Mirza Akbar v. Emperor', AIR 1940 PC 176 (C).

(12) It is well settled that after the common intention of the conspirators had been achieved any statement made by any of the conspirators would not be admissible under S. 10. This point has been clearly laid down by the Privy Council in — 'AIR 1940 PC 176 (C)', where their Lordships observed :

> "Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party."

In considering how far this principle applies to the present case two questions arise :

(i) what was the common intention of the conspirators as alleged by the plaintiff and when did the conspiracy cease to operate?

(ii) apart from Ext. 7 were there reasonable grounds in the evidence to believe that there was such a conspiracy?

(13) The answer to the first of the aforesaid two questions depends on a careful reading of the plaint. In para 7 it was alleged that on account of the dispute over the adoption suit between the plaintiff's husband and defendant 2 the latter conspired with his friend defendant 1 to deprive the plaintiff of the suit property and in pursuance of this conspiracy induced defendants 3 to 8 to reconvey the disputed property in favour of defendant 1 on 5-9-40. As soon as the said deed of reconveyance was executed this conspiracy ceased to be operative. In para 12, however, it was further alleged that the conspirators apprehended that the plaintiff would bring a title suit against defendant 1 and defendants 3 to 8 relying on her prior sale and that then the conspirators devised a plan for completely extinguishing her title and preventing her from challenging the title of defendant 1.

It was in pursuance of this second conspiracy that defendants 3 to 8 were induced to default in payment of the Government revenue so that the entire property may be brought to revenue sale and purchased by defendant 2. In para 12 of the plaint it was further stated that the subsequent reconveyance of the suit property to defendant 1 and other villages of the 'touzi' to the remaining defendants were all made in pursuance of this conspiracy. This second conspiracy is the main conspiracy in the case and on a fair reading of paras 12 and 13 it may be held that the common intention of the conspirators was to extinguish the plaintiff's title to the disputed property and to perfect the title of defendant 1 in such a manner as not to jeopardise the rights of defendants 3 to 8. In this view it may be said with some justification that the conspiracy would not cease to be operative until reconveyance by the auction-purchaser (defendant 2) in favour of defendants 3 to 8 also, i.e. till January 1943 and that the letter (Ext. 7) was written while the conspiracy was still operative.

(14) But whatever may be the nature of the allegations in the plaint the plaintiff did not lead any evidence worth the name to show that defendants 3 to 8 shared in the aforesaid intention of defendants 1 and 2. (After considering the evidence his Lordship proceeded :)

(15) My conclusion, therefore, is that there is no 'prima facie' evidence on the side of the plaintiff to prove the conspiracy as alleged in paras 12 and 13 of the plaint implicating defendants 3 to 8. The only conspiracy of which evidence may be said to exist is the conspiracy between defendants 1 and 2. That conspiracy ceased to be operative when defendant 2 resold the disputed property to defendant 1 on 13-10-42 and letter written subsequently by defendant 2 would not be admissible under S. 10, Evidence Act.

(16) The next question for consideration is whether the plaintiff is entitled to a reconveyance of the disputed property from defendant 1 on equitable considerations. I am inclined to accept the findings of both the lower Courts that the disputed 'touzi' was purchased by defendant 2 in the revenue sale 'benami' on behalf of defendant 1. The testimony of P. Ws. 2 and 8 on this question gains corroboration from other circumstances already discussed. But it is an admitted fact that defendant 1 paid his share of the revenue on the 'touzi' and it was the failure of the Choudhuries (defendants 3 to 8) to pay their quota of the revenue that brought about the revenue sale. The attempt of the plaintiff to prove by hearsay evidence that defendants 3 to 8 were ready and willing to pay their quota but that defendant 1 induced their agent Bitchitranada Mohanty not to deposit their quota of Government revenue has failed for reasons already given.

There is not even an allegation that there was fraudulent suppression of processes at the instance of defendant 1 or that the plaintiff was lulled into a sense of false security either by defendant 1 or by defendant 12. The plaintiff could have easily deposited the arrear revenue and thereby saved the property from sale. It is true that she failed to get her name mutated in the land registration records on 29-10-41; but the 'touzi' was put up for sale

only on 13-3-42 and during this period of six months there was ample opportunity for the plaintiff to safeguard her interest in the property by depositing the arrear revenue as permitted by S. 9, Bengal Land Revenue Sales Act, 1859. Instead of being vigilant to look after her own interests it appears that after her failure in the mutation case she became completely indifferent to the property. Her agent (P. W. 7) admitted that he made no enquiries in the 'Touzi' office as to whether all the co-sharers of the 'touzi' had paid their arrear revenue and whether any balance was due. Thus the facts leading to the revenue sale are as follows :

Defendant 1 as a recorded co-sharer deposited his quota of the Government revenue. The remaining co-sharers, namely, defendants 3 to 8 defaulted in payment of their quota due to their straitened financial circumstances. Their default was not brought about through the machinations of defendant 1. The plaintiff, who also claimed to be one of the co-sharers of the 'touzi', could have paid the arrear revenue and averted the sale; but she remained indifferent. There was no understanding, either express or implied, either between defendant 1 and the plaintiff or between defendants 3 to 8 and the plaintiff in consequence of which she was lulled into a sense of false security. Defendant 1 was aware that the 'touzi' was being put to sale due to the default of defendants 3 to 8 but would not avert the sale by depositing their quota of arrear revenue. When the property was brought to the revenue sale defendant 2 purchased it, presumably 'benami' on behalf of defendant 1 and subsequently reconveyed it to him.

(17) Both the lower Courts have relied on the leading decision of the Privy Council reported in — 'Deo Nandan Prasad v. Janki Singh', AIR 1916 PC 227 (D), and granted the relief asked for by the plaintiff. That case is, however, clearly distinguishable. There the co-sharer-mortgagee who purchased the estate in the revenue sale was himself the defaulter in payment of his quota of the Government revenue notwithstanding the existence of a previous agreement between him and the other co-sharers to the effect that he would pay his quota of the Government revenue. The default was brought about deliberately with a view to a subsequent sale and purchase on his behalf. The other co-sharers were not aware of the default or sale. On these facts their Lordships emphasised, while dissenting from a decision reported in — 'Doorga Singh v. Sheo Pershad Singh', 16 Cal 194 (E),

> "the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property."

This case was explained in a later Calcutta decision reported in — 'Kurshed Ali v. Dinanath Surma', AIR 1919 Cal 431 (F) and it was pointed out that the mere fact that the purchaser of an estate in a revenue sale was one of the co-sharers was not sufficient to attract the equitable principles of S. 90. Trusts Act and that there must be something unfair, something amounting at least to sharp practice, in the conduct of the purchaser. In — 'Akshaykumar v. Ahmad Ali', AIR 1932 Cal 434 (G), the principles laid down in — 'AIR 1916 PC 227 (D)', were also applied to a case where a co-sharer though not in default in payment of his quota of the arrear revenue had designedly brought about the revenue sale by scheming with the other co-sharers and deliberately procured their default. In that case Rankin C. J., the Chief Justice of Calcutta High Court, observed :

> "Of course, if defendant 1 had not intentionally procured the default which resulted in the revenue sale, he would have been entitled to purchase the plaintiff's estate for himself."

For granting equitable relief a co-sharer who subsequently purchased the property in the revenue sale must be guilty of some kind of sharp practice which would be inconsistent with any relation of mutual confidence between co-sharers. Both the lower Courts thought that defendant 1 was guilty of sharp practice inasmuch as he dissuaded defendants 3 to 8 from depositing their quota of the arrear revenue and thereby averting the sale. I have, however, shown that this finding of both the Courts is not based on any evidence worth the name. Hence, following the observations of Rankin C. J. quoted above, it would appear that defendant 1 was entitled to purchase the property 'benami' in the name of defendant 2 in the revenue sale inasmuch as he was not guilty of any sharp practice or anything unfair. There could be no question of mutual confidence between him and the plaintiff who were both then on bitter terms of litigation.

The mere purchase 'benami' in the name of defendant 2 is itself not evidence of fraud. His failure to deposit the arrear revenue due from the other co-sharers (defendants 3 to 8) cannot also lead to an inference that he was guilty of sharp practice inasmuch as there was no understanding between him and the other co-sharers that he should pay their quota of the revenue also. The present case is very similar to a later decision of the Privy Council reported in — 'Anath Nath v. Dwarka Nath', AIR 1939 PC 86 (H), (in which the judgment was delivered by Sir G. Rankin himself) where their Lordships refused to apply the principles of S. 90, Trusts Act, to a case where a co-sharer who subsequently purchased the property in the revenue sale was not guilty of any act of bad faith towards his co-sharers, had not lulled them into a sense of security, had not abused their confidence and had not done anything to prevent his co-sharers from becoming possible bidders.

The only distinguishing feature between that case and the present case is that in the former the co-sharer had done everything that was possible for him to do to prevent the sale whereas in the present case defendant 1 did not pay the arrear revenue due from defendants 3 to 8 though he could have paid it if he had so desired. But I do not think that this makes any difference inasmuch as the principle emphasised by their Lordships is the necessity for mutual confidence, candid dealing and good faith as between the co-sharers. Where there can be no question of one co-sharer being misled by the other and the latter is not

guilty of any sharp practice the equitable principles of S. 90 cannot be invoked.

(18) I would, therefore, allow the appeal, set aside the judgment and decree of both the Courts and dismiss the plaintiff's suit with costs throughout.

(19) MOHAPATRA J. : I agree.

B/V.R.B. Appeal allowed.

A. I. R. 1954 ORISSA 29 (Vol. 41, C. N. 8)

NARASIMHAM J.

Narsing Das Hiralal Ltd. and another, Petitioners v. Bisandayal Satyanarain Firm, Opposite Party.

Civil Revn. No. 248 of 1951, D/- 14-10-1952. from order of Addl. Dist. J., Cuttack, D/- 12-5-1951.

(a) Arbitration Act (1940), S. 28 — Scope.

Sub-section (1) is very wide and confers full discretion on Court to enlarge time for making award at any time. Court can exercise that power, even after the award has been made and filed, during the hearing of the petition under Ss. 14 and 17 and after the parties had led their evidence on merits. (Paras 6, 7)

Anno: Arbn. Act, S. 28 N. 1.

(b) Arbitration Act (1940), S. 30 — Misconduct — Making award after statutory period fixed in para 3 of Sch. 1 — When Court has extended time under S. 28(1) arbitrator cannot be held guilty of legal misconduct and award set aside on that ground. AIR 1948 Mad 40; AIR 1949 Cal 350 and AIR 1950 Lah 32, Distinguished. (Para 10)

Anno: Arbn. Act, S. 30 N. 12.

(c) Arbitration Act (1940), S. 28 — Court can exercise power conferred by sub-s. (1) suo motu. (Para 11)

Anno: Arbn. Act, S. 28 N. 1.

(d) Arbitration Act (1940), S. 28 — Reasonable exercise of discretion.

Award made after statutory time limit — Delay due to conduct of defendant — Defendant, after award was filed, not objecting to its validity on the ground of its having been made beyond time — Held that the Court exercised its discretion properly in extending the time and that the defendant had waived his objection by his conduct. (Para 11)

Anno: Arbn. Act, S. 28 N. 1.

M. S. Rao, for Petitioners; B. N. Das and S. C. Chakravarty, for Opposite Party.

CASES REFERRED TO :

(A) (1867) 37 LJ QB 121: 3 QB 404 (Pr 6)
(B) (1900) 69 LJ QB 481: 1900-2 QB 253 (Pr 6)
(C) ('20) AIR 1920 Cal 115: 46 Cal 1059 (Pr 6, 8)
(D) ('91) 13 All 300: 18 Ind App 55 (PC) (Pr 8)
(E) ('45) AIR 1945 Cal 19: 48 Cal WN 721 (Pr 9)
(F) ('49) AIR 1949 All 399: ILR (1949) All 720 (Prs 9, 11)
(G) ('48) AIR 1948 Mad 40: ILR (1948) Mad 83 (Pr 10)
(H) ('49) AIR 1949 Cal 350: ILR (1945) 2 Cal 70 (Pr 10)
(I) ('50) AIR 1950 Lah 32: Pak LR (1949) Lah 789 (Pr 10)

ORDER : This revision petition is against the appellate judgment of the Additional District Judge of Cuttack reversing the judgment of the First Additional Sub-Judge of Cuttack and setting aside an award given by the arbitrators and the judgment and decree following the award.

(2) The opposite party was the defendant in Suit No. 57/8 of 1949-48 in the Court of the 1st Additional Sub-Judge, Cuttack. That suit was brought under Ss. 14 and 17, Indian Arbitration Act, 1940 by the petitioners-plaintiffs for a judgment in terms of an award said to have been given by the arbitrators appointed by the parties, on 13-12-47. The plaintiffs and the defendant executed separate arbitration agreements (ekrarnamas) dated 13-3-47 and 11-3-47 respectively referring their dispute to three respectable merchants of Cuttack, namely, Rangalal Modi, Narsingdas Bhowsinka and Joharimal. In the arbitration agreements executed by the parties no time limit was fixed for the giving of the award and consequently the provisions of para 3 of the First Schedule to the Arbitration Act would apply and the award should be made within four months after the arbitrators have entered on the reference. As already stated, the award was given only on 13-12-47 in which it was stated that a sum of Rs. 3898/8/- was due from the defendant to the plaintiffs.

(3) Several objections were taken up both in the trial Court and in the lower appellate Court against the award. But the only point that need be considered now is whether the delay of more than four months in the making of the award was sufficient for the Court to set it aside. The trial Court held that the delay was mainly due to the defendant himself and that he had asked the arbitrators for adjournments on 26-3-47, 13-4-47 and 28-4-47 for the purpose of adducing his evidence. That Court also believed the oral evidence of one of the arbitrators to the effect that on several other dates also the defendant orally asked for adjournments. As late as 20-7-47 the defendant filed certain documents. The trial Court came to a finding that the delay in giving the award was due mainly to the defendant's action in taking time on successive occasions from the arbitrators. One of the main grievances of the defendant against the award was that the arbitrators did not afford sufficient opportunities to him to present his case (vide para 11 of his written statement). The trial Court, therefore, thought that in the interests of equity it should extend the period of four months prescribed in para 3 of the First schedule to the Arbitration Act.

The Court, however, omitted to state clearly under what provision of the Indian Arbitration Act it exercised the power of extending the statutory time limit for the making of the award. But it is obvious that this power was

exercised under sub-s. (1) of S. 28, Arbitration Act.

(4) The lower appellate Court, however, thought that the statutory time limit fixed in para 3 of the First sch. to the Arbitration Act can be extended only if there was an agreement in writing by both parties for extension of the time limit and that in the absence of such an agreement the Court had no jurisdiction to extend the time. It, therefore, came to the conclusion that the arbitrators were guilty of legal misconduct inasmuch as the award was not made within the prescribed statutory period and therefore set aside the award.

(5) The lower appellate Court has clearly misdirected itself. Its assumption that the trial Court acted under the provisions of sub-s. (2) of S. 28, Arbitration Act is not warranted. There is no doubt that under the provisions of that sub-section the time for making an award cannot be enlarged except with the consent of all the parties to the agreement and the arbitrators cannot on their own motion extend the time limit. But any discussion about the scope of sub-s. (2) of S. 28 is academic in the present case inasmuch as the trial Court purported to act under sub-s. (1) of S. 28. The appellate Court had therefore to consider only the following two important questions.

(i) Whether the trial Court had jurisdiction to enlarge the time for making the award in exercise of the powers conferred by sub-s. (1) of S. 28.

(ii) Assuming that the trial Court had the power, whether the Court exercised its discretionary power properly in the facts and circumstances of the present case.

(6) Sub-section (1) of S. 28 is as follows:

> "The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."

It will be noticed that the language of the sub-section is very wide and confers full discretion on the Court to enlarge the time limit for making the award at any time. That power can be exercised even though the time for making the award has expired and also even after the award has been made.

It will be useful to compare the provisions of this sub-section with the corresponding provisions of the previous statutory enactments dealing with arbitration. Section 12 Indian Arbitration Act, 1899 was as follows:

> "The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not."

Para 8 of Sch. 2, Civil P. C., 1908 was as follows:

> "Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period;"

It is true that in Sch. 2, Civil P. C., 1908 no statutory period was fixed for the making of an award as in para 3 of Sch. 1, Arbitration Act, 1940. But it will be noticed that though in S. 12, Indian Arbitration Act, 1899 and para 8 of Sch. 2, Civil P. C. 1908, it is expressly stated that the power of the Court to enlarge the time limit may be exercised whether the time for making the award has expired or not it is not further stated that this power can be exercised even after the award has been made.

In sub-s. (1) of S. 28, however, any doubt about the power of the Court to enlarge the time limit even after the award has been made, has been set at rest by the use of the following words: "whether the award has been made or not". Apparently those words were inserted with a view to give statutory recognition to the principle of English Law decided in — 'Lord v. Lee', (1867) 3 QB 404 (A) and — — 'Knowles v. Bolton Corporation', (1900) 2 QB 253 (B), where it was held that the Court had jurisdiction to extend the time for making an award even though the award had in fact been made. A similar view was taken in — 'Tejpal Jamunadas v. B. Nathmull & Co.', AIR 1920 Cal 115 (C), while construing S. 12, Arbitration Act 1899.

(7) Thus on a question of mere construction of sub-s. (1) of S. 28, Arbitration Act, 1940 and giving due importance to the words "whether the award has been made or not" deliberately inserted in that sub-section when the law of arbitration was re-enacted in 1940, I must hold that the power of the Court to enlarge the time limit is not limited to any particular stage of the arbitration proceeding and that it can be exercised at any time. In the present case the trial Court purported to exercise this power while hearing the petition under Ss. 14 and 17, Arbitration Act for the purpose of deciding whether the judgment should be given in terms of the award.

(8) Mr. Das, however, urged that the power of the Court under sub-s. (1) of S. 28 can be exercised only till the date of the filing of the award and not afterwards. In support of this argument he relied on a Privy Council decision reported in 'Har Narain Singh v. Bhagwant Kuar', 18 Ind App 55 (PC) (D). But that case was decided on a construction of Ss. 514 and 521, Civil P. C., 1882 where the words "whether the award has been made or not" were not found. Consequently, that decision is inapplicable to the present case. In — 'AIR 1920 Cal 115 (C)', while construing S. 12, Arbitration Act, 1899, it was pointed out that the aforesaid decision of the Privy Council was inapplicable in construing that provision of the Arbitration Act of 1899. The same reasoning would apply with greater force in construing sub-s. (1) of S. 28 of the Arbitration Act, 1940.

(9) There is also sufficient authority in subsequent Indian decisions to support the aforesaid view. In — 'Nani Bala v. Ram Gopal', AIR 1945 Cal 19 at p. 21 (E), it was pointed out

> "But if an arbitrator makes an award beyond time, the delay may be condoned at any time by the Court in a proper case, for S. 28 of the Act gives power to the Court to extend time even after the award had been made. If the award made in this case was otherwise a good award and there was no legal impediment to its being filed, the learned Subordinate Judge ought to have reserved consideration of this point at a later stage, when after the evidence had been led by the parties on the merits he would have been in a better position to exercise the discretionary power given by S. 28."

In the present case the First Additional Subordinate Judge exercised his discretionary power at the stage pointed out by the Calcutta High Court, after evidence had been led by the parties on merits.

Similarly in — 'Amar Nath v. Uggar Sen', AIR 1949 All 399 (F), it was pointed out that sub-s. (1) of S. 28 gave unrestricted power to the Court to extend time for making an award irrespective of whether the award has been made or not. I am therefore unable to find any indication either in the Arbitration Act or in any authority to the effect that once an award is filed before the Court it has no power under sub-s. (1) of S. 28 to enlarge the time for making the award.

(10) If, however, the Court refuses to extend the time limit there may be some justification for holding that the arbitrators are guilty of legal misconduct in making the award after the expiry of the statutory period and the award may be liable to be set aside. Mr. B. N. Das relied on — 'Kuppuswami Chetty v. Anantharamier', AIR 1948 Mad 40 (G); — 'I. G. H. Ariff v. Bengal Silk Mills Ltd.', AIR 1949 Cal 350 (H) and — 'Abdul Hakim Khan v. Lahore Improvement Trust', AIR 1950 Lah 32 (I)'. But these decisions are clearly distinguishable because in none of them did the Court concerned exercise its discretionary power under sub-s. (1) of S. 28 to extend the time limit. Those decisions, therefore, have no application to the present case where the trial Court has stated in its judgment that in the interests of equity it considers it proper to allow the period to be extended beyond four months.

(11) The next question for consideration is whether the trial Court exercised its discretion properly in thus extending the time limit. I have already shown that the defendant was mainly to blame for the delay in making the award. The arbitrators were constrained to give repeated adjournments, mainly at the instance of the defendant, though on some occasions the plaintiffs also took time. Even after the award was given by the arbitrators on 13-12-47 the defendant seems to have felt aggrieved on the ground that adequate opportunities were not given to him for presenting his case. In his objection petition in the trial Court also he never objected to the validity of the award on the ground that it was made beyond the statutory time limit. Under these circumstances I think the trial Court exercised its discretion properly in extending the time limit.

It is true that there was no specific prayer by the plaintiffs to the Court for extending the time limit and the Court granted that extension while writing out its judgment after considering the entire evidence on record. But sub-s. (1) of S. 28 does not say that the Court cannot exercise the power conferred by that sub-section suo motu. In — 'AIR 1949 All 399 (F), it was held that the absence of an application for the extension of time was a mere irregularity which may be waived by conduct. It was also held that where the arbitrators were not responsible for the delay in making the award they were not guilty of misconduct in conducting the proceeding. In considering whether the discretion was properly exercised by the trial Court I should take note of the conduct of the petitioners in submitting themselves to the jurisdiction of the arbitrators on 20-7-47 after the expiry of the statutory period of four months and their omission to state in their objection petition that the award was invalid on the ground that it was made after the expiry of the statutory period. It appears that they waived this objection by their conduct and taking all the facts and circumstances of this case into consideration I am not prepared to say that the trial Court exercised its discretion improperly.

(12) For the above reasons the order of the lower appellate Court is set aside and the order of the trial Court is restored. The opposite party should pay costs of the lower appellate Court the trial Court and also of this Court to the petitioners. Hearing fee is assessed at two gold mohurs.

B/ M.K.S. Revision allowed

A. I. R. 1954 ORISSA 31 (Vol. 41, C. N. 9)

MOHAPATRA AND MOHANTY JJ.

Parikhit Thapa, Appellant v. Nidhi Thapa and others, Respondents.

Second Appeal No. 242 of 1950, D/- 18-8-1953, from order of Addl. Sub. J., Sambalpur, D/- 6-1-1950.

T. P. Act (1882), S. 54 — Sale of property less than hundred rupees in value — (Evidence Act (1872), S. 91). AIR 1928 Mad 546, Dissent.

Sale can be effected either by registered instrument or by delivery of property itself. Sale effected by delivery — Fact that the parties who wanted the other terms, such as, price, default clause or the clause for damage if vendee did not get possession or was dispossessed, rendered into writing and had executed an unregistered deed will not render the sale completed by actual delivery invalid — Existence of such a document is not a bar under S. 91, Evidence Act from proving the transaction of sale by actual delivery — The document itself is admissible for the purpose of proving the terms of the contract between the parties. AIR 1929 Pat 620; AIR 1943 Bom 431; AIR 1925 All 206 (1) and AIR 1936 Mad 301, Rel. on. (Para 1)

Anno: T. P. Act, S. 54 N. 21; Evi. Act, S. 91 N. 8.

N. Sen, for Appellant; G. K. Misra, for Respondents 1-3 and 5.

CASES REFERRED TO :

(A) ('28) AIR 1928 Mad 546: 111 Ind Cas 677 (Pr 1)

(B) ('29) AIR 1929 Pat 620: 10 Pat LT 449 (Pr 1)

(C) ('43) AIR 1943 Bom 431: ILR (1943) Bom 653 (Pr 1)

(D) ('25) AIR 1925 All 206(1): 79 Ind Cas 394 (Pr 1)

(E) ('36) AIR 1936 Mad 301: 59 Mad 779 (Pr 1)

MOHAPATRA J. :

This is a plaintiff's Second Appeal against the reversing judgment of Shri B. Misra, Additional

Subordinate Judge, Sambalpur dated 6-1-50 which arises out of a suit brought by the plaintiff for a declaration of his title and for confirmation of his possession or in the alternative for recovery of possession on the basis of a sale by the defendants 1, 2 and 3 on 11-3-1942 for a sum of Rs. 22/-. The plaintiff further alleges that defendants 1, 2 and 3 executed an unregistered deed of sale in favour of the plaintiff on that date but particularly relied upon the factum of delivery of possession of the disputed land by defendant 1, 2 and 3 in his favour to complete the transaction of sale. The defence was an attack on the genuineness of the transaction, i. e. the unregistered deed of sale. They further took up the plea that there was no delivery of possession as alleged by the plaintiff.

Both the Courts below have concurrently found in fact that the unregistered deed of sale is a genuine transaction and further that there was in fact delivery of possession. But while the trial court decreed the plaintiff's suit on the finding that the same transaction was completed by delivery of possession as the value of the property in dispute was below Rs. 100/- and found that the unregistered deed is admissible only for the purpose of proving the nature and character of the possession of the plaintiff, the lower appellate court relying upon a Madras decision in — 'Kuppuswami Goundan v. Chinnaswami Goundan', A. I. R. 1928 Mad 546 (A) has dismissed the plaintiff's case on the finding that there being an unregistered deed of sale that alone is admissible for the purpose of proving the contract between the parties on the question of sale and as the document is not a registered document it must be taken out of consideration as being inadmissible. The plaintiff will be barred by the provisions of Section 91, Evidence Act, to prove the terms of the sale by proving the actual delivery of possession inasmuch as the terms have been embodied in the form of a document.

Shri Sen appearing on behalf of the plaintiff-appellant contends that the view taken by the learned lower appellate court is contrary to law and is contrary to the decisions of the various High Courts of India and even contrary to a subsequent decision of the Madras High Court wherein — 'AIR 1928 Mad 546 (A)' was not followed.

By a reference to Section 54, T. P. Act, which runs as follows: (His Lordship after quoting the provisions stated:) We find it clear that in cases of sales of this description where the subject-matter of the sale is valued at less than Rs. 100/-, the same can be effected either by a registered instrument or by delivery of the property itself.

In the present case, the plaintiff bases his case on the position that the sale is completed by the fact of delivery of possession as required under the provisions of Section 54, T. P. Act. Indeed a document which in the present case was unregistered was unnecessary. In our opinion, it cannot be suggested for a moment that the plaintiff's sale will be invalid even though, completed by actual delivery of possession simply because the parties wanted the other terms of the contract between them to be rendered into writing, such as, the price, the default clause the clause for damages etc. if the plaintiff does not get possession of, if he is dispossessed. The factum of actual delivery of possession cannot be deemed to be a term of the contract as provided for under the provisions of Section 91, Evidence Act. As such, the plaintiff is certainly entitled to prove the factum of actual delivery of possession in spite of the present unregistered deed of sale and in the present case, there being such delivery of possession, the sale is complete.

We may in this connexion refer to a decision of their Lordships of the Patna High Court in — 'Keshwar Mahton v. Sneonandan Mahton', A. I. R. 1929 Pat 620 (B). Exactly the same points arose for consideration before their Lordships that in a case of the description where the property is valued at less than Rs. 100/- and the sale was effected by delivery of possession even though there was an unregistered deed embodying the terms of the contract between the parties, their Lordships expressed their opinion categorically that Section 91, Evidence Act, is not a bar to prove the transaction of sale by actual delivery of possession. Their Lordships further held that the unregistered deed is admissible for the collateral purpose, collateral to the pertinent purpose of completing the title to the property, to show the terms of agreement between the parties and the nature and character of possession.

The decision reported in — 'A. I. R. 1928 Mad 546 (A)' was placed before their Lordships. Their Lordships were expressly of opinion that if —'AIR 1928 Mad 546 (A)' lays down any other principle which is contrary to this, their Lordships were not inclined to agree with the view. This decision of the Patna High Court has been followed by the Bombay High Court in — 'Tribhovan Hargovan v. Shankar Desai', A. I. R. 1943 Bom 431 (C). This seems to be the view of the Allahabad High Court as expressed in — 'Daya Ram v. Sita Ram', AIR 1925 All 206 (D).

We will last of all refer to the subsequent decision of the Madras High Court in — 'Muhammad Gosukani v. Md. S. Maracayar', A. I. R. 1936 Mad 301 at p 303 (E). Their Lordships considered the view expressed in the previous decision in — 'AIR 1928 Mad 546 (A)' and made observations as follows:

> "The expression 'mere delivery of property' does not, of course, find a place in Section 54; and with respect I am unable to see why, if the property is such as may be sold by delivery, it is any the less so sold because the parties, upon agreeing to the sale, unnecessarily have recourse to the execution of a document. Nor am I able to understand why the incontestable proof afforded by such a document of an agreement between the parties may not be accepted as such."

Their Lordships disagreeing with the view expressed in the previous case found that in such a case proof of completion of the title can be obtained by actual delivery of possession and the document is admissible for showing the terms of the contract as between the parties. This being the decided view of most of the High Courts, we find that the plaintiff has succeeded in proving his title to the property by proof of actual delivery of possession and by proving the terms of the contract embodied in the unregistered sale deed.

The appeal, therefore, is allowed. The judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial court are restored. As Shri Misra appearing on behalf of the respondents frankly conceded that the position of law relied upon by the appellant is irresistible, there will be no order for costs. The plaintiff is entitled to costs of the lower appellate court.

(2) MOHANTY, J.: I agree.

A/M.K.S. Appeal allowed.

A.I.R. 1954 ORISSA 33 (Vol. 41, C. N. 10)

PANIGRAHI AND NARASIMHAM JJ.

Anam Swain and others, Accused v. State.

Jury Ref. No. 1 of 1952, D/- 19-9-1952, referred by Addl. S. J., Cuttack, D/- 7-8-1952.

(a) Criminal P. C. (1898), Ss. 307 and 299 — Powers of High Court under S. 307.

The Jury are the sole judges of fact and however much a Judge may differ from their opinion, if the evidence is properly placed before them and the evidence is such that a reasonable body of men might reach conclusion which the Jury has reached, the Judge has no power to make a reference. Nor would the High Court have the power to interfere. The court can interfere only if the verdict of the Jury is perverse or against the weight of evidence. The paramount consideration must be whether the ends of justice require that the verdict of the Jury should be set aside. AIR 1946 PC 151, Applied. (Para 5)

Anno: Cr. P. C., S. 299 N. 2; S. 307 N. 1, 4 and 11.

(b) Evidence Act (1872), S. 45 — Opinion of medical expert as to age, value of.

The ossification test is no doubt a surer test for determining age. But the opinion of a doctor as to the age of the girl arrived at without conducting any ossification tests and based on other factors should not be brushed aside merely because he did not conduct such a test, taking into consideration the conditions obtaining in India where such tests are not conducted. (Para 13)

Anno: Evi. Act, S. 45 N. 5.

(c) Criminal P. C. (1898), Ss. 297, 298 and 299 — Duties of the Judge and Jury respectively.

In a jury trial the appreciation of facts is exclusively within the competence of the jury and the Judge is expected to help the Jury only in the appraisal of the evidence. He may, of course, suggest the probability or otherwise of the effect of a certain fact elicited in evidence, but he would be going beyond his jurisdiction if he were to say that he does not believe a certain fact. (Para 14)

The Judge should confine himself only to laying down the law on his own responsibility without referring to decided cases. The question whether two facts contradict each other should invariably be left to the Jury and they should be left free to consider whether the contradiction is so serious as to make the witnesses unworthy of credit. The duty of the Judge ends when he points out the two versions and any apparent contradictions implied in those versions. He should not proceed beyond that and say that the contradictions justify rejection of the evidence. This is a matter for the Jury to form an opinion about. (Para 14)

Anno: Cr. P. C., S. 297 N. 6, 9; S. 298 N. 1; S. 299 N. 2.

(d) Evidence Act (1872), S. 3 — Proved.

The proof of a fact depends not upon the accuracy of statements made at different stages of a case but upon the probability of its having existed. Evidence of a fact and proof of a fact are not synonymous. While, therefore, there may be inaccuracies in the evidence, the fact sought to be proved may be so probable that a prudent man may act upon the supposition that it exists. It is the broad facts of the case, and not the little details that go to make up those facts that will make the existence of those facts probable or not. Discrepancies are bound to occur in human testimony and mathematical precision in the statements of witnesses cannot be expected. (Para 15)

Unless the contradictions are of such nature as to affect the existence of the fact in issue, they cannot be regarded as material. The omission of a detail in an earlier stage of the proceedings is not to be treated as a contradiction of the facts spoken to later unless it is a material fact. (Para 15)

Anno: Evi. Act, S. 3 N. 5.

(e) Penal Code (1860), S. 376 — Evidence and proof.

Per Narasimham J.: In cases of rape the alleged victim and the accused persons should be specially examined with a view to ascertaining if they are infected with venereal disease. (Para 18)

Advocate General and C. M. Acharya, for the Reference; V. Pasayat, for the Accused.

CASES REFERRED TO:

(A) ('46) AIR 1946 PC 151: 47 Cri LJ 905 (PC) (Pr 5)
(B) ('89) 15 Bom 452 (Pr 5)
(C) ('27) AIR 1927 Cal 848: 54 Cal 708: 28 Cri LJ 903 (Pr 5)
(D) ('28) AIR 1928 Mad 1186: 51 Mad 956: 30 Cri LJ 317 (FB) (Pr 5)

PANIGRAHI J.:

This is a reference made under S. 307, Criminal P. C., by the Additional Sessions Judge, Cuttack, recommending that the unanimous verdict of 'guilty' returned by the Jury, in respect of a charge under S. 376, I. P. C., should be set aside.

(2) The prosecution case, briefly, is this. On the night of 12-2-1951, P. W. 7 Bimali Dei, an unmarried girl was sleeping in her house in village Patkura in P. S. Tikhiri of Cuttack district, with her mother (P. W. 5), her sister (P. W. 6) and her younger brothers. At midnight she was carried away by some persons who made a forcible entry into the house, and was carried to a field about 600 yards away from her house and there she was raped by the four accused persons. After she had been raped twice by each of the accused persons, she was brought by them and left in the backyard (bari) of her house in a prostrate condition. Meanwhile her mother and sister had been aroused by the cries of a young baby and P. W. 5 called out P. W. 7 but found her missing. A little later P. W. 5 could hear the moans of P. W. 7 who had by then been left in the backyard of the house. The girl was helped into the house by her mother and sister and sometime later she disclosed what had happened to her mother.

The father of the girl was at that time absent from the village, and on receiving information about the occurrence returned to the village on the 14th evening. An attempt was

made by the villagers to hush up the matter by persuading the accused to pay compensation but as no settlement could be arrived at, P. Ws. 3 and 7 went to the Police Station where the girl (P. W. 7) lodged First Information on 18-2-1951. On 19-2-1951, she was examined by P. W. 1, a doctor, who noticed some abrasions on her right and left scapula and buttocks. He also noticed a laceration of the fourchettes & it was gaping. The hymen was ruptured and was bleeding on touch. The mucus membrane of the vulva was inflamed, tender, and signs of recent tearing were found. The accused pleaded a complete denial of the occurrence and stated that the case had been foisted on them at the instigation of P. W. 4.

(3) The learned Additional Sessions Judge clearly charged the Jury for an acquittal. He criticised the prosecution from all points of view. He indicated, in unmistakable terms, that the story given out by the complainant was hard to believe. He pointed out what in his opinion were material contradictions and discrepancies between the version given by the girl in the F. I. R. (Ext. 5) and her evidence in Court, saying that they could not be brushed away as being of a minor character. The learned Judge then referred to the contradiction between the girl's evidence and her mother's evidence and her sister's evidence. Referring to the evidence of the doctor he said that the injuries pointed out by the doctor were as consistent with a case of adultery as with rape, though it was nobody's case that there had been an offence of adultery as admittedly the girl was unmarried.

The injuries noticed on the person of two of the accused persons were, in the opinion of the learned Judge, sufficiently explained and not such as to cause any suspicion against them. He did not choose to place any reliance upon the evidence of the doctor with regard to the age of the girl. On this part of the case the learned Judge told the Jury that the evidence of the doctor was "no surest guide" in the absence of the Ossification test. He also referred to the defence evidence and characterised it unconvincing. The accused had been charged under Ss. 457 and 376, I. P. C. The jurors returned a verdict of 'guilty' in respect of the charge under S. 376 and 'not guilty' on the charge under S. 457. The learned Sessions Judge refused to accept the verdict in respect of S. 376 and has made the present reference to this Court, as, in his opinion, the two different verdicts of the Jury are inconsistent and "not mutually tenable", and there was no evidence at all to sustain any of the charges against any of the accused persons.

(4) The powers of the High Court to interfere with the verdict of a Jury are defined in S. 307, Criminal P. C. If the Sessions Judge is clearly of opinion that it is necessary in the ends of justice to submit a case in respect of such accused person to the High Court he shall submit the case accordingly, recording the grounds of his opinion. The Section also lays down what the High Court may do in such a case. Sub-section (3) of S. 307 says:

> "In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on appeal and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict such accused of any of the offences upon which the Jury could have convicted him on the charge placed upon it."

(5) It is well settled that the Jury are the sole judges of fact and however much a Judge may differ from their opinion, if the evidence is properly placed before them and the evidence is such that a reasonable body of men might reach the conclusion which the Jury has reached, the Judge has no power to make a reference. Nor would the High Court have the power to interfere. There was a conflict of opinion between the different High Courts as to whether the High Court would interfere only if the verdict of the Jury was perverse in the sense of being unreasonable or whether it could interfere if, upon 'its own' view of the facts, the verdict is unsustainable. But this conflict of opinion has been resolved by the Judicial Committee in — 'Ramanugraha Singh v. Emperor', AIR 1946 PC 151 (A). Their Lordships of the Judicial Committee held that the reasoning in the cases reported in — 'Queen Empress v. Dada Ana', 15 Bom 452 (B); — 'Emperor v. Har Mohan Das', AIR 1927 Cal 848 (C) and — 'Veerappa Goundan v. Emperor', AIR 1928 Mad 1186 (FB) (D) and in other cases which laid down that the Court could interfere only if the verdict of the Jury was perverse or against the weight of evidence, was correct. The paramount consideration must be whether the ends of justice require that the verdict of the Jury should be set aside. Their Lordships observed:

> "In general, if the evidence is such that it can properly support a verdict of either guilty or not guilty, according to the view taken of it by the Trial Court and if the Jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the Jury must prevail since they are the judges of fact. In such a case a reference is not justified and it is only by accepting their view that the High Court can give due weight to the opinion of the Jury."

(6) We have been taken through the evidence fully and after giving due weight to the opinion of the learned Judge we are unable to say that the verdict of the jury is not justified by the evidence. We are further of opinion that the apparent discrepancies and contradictions pointed out by the learned Judge are not so serious as to be regarded as fatal to the prosecution case; and in any event more than one view of the evidence is possible. It was certainly within the province of the Jury to take one view rather than the other; and it is not a case in which it can be said that there was a complete lack of evidence to support the prosecution case and that the verdict of the Jury should, therefore, be pronounced as "perverse".

(7) The learned Addl. Sessions Judge appears to have made an unfortunate confusion between 'adultery' and 'rape'. Adultery is an offence committed against a married woman whereas rape may or may not be so. Rape may be committed against a married woman if sexual intercourse is had without her consent, and it becomes adultery only if she consents to such intercourse and thus offends against her marital ties. The complainant P. W. 7 is an unmarried girl and no question of adultery could at all

arise in this case. I am, therefore, unable to understand what the learned Judge had in mind when he observed:

"A third possibility might be there, which is adultery with the consent of the girl."

Again he says:

"But the Jury had been clearly told in the address that the learned Public Prosecutor had openly sought to abandon that alternate theory of rape in the course of his argument and that since it was no side's case that sexual intercourse was with consent, though they could reject the prosecution story on the theory of probability, that consent was there, there was no material for them to make out a positive third case that sexual intercourse with the girl was with her consent."

It is difficult to follow the reasoning underlying this observation. In another part of his reference the learned Judge says:

"But the medical evidence was clear that such intercourse might have been as much with her consent as without her consent."

The learned Judge failed to see that no medical man could give any opinion as to whether sexual intercourse was made with or without consent. It was for the Jury to see, having regard to the circumstances and the evidence of the girl, whether she consented to the intercourse. This confusion appears to have been mainly responsible for the difference of opinion between the Judge and the Jury.

(8) But apart from what has been said above the reasons given by the learned Judge for his difference with the Jury may now be examined.

(After discussing the evidence His Lordship proceeded): These were the points made out against the girl's story by the learned Judge in his reference, and I have no hesitation in saying that none of them appeals to me as being convincing enough to justify disagreement with the view taken by the Jury. These are all matters of inference to be drawn from facts and should be left to the Jury to form their opinion about.

(9) The learned Additional Sessions Judge next refers to what he calls inconsistencies between the version given by P. W. 7 in the F. I. R. (Ext. 5) and that given in her evidence in Court. (After discussion of these inconsistencies and some more evidence His Lordship proceeded).

(10-11) Referring to the delay in lodging the F. I. R. the Judge is of opinion that the delay was not "sufficiently explained at least for the period for which P. W. 3 waited in the village at the instance of some of the villagers." In a case like this the delay is not unnatural. Whether the explanation for the delay given by P. Ws. 3 and 6 was sufficient or not, the Jury appear to have satisfied themselves that there was good cause for the delay that had occurred. Here, again, it is a matter for the jury, on which they could come to their own opinion.

(12) The learned Judge then makes much of the absence of any reference to the cutting of the rope in the F. I. R. The suggestion is that the accused effected entry into the house by cutting the rope tied to the door-leaf. The rope had been seized by the Police ten days later. I am unable to see anything material in the omission to mention this detail in the F.I.R. What the learned Judge seems to have thought is that the Jury should be taken to have disbelieved the girl's story alleging that the accused persons entered forcibly into the house as false, inasmuch as they acquitted the accused persons of the charge of S. 457, I. P. C. But such an inference, in my opinion, does not necessarily follow from the facts elicited in evidence. The girl merely stated that she did not know the persons who had forcibly entered into the house and carried her away and that she could identify them only, later, when she was being raped. Apart from the suggestion conveyed in this statement there is no other evidence to show as to who the persons who entered into the house were or as to who carried her away. In such circumstances the Jury were right in not holding the accused guilty of the offence of house-breaking.

(13) As I have already stated above the learned Judge does not appear to have properly understood the prosecution case with regard to the age and consent of the victim of the rape. The prosecution case is that the girl had attained puberty about four months before the date of occurrence and that, at the time of the occurrence, she was fifteen years of age. This is corroborated by P.W. 3 & P.W. 5 the father & mother of the girl respectively, as well as by P. W. 1 the doctor. The doctor's evidence shows that she had 28 permanent teeth and no wisdom tooth. He estimated her age from the development of her breasts, height and weight and the appearance of pubic hair.

The ossification test to which the learned Judge refers is no doubt a surer test for determining age. But I am not aware of any such tests having been conducted anywhere in India, particularly in Orissa. Nonetheless Courts have acted on the opinion of doctors, arrived at without conducting any ossification tests and based on other factors as indicated above. The learned Judge seems to have ignored the conditions obtaining in this country, and has brushed aside the opinion of the doctor on the ground that he did not conduct the ossification test on the girl. The fact that the girl had attained puberty just four months prior to the occurrence must have impressed the Jury who saw the girl, considerably in returning their verdict and it is unfortunate that the learned Sessions Judge should have wholly overlooked this important piece of evidence.

Having regard to the evidence on the point the learned Public Prosecutor obviously told the Jury that the question of consent did not arise. But curiously enough the learned Sessions Judge has interpreted the position taken up by the Public Prosecutor as amounting to an 'abandonment' of the "alternative theory of rape with consent". The prosecution did not at any time suggest that the girl consented and the question of 'abandoning that theory' as suggested by the learned Sessions Judge is the result of a misunderstanding of the prosecution case. I see no ground for supporting the learned Judge in thinking that the Jury had tried to make out a 'third case' as they were under no misconception that the girl was below 16 years of age and was raped.

(14) After going through the evidence I am satisfied that there can be no doubt about the truth of the prosecution version and the Jury

were right in their appreciation of the prosecution evidence. In his charge the learned Judge appears to have obtrusively imposed his own opinion of the facts and freely expressed himself against the credibility of the witnesses. It should be borne in mind that appreciation of facts is exclusively within the competence of the Jury and the Judge is expected to help the Jury only in the appraisal of the evidence. He may, of course, suggest the probability or otherwise of the effect of a certain fact elicited in evidence, but he would be going beyond his jurisdiction if he were to say that he does not believe a certain fact, as has been done in this case. I have also noticed that the learned Sessions Judge has referred in his charge to many reported cases and their effect. This would result in confusing the Jury as they are not expected to be learned in law. The Judge should confine himself only to laying down the law on his own responsibility without referring to decided cases. The question whether two facts contradict each other should invariably be left to the Jury and they should be left free to consider whether the conviction is so serious as to make the witnesses unworthy of credit. The duty of the Judge ends when he points out the two versions and any apparent contradictions implied in those versions. He should not proceed beyond that and say that the contradictions justify rejection of the evidence. This is a matter for the Jury to form an opinion about.

(15) I have also noticed that the learned Judge has mainly relied on the so-called contradictions and discrepancies in the prosecution evidence, both in his charge to the Jury and in his reference to this Court to discredit the prosecution case. The proof of a fact depends not upon the accuracy of statements made at different stages of a case but upon the probability of its having existed. A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of that particular case, to act upon the supposition that it exists. Evidence of a fact and proof of a fact are not synonymous. While, therefore, there may be inaccuracies in the evidence, the fact sought to be proved may be so probable that a prudent man may act upon the supposition that it exists.

It is the broad facts of the case, and not the little details that go to make up those facts, that will make the existence of those facts probable or not. Discrepancies are bound to occur in human testimony and mathematical precision in the statements of witnesses cannot be expected. These inaccuracies or discrepancies may arise out of the incompetency of a witness to state a fact precisely or completely, or out of the failure of the person who records his statement to appreciate the importance of the fact at the time of recording it and the accuracy of the record. They may also arise out of lapse of memory or the strangeness of the surroundings. We therefore come across discrepancies in very many cases between the F. I. R. recorded by a Police Officer and the statement recorded by a Magistrate or a Judge. If the decision of cases were to depend upon an exact correspondence between the language used by different officers at different stages, no case can possibly be proved.

It is common experience that proper attention is not paid to accuracy or precision in the record prepared during investigation or even in the Committing Court. Similarly, with regard to the so-called contradictions. Unless the contradictions are of such nature as to affect the existence of the fact in issue, they cannot be regarded as material. The omission of a detail in an earlier stage of the proceedings is not to be treated as a contradiction of the facts spoken to later unless it is a material fact. In a Jury case, it should be remembered that the Gentlemen of the Jury being laymen, are likely to overlook or even forget little details of the case, and concentrate their attention only on the broad facts.

The broad facts in this case are: (1) that the girl had attained puberty four months before the offence; (2) that she had been removed at dead of night and forcibly raped; (3) that her hymen had been ruptured and the fourchette had been lacerated; (4) that her scapula and buttocks bore marks of injury; (5) that a patch of blood was found on her wearing cloth near the buttocks; (6) that there were marks of injury on the inner side of the thighs of two of the accused persons, caused by finger nails and that no explanation was given for the existence of those injuries or that the explanation given was so improbable as to be rejected; (6a) that the girl had no previous sexual experience; (7) the unlikelihood of a story being concocted which would ruin the future of the girl; (8) the absence of any motive for a false story being foisted on the accused; and (9) that she was affected with gonorrhea.

With regard to the last point it is unfortunate that the accused persons were not examined by P. W. 2 the doctor to ascertain whether any of them had infection of gonorrhea. The other outstanding facts have been proved by unimpeachable evidence. Mr. Pasayat pointed out that the charge to the Jury was vitiated owing to the failure of the Judge to put certain facts before the Jury which would have weighed in favour of the accused. He cites, as instances, the following facts; (1) that the delay in lodging the F. I. R. had not been satisfactorily explained; (2) that the non-examination of the Punchayet witnesses who attempted to effect a settlement of the matter on the day after the occurrence has not been satisfactorily explained; (3) that the defence evidence was discussed first before the prosecution evidence was placed before the Jury, & (4) that P. W. 5 the mother of the girl did not send word to her husband immediately after the occurrence.

I do not think that any of these circumstances was overlooked by the Jury in spite of the fact that the learned Judge did not specifically mention them in his charge. The prosecution witnesses were cross-examined at great length on all these points and the accused were defended by Mr. Pasayat himself who argued these points in his address to the Jury. Nor do I consider these points to be of such great importance as to incline me to hold that the non-direction of the Jury on these points amounted to a miscarriage of justice.

(16) After having gone through the evidence with great care, I am satisfied that the verdict returned by the Jury in this case was the only verdict possible and any other view would, in

my opinion, have been perverse. I would accordingly reject this reference, accept the verdict of the Jury and convict the accused persons u/s. 376, I.P.C., and sentence each of them to undergo four years rigorous imprisonment and to pay each a fine of Rs. 100/-. In default of payment of fine each of the accused shall undergo rigorous imprisonment for a further period of 6 months. Out of the fines, if realised, Rs. 300/- will be paid to the complainant as compensation under Section 545, Cr. P. C.

NARASIMHAM J.:

(17) I agree with the order proposed by my learned brother.

(18) I am, however, constrained to make some observations regarding the unsatisfactory manner in which the accused persons were medically examined by Dr. Harekrushna Parija (P. W. 2). It is a well-known rule (see Modi's Medical Jurisprudence, Tenth Edition, p. 303 and p. 305) that in cases of rape the alleged victim and the accused persons should be specially examined with a view to ascertain if they are infected with venereal diseases. Dr. Jadunath Kar (P. W. 1) who medically examined the girl Bimali Dei took special care to collect some smear from the vagina of the girl and sent it to the Chemical Examiner from whose report it appears that the girl was infected with gonorrhea. Dr. Harekrushna Parija (P. W. 2), however, has not stated that he examined the accused persons with a view to ascertain if any of them was infected with venereal diseases. His evidence is entirely silent on this subject. Any medical officer with some knowledge of medical jurisprudence is expected to know that in cases of rape the accused ought to be specially examined for signs of venereal disease, if any.

Even if this medical officer overlooked this point the investigating police officer or the superior police officers who supervised the case ought to have sent a special request to the Medical Officer to further examine the accused persons to find out if there were signs of venereal disease. Unfortunately, this was not done with the result that an important piece of evidence was lost. If any of the accused persons was found to suffer from gonorrhea that would be the strongest piece of corroborative evidence of the girl's statement incriminating that accused. On the other hand, if none of the accused was found to suffer from gonorrhea that circumstance itself would completely disprove the girl's allegation of rape by the accused persons because according to her evidence that was the first time when any person had sexual intercourse with her. I trust the authorities concerned will make careful enquiries and find out who was responsible for this important omission.

B/K.S.B. Reference rejected.

A.I.R. 1954 ORISSA 37 (Vol. 41, C. N. 11)

NARASIMHAM AND MOHAPATRA JJ.

Neelamoni Sahu, Appellant v. Khetrabasi Sahu and others, Respondents.

First Appeal No. 31 of 1948, D/- 15-7-1953, from decision of Sub-J., Berhampur, D/- 27-4-1948.

(a) Specific Relief Act (1877), S. 42 — Property in custody of Court — Suit for mere declaration — Maintainability.

A suit for mere declaration that the plaintiff is owner of a portion of the amount deposited in Court without consequential relief for refund is maintainable if at the time of the institution of the suit the amount is in possession of the Court pending the decision of the suit and not in possession of the person against whom the relief is sought. 27 Mad 59; 36 Mad 62; AIR 1939 Mad 853; AIR 1938 PC 73, Rel. on. (Para 4)

Anno: Sp. R. Act, S. 42 N. 15.

(b) Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 10 — Scope.

The language of S. 10 is wide enough to embrace a suit brought by a debtor in respect of the loan advanced, for a declaration on the basis of the loan advanced on the mortgage transaction. It is not necessary to restrict its scope to a suit for redemption only. (Para 6)

(c) Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 2(i) — Mortgage transaction is loan.

A mortgage transaction is, within the definition given in the Act, a loan, when the transaction carries interest and is in respect of past liability. (Para 7)

(d) Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 10 — Power of Court to ascertain interest.

Once it is found that a suit is in respect of a loan advanced, the Court is given the power under S. 10 to reopen the transaction and ascertain that the interest for the period preceding the institution of the suit together with any amount already realised and received through Court or otherwise is greater than the amount of 'loan originally advanced.' The Court is empowered to trace back the cash consideration passed between the parties at the time of the original loan and is to take account of all amount received by the creditor as interest 'through Court or otherwise.' (Para 7)

(e) Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 10 — Past and future interest.

It is clear from the language of S. 10 that any amount realised as interest through Court or otherwise is to be taken into account. It does not make any difference between the past interest and the future interest in respect of the previous transaction that has merged into a decree passed on the basis of a part of the loan. (Para 8)

P. C. Chatterji, for Appellant; P. Misra, for Respondents.

CASES REFERRED TO:

(A) ('04) 27 Mad 59
(B) ('13) 12 Ind Cas 170: 36 Mad 62
(C) ('39) AIR 1939 Mad 853: ILR (1939) Mad 986
(D) ('38) AIR 1938 PC 73: ILR (1938) Lah 63 (PC)

MOHAPATRA J.: This First Appeal is against the judgment and decree dated 27-4-1948 of Sri R. C. Misra, Subordinate Judge of Berhampur, and is brought by the creditor (defendant 1), the

Court having allowed relief under the provisions of S. 10, Orissa Money-Lenders Act in favour of the plaintiffs. Defendant 3 (Ghanosyamo Sahu) was the original debtor along with one Bada Khetrabasi. Plaintiff 2 Raghunath and defendant 4 Neelakantha Sahu are the sons of defendant 3. Plaintiff 1 Khetrabasi is the brother of the said Ghanosyamo. Baba Khetrabasi was not a member of the family, but a partner in business with them. Padma Sahuani (plaintiff 3) is the widow of deceased Bada Khetrabasi. The said Bada Khetrabasi and defendant 3 executed a promissory note of Rs. 4000/- (Ext. 2) in favour of defendant 1 on 19-4-1931, the note bearing interest at twelve per cent. per annum. Thereafter the executants used to make occasional payments and also used to borrow further sums from time to time. The biggest item that they borrowed after the execution of the said handnote was Rs. 2015/5/6. On calculation, the total amount due to the creditor was found to be Rs. 9382/- on 11-8-1936.

The said Bada Khetrabasi and defendant 3 executed a further handnote on 11-8-1936, for the said amount, that is, Rs. 9382/- (Ext. 2-a). It is important to note here that for a part of this amount due upon the promissory note dated 11-8-1936, that is, for Rs. 5800/-, the debtors executed a simple mortgage bond (Ext. 1) in favour of the said creditor on 13-4-1937. Defendant 1 brought a suit on the basis of the said promissory note dated 11-8-1936, for the recovery of the amount from the debtors, that is, Bada Khetrabasi and defendant 3, due on the handnote excluding the amount which was covered by the said mortgage bond dated 13-4-1937. Eventually, the creditor got a decree in O. S. No. 16/41; the decree was completely satisfied by a deposit, having been made by the judgment-debtors, of a sum of Rs. 3751/4/7 excluding the costs. The plaintiffs and defendants 3 and 4 having sold some of their properties, mortgaged to defendant 1, to defendant 2, defendant 2 deposited in Court a sum of Rs. 9864/5/6 on 27-1-1945, under the provisions of S. 83, T. P. Act. Defendant 1, the mortgagee, however, refused to take the amount in full satisfaction of the mortgage dues, but was willing to accept it in part satisfaction of them. The petition, however, was not pressed by defendant 2 and the deposit is still in Court.

The plaintiffs bring this suit seeking relief under the provisions of S. 10, Orissa Money-Lenders Act on the allegations that the cash consideration that passed between the creditor and the debtors in respect of the above three transactions, that is, promissory notes dated 19-4-1931 and 11-8-1936 and the mortgage bond dated 13-4-1937, is only Rs. 6216/11/6: that the creditor, under the present law, is not entitled to more than double the amount, that, at any rate, the creditor having already realised Rs. 6977/15/4 is entitled now only to a sum of Rs. 5455/15/8; as such, the plaintiffs pray for declaration that out of the deposit made by defendant 2 defendant 1 is entitled only to a sum of Rs. 5455/15/8 and the plaintiffs are entitled to the balance.

(2) The trial Court, accepting the legal position relied upon by the plaintiffs, that they are entitled to reopen the previous transactions under the provisions of S. 10, Orissa Money-Lenders Act, has decreed the suit on the following terms:

"That the suit be decreed on contest against defendant 1 in favour of the plaintiffs as well as defendants 3 and 4. Preliminary accounts to determine how much defendant 1 shall be entitled out of the amount deposited in Court by the pro forma defendant 2. Let it be declared that defendant 1 shall be entitled under his mortgage out of the amount in deposit only double the principal amount actually lent less those realised so far previously either under the two promissory notes or under the decree in O. S. 16/41. The costs of that decree however shall be excluded. The balance of the amount in deposit, the plaintiffs and defendants 3 and 4 shall be entitled to. Parties shall bear their own costs of this suit."

(3) Several pleas were taken in the trial Court by the defendant but Mr. P. C. Chatterji, appearing on behalf of defendant 1, the appellant, has very fairly pressed only two contentions; (i) that the suit as framed is not maintainable and is barred under the proviso to S. 42, Specific Relief Act; and (ii) that in any view, in reopening the previous transactions, the Court is to take completely out of consideration the amount which merged into a decree and had been completely satisfied.

(4) In developing his first point, Mr. Chatterji has drawn our attention to the reliefs sought for in the plaint of the present suit which runs as follows:

"Therefore the plaintiffs pray that the Honourable Court may be pleased to pass decree with costs:

(i) declaring that defendant 1 is entitled to only a sum of Rs. 5455/15/8 out of the amount of Rs. 9864/5/6 now in deposit in M.J.C. 9/45 in this Court towards full discharge of his money lending transaction from 1931 to 1945 with the plaintiffs and defendants 3 and 4:

(ii) declaring that the plaintiffs are solely entitled to the rest of the amount of Rs. 4408/5/10 out of the said deposit amount or in the alternative declaring that the plaintiffs and defendants 3 and 4 are together entitled to the said excess amount of Rs. 4408/5/10:

(iii) granting such other or further relief as to the Court may deem fit in the circumstances of the case."

Mr. Chatterji contends that the reliefs of mere declaration as to how much defendant 1 is entitled and how much the plaintiffs and other parties are entitled to are not sufficient for maintaining a suit when the further relief for refund of money to the plaintiffs is available to them: as such, the suit is clearly hit by the proviso to S. 42, Specific Relief Act which runs as follows:

"42. xx xx xx

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

The simple answer to this contention of Mr. Chatterji is that the money is still in deposit in Court, that is to say, in 'custodia legis'. In such a case, the plaintiffs need not pray for refund inasmuch as a mere declaration is sufficient for the purpose of withdrawing the amount from Court as to which they are declared by Court to be entitled. We may refer to a decision, reported in — 'Vedanayaga Mudaliar v. Vedammal', 27 Mad 59 (A), the facts of the case being that a minor was entitled to a certain property which was in possession of his mother; the plaintiff filed an application under the Guardians and Wards Act for an order appointing him guardian of the property of the minor; pending the hearing of this

application he was appointed the receiver of the property and in this capacity he took possession of it from the mother; the validity of the order appointing the plaintiff receiver was challenged and it was ultimately held that the order had been wrongly passed and directed that the mother be replaced in possession of the property; the minor having been murdered the receiver filed a suit for a declaration that he was entitled to the property of the minor as the nearest reversioner; it was contended by the mother that the suit could not be maintained without a prayer for possession; but the Court held that the property was then neither in the possession of the plaintiff nor in the possession of the mother but was in 'custodia legis'; and the fact that it was in possession of the plaintiff made no difference as it was a mere accident. The possession, therefore, being with Court, a mere declaration of title is sufficient to maintain a suit.

The same view also was reiterated in — 'Malaya Pillai v. Tirumala Perumal Pillai', 38 Mad 62 (B) In that case proceedings were taken under Ss. 145 and 146, Criminal P. C., and a receiver was appointed to hold possession of the property in dispute. At the time of the suit, the property being still in possession of the receiver, their Lordships held that there was no necessity to claim any further consequential relief; a mere declaration of title was sufficient to take out all the mischiefs of the proviso to S. 42, Specific Relief Act.

We have had the advantage of the thorough discussion of the question after review of several decisions on the point in — 'K. Sundaresa Iyer v. Saravajana Sowkiabi Virdhi Nidhi Ltd.', AIR 1939 Mad 853 (C), decided by Leach C. J. and Patanjali Sastri J. (as he then was). The leading judgment was delivered by Chief Justice Leach who confirmed the view that a suit for mere declaration that the plaintiff was owner of certain property without consequential relief for possession was maintainable if at the time of the institution of the suit the property was in possession of the Court pending the decision of the suit and not in the possession of the person against whom the relief was sought. Chief Justice Leach had also discussed in his judgment a Privy Council decision reported in — 'Sunder Singh v. Sunder Singh', AIR 1938 PC 73 (D), where their Lordships of the Privy Council, agreeing with the High Court, expressed the view that where the plaintiff claimed to be a trustee and administrator of certain institution of which neither he nor defendant was in possession or control of the management, a suit for mere declaration under S. 42 was maintainable

Mr. Chatterji, however, strongly relies upon a further observation made by their Lordships of the Privy Council in the aforesaid decision which runs as follows:

> "And it may be added that where it is not open to the plaintiff to pray for possession also as against the defendant, injunction is the further relief within the meaning of the proviso."

We, however, find in the present case that no prayer for injunction is necessary in view of the position that after the deposit was made in Court under the provision of S. 83, T. P. Act, defendant 1 refused to accept the deposit in full satisfaction of his amount, and, as such, as we are given to understand, the deposit is still lying in Court.

(5) We would further observe that the plea, the suit is not maintainable under the proviso to S. 42, Specific Relief Act, was not taken in the trial Court and is being taken for the first time in this appeal. Had the plea been taken in the trial Court the plaintiffs would have got an opportunity of getting the plaint amended accordingly and paid the necessary court-fees. We are, therefore, inclined to hold that the point could not be taken for the first time in appeal; but as the point was argued at some length at the Bar we have expressed our view on the point.

(6) Mr. Chatterji further argues that the plaintiffs will not be entitled to relief under the provisions of S. 10, Orissa Money-Lenders Act in a suit of this nature. Relief under S. 10 is available only in a suit for redemption brought by the plaintiff. Section 10(1) runs thus:

> "Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit whether brought by a money-lender or by any other person in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced."

The language used "in any suit whether brought by a money-lender or by any other person in respect of a loan advanced before or after the commencement of this Act" is wide enough to embrace the present suit within the meaning of this language inasmuch as the present suit is also in respect of the loan advanced, that is, for a declaration on the basis of the loan advanced on the mortgage transaction. In our opinion, we would be unnecessarily putting too narrow a construction upon the above Clause which is not warranted by law if we accept the contention of Mr. Chatterji.

(7) Urging the second point, Mr. Chatterji's contention is that the dues on the promissory note dated 11-8-1936 excluding the amount which was the subject-matter of the mortgage transaction dated 13-4-1937, were converted into a decree and had been completely satisfied; as such, that cannot be reopened and, at any rate, that is to be taken out of consideration if relief is at all to be given to the present plaintiffs. As we have made it clear in stating the case that defendant 3 and Bada Khetrabasi executed a promissory note for Rs. 9362/- on 11-8-1936; and a part of this consideration, that is, Rs. 5800/-, was secured by a subsequent mortgage bond dated 13-4-1937. That mortgage transaction is still subsisting and has not been sued upon by the mortgagee-creditor. As we have found, the present suit is in respect of "the loan advanced", that is, for a declaration in respect of the dues of the mortgagee on the basis of the mortgage transaction which undoubtedly is, within the definition given in the Act, a loan, as the transaction carries interest and is in respect of past liability.

Once we find that the present suit is in respect of a loan advanced, the Court is given the power under the section to reopen the transaction and ascertain that the interest for the period preceding the institution of the suit together with any amount already realised and received through Court or otherwise is greater than the amount of 'loan originally advanced'. The Court is empowered to trace back the cash consideration passed between the parties at the time of the original loan and is to take account of all amount received by the creditor as interest 'through Court or otherwise'. In the present case, even though the decretal dues under the handnote were deposited in Court and the decree was satisfied, the Court is empowered to reopen the transaction and take

into account the receipts made by the creditor so as to conform to the limit that the creditor would not be entitled to any amount greater than the amount of the loan originally advanced. Mr. Chatterji has further contended that out of the deposit in Court in satisfaction of the previous handnote dated 11-8-1936, the amount of costs of that suit should be excluded; but as we find in the statement of facts in the lower Court the judgment-debtors deposited a sum of Rs. 3751/4/7 in discharge of the decretal dues excluding the costs.

(8) The last point taken up by Mr. Chatterji is that the future interest granted in the previous decree should not be considered as interest. The contention seems to have no force in view of the clear language of the section "that any amount realised as interest through Court or otherwise" is to be taken into account and it does not make any difference between the past interest and the future interest in respect of the previous transaction that had merged into a decree passed on the basis of a part of the consideration.

(9) In conclusion, therefore, the appeal fails and is dismissed with costs. The decree passed by the lower Court is confirmed.

(10) NARASIMHAM J.: I agree.

B/V.S.B. Appeal dismissed.

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PANIGRAHI AND MOHAPATRA JJ.

Madhabananda Mohapatra and others, Appellants v. Rabindranath Misra and others, Respondents.

Second Appeal No. 153 of 1948, D/- 11-11-1952, from a decision of Dist. J., Cuttack, D/- 24-8-1946.

(a) Evidence Act (1872), Ss. 101 to 103 — Discharge of onus.

Held that though the defendants had not succeeded in establishing their case that the plaintiff was the daughter of one J the onus that lay on the plaintiff to prove that she was the daughter of K could not, for that reason be held to have been discharged. (Para 5)

Anno: Evidence Act, Ss. 101 to 103 N. 2, 8.

(b) Civil P. C. (1908), O. 41 R. 27 — "For any other substantial cause".

Party not sufficiently diligent and non-production of document not proved to be due to causes beyond her control — Party not given opportunity to supplement her evidence by fresh evidence after a long lapse of time. (Para 11)

Anno: C. P. C. O. 41 R. 27 N. 8.

(c) Evidence Act (1872), Ss. 3, 134 — Proof.

It is not enough, to prove a fact, that number of witnesses should assert it. Proof of a fact would depend upon the character of the witnesses, their competency to speak to the fact. It is the assurance or persuasiveness of the evidence which alone would incline a judicial mind to put any reliance on the testimony. (Para 12)

Anno: Evidence Act, S. 3 N. 5; S. 134 N. 1.

(d) Civil P. C. (1908), S. 100, O. 41 R. 1 — Interference with finding of fact.

A Court of appeal should hesitate long before it disturbs the findings of the trial Judge based on verbal testimony. and it should satisfy itself that the appellant had discharged the heavy burden of showing that the decision of the trial Court was wrong. Otherwise it would be assuming a function not warranted by law. (1947) A. C. 484; AIR 1918 PC 92, Rel. on. (Para 14)

Anno: C. P. C., O. 41 R. 1 N. 13, S. 100 N. 52, 53.

D. Mohanty and S. K. De, for Appellants; M. S. Rao, for Respondents.

CASES REFERRED TO: Paras

(A) (1947) 1947-1 All ER 582: 1947 AC 484 13

(B) ('18) AIR 1918 PC 92: 45 Ind App 183 (PC) 14

PANIGRAHI, J.:

This is a second appeal by some of the alienees from defendant 16 Abala Dibya, the widow of one Kulamoni Panigrahi who died on 18-5-1929. The plaintiff Indumati, claimed to be his daughter by his first wife Gurubari and sued for a declaration that the alienations made by defendant 16 in favour of the other defendants are not binding upon her reversionary interest as those alienations had not been made for legal necessity. All the defendants challenged the plaintiff's claim to have been the daughter of Kulamoni, and their allegation was that she was the daughter of Jadumoni Panigrahi, the natural brother of Kulamoni who had admittedly gone away in adoption to one Nidhi Panigrahi.

(2) The two important issues framed in the suit were issue no. 2: "Is the plaintiff, as alleged in the plaint, the daughter of Kulamoni?" and issue no. 10 : "Was there any legal necessity for the kabalas and are the kabalas genuine and for consideration?" The learned Munsif who tried the suit in the first instance held against the plaintiff on both the issues and dismissed the suit. The plaintiff having died, her sons filed an appeal in the Court of the District Judge and the decision of the trial Court was reversed by the learned District Judge. The appellate Court held, agreeing with the Munsif, that the alienations made by defendant 16 were not for legal necessity. But disagreeing with the finding of the trial Court he held that the plaintiff had succeeded in proving that she was the daughter of Kulomani by his first wife, Gurubari. He accordingly reversed the decision of the trial Court and gave a decree to the plaintiff as prayed for in the plaint. It is against this judgment of the learned District Judge that the alienee-defendants have come up in second appeal.

(3) The only point that has been seriously contested before us is whether the plaintiff has succeeded in proving that she is the daughter of Kulamoni. In proof of her contention, the plaintiff mainly relied upon the credibility of the witnesses examined on her behalf and upon two documents, Exts. 1 and 2. The defendants also examined a number of witnesses to prove that the plaintiff was the daughter of Jadumoni, and in support of their case exhibited a few documents the most important of which are Exts. C, C-1, E, F, and F-1.

(4) The learned Munsif, on an analysis of the evidence, held that the oral evidence on either side was "interested, unsatisfactory and unsafe to rely upon". He, therefore, preferred to rely on the documents filed by the respective parties as some of them had been executed at a time when the paternity of Indumati was not in dispute. Exhibit 1 is the School Admission Register of the lower primary school of Anantabrahmapur, and P. W. 1 was the teacher of that school in the year 1926 The learned Munsif closely examined the entries,

as well as the absence of entries, made in some of the columns of the register and held that he was unable, in view of the suspicious nature of the document, to place absolute reliance on it and regard it as a conclusive piece of evidence in support of the plaintiff's paternity. Exhibit 2 is a postcard written by defendant 10, to the plaintiff's husband, Surendra (P. W. 9) on 16-10-1940. With reference to this document the learned Munsif observed that the reference made therein to "Indu Bou Khadi" is ambiguous and it might as well refer to Jadumoni's wife as to defendant 16, Abala, as both these ladies stood in the same degree of relationship to the writer of that postcard.

The trial Court then referred to the registered deeds of gift, Exts. C and C-1 executed by Jadumoni in favour of Indumati on 18. 4. 31 and 4. 2. 36 respectively, wherein the plaintiff is described as the daughter of Jadumoni. By Ext. E dated 3-3-41 Indumati sold about two acres of land gifted to her under Ext. C-1, for a sum of Rs. 300/-. The property gifted by Jadumani under Ext. C-1 is referred to in Ext. E as "Pitralaya", that is to say, property acquired by her from her parents' house. Exts. F and F-1 are two letters written by Surendra the husband of the plaintiff to Jadumoni and his wife. They are dated 14-9-38 and 8-11-38 respectively. In these two letters a reference is made to the gift of lands made by Jadumoni and he is referred to as "father" and his wife as "mother" by Surendra. Relying on the above documents the learned Munsif held that they justified an inference that the plaintiff was, in fact, the daughter of Jadumoni and that the documentary evidence adduced by the defendants outweighed the oral and documentary evidence adduced by the plaintiff.

(5) The learned District Judge, however, on appeal, made the following observations while referring to the evidence of the defendants:

> "Comparing the antecedents of these witnesses I cannot agree with the learned Munsif that the witnesses examined on behalf of the plaintiff have not been able to acquit themselves better than the witnesses examined on behalf of the defendants. In fact, the challenge that has been made by the contesting defendants against the assertion of the deceased plaintiff that she was the daughter of Kulamoni has been made to rest, so far as the oral evidence is concerned on such unstable basis, that I shall have no hesitation to affimatively hold that the oral evidence adduced on behalf of the deceased plaintiff is really superior to that adduced on behalf of the contesting defendants."

It would appear from this passage that the learned Judge thought that it was for the defendants to disprove the paternity of the plaintiff as alleged by her, rather than for the plaintiff affirmatively to establish that she was the daughter of Kulamoni.

It may be that the defendants have not succeeded in establishing their case that the plaintiff was the daughter of Jadumoni, but the onus that lies on the plaintiff to prove that she is the daughter of Kulamoni cannot, for that reason, be held to have been discharged. The learned Judge then proceeds to discuss Exts. C and C-1, F and F-1 and concludes that, in his view, "it is rather difficult to assume that the deed (Ext. C) was a bona fide one". The reason for this inference, as given by the learned Judge is that it is not likely that a father would make a gift of a few acres of his land to one of his unmarried daughters when he had other children. He accordingly holds that the recital in Ext. C "does not, and cannot, establish that Indumati was the daughter of Jadumoni". Referring to Ext. C-1 the learned Judge holds that Jadumoni executed that document "to hold up his own pretensions and intended to appear as sympathetic towards Indumati", and finally comes to the conclusion that Exts. C and C-1 admit of better explanation and that "the real explanation must be in favour of the deceased plaintiff".

(6) Referring to Ext. E the appellate court held that the reference to "Pitralaya" in the document was not inconsistent with the plaintiff's case as Jadumoni was the natural brother of Kulamoni and the reference to Pitralaya may cover both Jadumoni and Kulamoni. He accordingly concludes:

> "I do not find anything directly contrary to the deceased plaintiff's assertion that she was the daughter of Kulamoni as recited in Ext. E".

In arriving at this conclusion the learned District Judge appears to have committed more than one error of record and the inference that he has drawn as to the legal effect of the proved facts is a gross error. In the first place both Exts. C and C-1 were accepted by the plaintiff as genuine documents and the plaintiff acted on these documents in alienating a portion of the lands conveyed to her by them. She is also in possession of the rest of the lands granted to her by Jadumoni. It is, therefore, strange that the learned Judge overlooked this attitude of the plaintiff and held that the deeds were not bona fide documents. To go further and hold, as he has done, that the real explanation must be in favour of the plaintiff, is not only to misinterpret the documents, but would be flying in the face of the express recitals made therein.

Exhibit E does not recite that the plaintiff is the daughter of Kulamoni, as has been assumed by the lower appellate Court. Exhibit E describes the plaintiff as the wife of Surendra and not as the daughter of Kulamoni. Having regard to the fact that both P. W. 9 and P. W. 10 stated in their oral evidence that they were aware of the description made in Exts. C and C-1 that the plaintiff was the daughter of Jadumoni and that the plaintiff did not assert herself as the daughter of Kulamoni in the later document Ext. E, it is impossible to explain away the recitals in Exts. C and C-1 as supporting the plaintiff's case. The learned Judge's finding: "Thus, in my opinion, the recital in Ext. C-1 does not and cannot establish that Indumati was the daughter of Jadumoni" appears to be wholly opposed not only to the tenor of the document but also to the conduct of the donee who benefited under that deed.

(7) Exhibit F dated 14-9-38 and Ext. F-1, dated 6-11-38 are letters written by P. W. 9 Surendra, the husband of the plaintiff. He admits the genuineness of both the letters and the contents of these letters would show that he had lent some money to Jadumoni two or three years prior to the year 1938, and accused him of putting off payment on some pretext or other. He says that Jadumoni owed him Rs. 230/- and the interest for 2½ years on that amount was stated to be Rs. 107-13-0, and that it was the last demand that he was making. He says:

> "If you want to keep back the amount on the ground that you have given three acres of land to the daughter, you had better tell me plainly. I was always regarding you as my guardian, but I now realise what it is. After having lent you cash I am not going to beg for its return

My heart is burning, I do not therefore have regard for relationship."

In Ext. F-1 written on 8-11-38, which was addressed to the wife of Jadumoni, P. W. 9 says:

"Father was coming and putting up with us but of late he is not doing so. Without thought I conveyed many harsh words through Banchha and I was about to return the presents: I, therefore, apologise. If children commit mistakes parents should not take it to heart. I know father has great affection for us .... He was managing our household, he was himself going to bazar and cooking food for Indu and me and sending me to office; I can never forget it .... Please therefore send Lakshmi (daughter of Jadumoni by his second wife)."

The rest of the contents of the letter is couched in such affectionate and intimate terms that it is impossible to overlook the suggestion made on behalf of the defendants that they were not made euphemistically but actually conveyed what they had intended to convey. The learned District Judge does not appear to have gone through these letters carefully, and appears to have been under the impression that apart from describing Jadumoni and his wife as 'father' and 'mother' there was nothing significant in them.

The learned Munsif was perfectly right when he observed that the tone and language in which these letters had been couched could not but create an impression that Indumati was, in fact, the daughter of Jadumani. The appellate Court, however, commented upon the manner in which these letters were produced and held that Jadumoni must have supplied them to D. W. 5 who produced them in Court. No objection was taken by the plaintiff when these letters were produced and exhibited, and no suggestion was made in the evidence adduced by the plaintiff and her witnesses that Jadumoni was acting against her interest. The learned Judge thought that as unilkely that P. W. 9 addressed Jadumoni and his wife as father and mother as though they were virtually in the position of parents.

He appears to have wholly overlooked the reference to the loan given to Jadumoni and the reference to his gift of lands to Indumati. Nor does he refer to the other contents of the letters in which a reference is made to Lakshmi, Babaji, Gobinda and other children of Jadumoni and to Jadumoni's stay with P. Ws. 9 and 10 at his Cuttack lodging. These are not consistent with the plaintiff's story. Admittedly, Kulomani had gone away in adoption to another family and it is strange that Jadumoni should have taken so much interest in the plaintiff, though she was his natural brother's daughter and had gone away to another family after her marriage. This is in strange contrast to the evidence of P. W. 9 and P. W. 10 who say that they never went to the house of defendant 16 (Abala) after their marriage.

(8) Finally, the learned District Judge concludes, as he started, with the observation that Exts. C and C-1, E, F and F-1 do not establish that Indumati was the daughter of Jadumoni and not of Kulamoni. As stated already, the question here is whether the plaintiff had succeeded in proving that she was the daughter of Kulamoni as alleged by her; it was not for the defendants affirmatively to establish one way or the other. So, even if these documents were to be ignored and excluded from the evidence the question will still remain whether the plaintiff has, on her own evidence, discharged the onus that lay on her of proving her case.

(9) Referring to the Admission Register Ext. 1 filed by the plaintiff the learned District Judge has again committed an error when he held:

"In my opinion, the whole controversy on this point should cease because of an admission made by the widow of Kulamoni. She states that Jadumoni's daughter was never put into any school" .. "If Indumati had been a student of the school in 1926 and if, owing to an accident because of Jadumoni's Secretaryship of the school Kulamoni's signature was not taken in the appropriate column this would not justify the conclusion that the entry is a forged one."

Here, again, the learned Judge appears to have put the cart before the horse. The learned Judge assumes Ext. 1 to be a genuine document and for that reason discredits the evidence of Kulamoni's widow that the plaintiff never went into the school. The alleged statement of Kulamoni that Indumati was his daughter must be taken not to have been proved because Kulamani's signature does not appear in the register. The only fact proved is that an entry to that effect has been made in the register by P. W. 1—assuming that the entry was made at the time it purports to have been made.

The register was issued on 6-3-26 but the entry against Indumati's name bears the date 1-3-26, and the page on which this entry appears does not bear the signature of the Inspecting Officer. The entry itself has been made in different inks and P. W. 1 was unable to explain who made the subsequent entry and when. The attestor, P. W. 2, is a man of no status and has obviously put his signature against several entries purporting to have been made on different dates, but written with the same ink. The learned Munsif therefore suspected, and in my opinion rightly that all the attesting signatures were taken at one sitting. Moreover it is to be noticed that P. W. 9 the husband of the plaintiff is an employee in the District Board office and that the school at Anantabrahmapur is managed by the Board. It is also clear from the evidence that Jadumoni is the Secretary of the school. P. W. 1 was the teacher of the school from 1926 to 1928 and, on his own admission, his evidence that Indumati was the daughter of Kulamoni was based on hearsay.

He further admitted that he is a poor man and had to go to Jadumoni's house to get paddy or rice. P. W. 2 was a witness for Basudeb, brother of P. W. 5, in a criminal case filed by defendant 9. Having regard to these admissions which the lower appellate Court appears to have altogether overlooked, the learned Munsif very properly declined to place any reliance on their statements and to hold that Ext. 1 was a genuine document. The plaintiff herself deposed that she left school 7 to 8 years before her marriage proposals which took place when she was about 11 years of age. She admitted that she did not remember the names of any of her school friends. In view of the extreme vagueness of her statements regarding her joining any school or leaving it, Abala's deposition that the plaintiff never went to any school is not altogether improbable.

Furthermore the admission made by P. W. 6 that he fabricated the horoscope of Indumati at the time of her admission into the school and that a wrong date of birth was mentioned in the register, would itself weaken the value to be attached to Ext. 1 which stands, more or less, self-condemned. The learned District Judge, while disagreeing with the learned Munsif, does not give any reasons of his own as to why he came to the conclusion that Ext. 1 should be taken to be

genuine. He merely criticises the trial Court's judgment and says that he was not impressed with the reasons given by the Munsif for discarding it. But it does not appear that he applied his own mind to the facts and arrived at an independent conclusion of his own.

(10) Exhibit 2 is a post-card written by defendant 10 to P. W. 9 intimating the death of a child in his family and says that it was written for the information of Indumati. Then follows the following sentence on which reliance is placed: "Indu Bou Khudi (aunt Indu Bou) has gone with Dina (uncle) to Cuttack two or three days ago". P. W. 9 filed this exhibit in his chief examination, and the only statement that he made, with reference to this document, is : "Radha Nath was addressing Abala as 'Khudi' (ant)". He did not say that she was also being addressed as Indubou Khadi, or that the reference in the post-card was to Abala. The plaintiff, however, wanted to make capital out of one sentence in the deposition of Abala as D. W. 9. That statement is the very last sentence in her cross-examination and was to the effect that "Radhanath calls me 'Indu Bou Khudi" "But she immediately corrected herself in re-examination and said that she had got confused. The learned trial Court accepted this explanation as true. But the learned lower appellate Court failed to see that mere forms of address or description of persons by third parties, are not enough by themselves to establish the paternity of the claimant.

(11) An attempt was made by the plaintiff to put in a birth register said to have been maintained by the choukidar. P. W. 4 is the ex-choukidar and his evidence is that the birth register was with his successor, Kina Malik. Beyond taking out summons to Kina Malik once during the trial the plaintiff took no further steps to cause the production of the register or to examine Kina Malik. In the lower appellate Court a petition under O. 41, R. 27, Civil P. C. was filed, praying that the register be accepted in evidence and that Kina Malik be examined. That Court, however, refused to accept any additional evidence as it was not satisfied that the reasons given by the plaintiff for its non-production earlier were convincing. No attempt was made to file this document in this Court either, although the appeal had been pending for four years, till the last date when the respondents' counsel was about to close his case.

A petition was filed before us but no reason was given as to why the document could not be filed earlier; and we see no good ground why, after this long lapse of time, we should give the plaintiff, an opportunity to supplement her evidence by fresh evidence. We are not satisfied that the plaintiff has been sufficiently diligent, or that its non-production was due to causes beyond her control. Moreover, the document does not prove itself and would require oral evidence to prove the entry made therein relating to the plaintiff's date of birth. Admittedly neither Kina Malik nor P. W. 4 made the entry. According to the evidence P. W. 4 is an illiterate man and he says: "I got an entry about the birth of Kulamoni's daughter written by some one whose name I do not remember now". It would, therefore, be a wild goose chase to allow the plaintiff at this stage to go about finding who the alleged maker of this entry is and prove it. Even till now, the plaintiff has not been able to ascertain who made the entry. In such circumstances we intimated to the learned counsel for the respondents that we would not entertain her belated application at this stage.

(12) Adverting to the oral evidence, the learned District Judge has just skipped through it, and does not discuss the evidence on the side of the plaintiff beyond observing that it is superior to the evidence adduced on the side of the defendants. We have been taken through the entire oral evidence and we do not find any sufficient reason to differ from the view taken by the learned trial Court who had the opportunity and privilege of seeing the witnesses in the box. In the absence of any convincing reasons given by the lower appellate Court we are disposed to agree with the finding of the trial Court that the evidence on the side of the plaintiff is unreliable and is of such character that it falls short of proof of the paternity of Indumati. I have already referred to the evidence of P. Ws. 1 and 2 and recorded the reasons for my agreement with the view taken by the trial Court of that evidence.

P. W. 3 is 37 years old and is an agnate of the plaintiff but does not know the name even of his common ancestor. He made an admission that defendant 9 filed a case against the brother of P. W. 5 & that he was a witness for the accused. P. W. 4 also made an admission that his son wanted to make some purchases of lands from Abala Dibya but was not successful. P. W. 5 admitted that he was a bhag tenant under Abala but that he was subsequently dispossessed by defendant 10. He also stated that there were cases between him and defendant 9. P. W. 6 is a self-confessed liar, having regard to his admission that he prepared a false horoscope of Indumati. He attested Exts. C and C-1, the deeds of gift made in favour of the plaintiff, and goes to the length of saying that Jadumoni never put forward his son Gobindo, as the adopted son of Kulamoni, though the plaintiff herself did not deny it. He appears to have sold some lands under Ext. D which did not take effect. P. W. 7 is a man of a neighbouring village and is not related to either of the parties.

His evidence is that he was engaged in a case in the rent Court and was suddenly called to give evidence in this case. According to him, he attended the marriage of the plaintiff, but he could not say who acted as the karta. He also denied that Jadumoni ever made any gift of lands to the plaintiff. P. W. 8 also seems to be a casual witness and his only claim to have known about the paternity of the plaintiff is that he was a neighbour. He used to go to Anantabrahmapur and sit on the verandah of Kulamoni's house. P. W. 9 is the husband of the plaintiff and P. W. 10 is the plaintiff herself. Having regard to the nature of the evidence tendered by these witnesses the learned Munsif was, in my opinion, right in his view that it would not have been impossible for the plaintiff to have got hold of a few witnesses of that type and get them to speak to particular facts to suit her case. It is not enough, to prove a fact, that a number of witnesses should assert it. Proof of a fact would depend upon the character of the witnesses, their competency to speak to that fact, the opportunities that they had to know about the relationship of Indumati and Kulamoni, and their degree of intimacy with Kulamoni himself.

None of these witnesses can claim to have had any contact or relationship with Kulamoni, and their evidence is so casual and interested that it lacks assurance or persuasiveness which alone would incline a judicial mind to put any reliance on their testimony. After a very careful examination of the evidence, therefore, we are persuaded that the finding of the trial Court is justified and

that the lower appellate Court should not have reversed it without giving substantial reasons. The keynote of the judgment under appeal is that Jadumoni was hostile to the plaintiff; that he executed Exts. C and C-1 in order to placate Indumati as he put forward his own son, Gobinda, as the adopted son of his natural brother Kulamoni; that Indumati described herself as the daughter of Kulamoni in Ext. E; that Exts. F and F-1 should be discarded as they were not produced from proper custody. None of these reasons appear to be correct or convincing and the conclusions drawn by the learned District Judge are based upon assumptions for which there is not a shred of evidence. None of the reasons given by him are conclusive and most of them are of no value at all.

On the other hand, the conclusions of fact reached by the trial Judge were based primarily on his estimate of the witnesses who gave their evidence in his presence—an opportunity which was denied to the lower appellate Court.

(13) The rule to be followed in such cases is stated by Viscount Simon in — 'Watt v. Thomas', (1947) AC 484 (A), as follows:

"If the evidence, as a whole, can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony, by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies, is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallibly determining which side is telling the truth or refraining from exaggeration. Like other tribunals he may go wrong on questions of fact, but it is a cogent circumstance that Judge of first instance, when estimating the value of verbal testimony has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

(14) Learned counsel for the respondent, however, contends that the function of this Court sitting in second appeal is further restricted and that this Court should not interfere with a finding of fact arrived at by the lower appellate Court, however grossly erroneous it may be. As has been very often laid down by the highest judicial tribunal, questions of law and fact are very often difficult to disentangle. It is no doubt true that in second appeal this Court has no jurisdiction to set aside a mere finding of fact, however gross the error may be. But the proper legal effect of a proved fact is essentially a question of law—See — 'Nafarchandra Pal v. Shukur Sheikh', AIR 1918 PC 92 (B). The finding of the first appellate Court upon a question of fact is regarded as final if that Court had before it evidence proper for its consideration in support of that finding. But where the Court misreads the evidence, or overlooks an important piece of evidence, no sanctity attaches to its finding, any more than to that of the trial Court.

Where the parties are in agreement on the genuineness or the bona fide character of a document it is not open to a Court of appeal to ignore the admission, and arrive at a contrary finding. But if there is a misconstruction of the document and the appellate Court misreads a document and if its inference is derived from a misconception, then the error is not merely an error of fact but an error of law. In such a case, that Court must be held to have exceeded its jurisdiction justifying interference by this Court. A Court of appeal should hesitate long, before it disturbs the findings of the trial Judge based on 'verbal' testimony, and it should satisfy itself that the plaintiff-appellant had discharged the heavy burden of showing that the decision of the trial Court was wrong. Otherwise it would be assuming a function not warranted by law. We are satisfied that the lower appellate Court was not only wrong in its estimate of the evidence, but clearly exceeded its jurisdiction in reversing the judgment of the trial Court without giving its own reasons. This second appeal must accordingly succeed, the judgment of the learned District Judge should be set aside, and that of the learned Munsif dismissing the plaintiff's suit restored. The appellants will have their own costs throughout.

(15) MOHAPATRA J.: I agree.

C/D.H.Z. Appeal allowed.

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NARASIMHAM AND MOHAPATRA JJ.

Balaram Panda, Plaintiff-Appellant v. Gopinath Misra and other, Defendants-Respondents.

Second Appeal No. 528 of 1948, D/- 20-7-1953, from order of Additional Sub-Judge, Cuttack, D/- 31-7-1948.

(a) Evidence Act (1872), Ss. 101-103 — Shifting of onus.

Apparent things should be taken as real until the contrary is proved. Thus, though doubtless, as the plaintiff in the suit brought to recover his commission by an insurance agent, the primary duty of proving his case rests on him, yet where the admitted position is that the plaintiff was shown as the agent in respect of the business, the burden shifts on defendant, the chief agent, who claims that very business as his own, to show that the plaintiff was merely a name-lender. (Para 9)

Anno: Evidence Act. Ss. 101-103 N. 2.

(b) Civil P. C. (1908), S. 107 — Appreciation of evidence by appellate Court.

When there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. AIR 1951 SC 120, Foll. (Para 9)

Anno: C. P. C., S. 107 N. 14.

(c) Insurance Act (1938), Ss. 42 and 40 — Test to determine who is entitled to commission.

Where the insurance policy is effected substantially through the efforts of an agent but the technical completion of the contract is brought about by another person, the former alone is entitled to the commission. The test in such cases is whose efforts were responsible for the proponent agreeing to effect the contract of insurance with the Company in respect of the sum. 201 Ind Cas 289 (Pat), Rel. on. (Para 11)

Anno: Ins. Act, S. 40 N. 1; S. 42 N. 1.

(d) Insurance Act (1938), S. 40 (2) — Right to commission

An agent does not forfeit his right to commission merely because he is frank enough to admit that it was the efforts of the chief agent that were mainly responsible for securing the policy. (Para 14)

Anno: Ins. Act, S. 40 N. 1.

(e) Transfer of Property Act (1882), S. 130 — Assignment how effectuated.

An assignment of an actionable claim must conform strictly to the provisions of S. 130. And to effectuate an assignment there must be words of transfer in the instrument.

Where a letter did not show that the writer of it, namely, an insurance agent, was transferring his interest in the commission to the chief agent, that it was not addressed to the chief agent at all and that it was just an order to the Branch Manager of the Company to pay the commission due to the insurance agent to the chief agent.

Held that the letter was not an assignment of the commission due to the insurance agent, but was merely a pay order which could be cancelled by the agent: AIR 1942 Pat 307 and AIR 1925 Mad 753. Rel. on. (Para 15)

Anno: T. P. Act, S. 130 N. 2 and 3.

A. Das and B. Mohapatra, for Appellant; H. Mohapatra, for Respondents.

CASES REFERRED:

(A) ('51) AIR 1951 SC 120: 1950 SCR 781 (Pr 9)

(B) ('42) 201 Ind Cas 289 (Pat) (Pr 11)

(C) ('42) AIR 1942 Pat 307: 201 Ind Cas 342 (Pr 15)

(D) ('25) AIR 1925 Mad 753: 87 Ind Cas 382 (Pr 15)

NARASIMHAM J.:

This is a plaintiff's appeal against the judgment of the Additional Subordinate Judge, Cuttack, reversing the judgment of the Munsif of Cuttack and dismissing the plaintiff's suit for recovery of Rs. 3,393/8/- as agent's commission from defendant 1 who is the Lakshmi Insurance Co. Ltd.

(2) On 27-8-1942 the Maharaja of Parlakhemedi, one of the premier zamindars of Orissa, signed a proposal form (Ex. J.) for insuring his life with the Lakshmi Insurance Company for a sum of one lakh of rupees. The proposal was in due course accepted by the Company & he paid the first annual premium amounting to Rs. 9,024/14/-. The commission due to the agent on this first premium, according to the terms of contract between the Company and its agent was Rs. 3,393/8/-. The plaintiff was one of the insurance agents of the Company and he claimed the commission alleging that the business was secured through his agency. The nominal Chief Agent of the Company at Cuttack in August, 1942 was defendant 2 Gopinath Misra. He claimed the aforesaid commission alleging that though the plaintiff was given out as the agent in respect of the said business, in reality the business was secured through the Chief Agent's endeavours. In support of this claim he relied mainly on a letter (Ex. C) written by the plaintiff himself to the Insurance Company directing it to pay the entire commission including the renewal commissions on the Policy of the Maharaja of Parlakhemedi to the Chief Agent of Orissa who was said to be 'really responsible for this case'. The trial Court disbelieved the claim of the Chief Agent (defendant 2) and decreed the suit holding that Ex. C was brought about by undue influence and coercion and that no weight should be attached to the recitals contained therein. The lower appellate Court, however, held that Ex. C was written out voluntarily by the plaintiff and that in view of the admissions contained therein and other unsatisfactory features in his evidence it could not be held that the said business was secured through him.

(3) To appreciate the dispute it will be useful if certain admitted facts are first recapitulated. Pandit Godavaris Misra who is one of the prominent politicians of Orissa and formerly a Congressman, was mainly responsible for expanding the business of the Lakshmi Insurance Company (whose headquarters was then in Lahore) in Orissa. He was the Chief Agent of the Company from 1927 and the office of the Company at Cuttack was located in a part of his own residence. The business of the Company was practically managed, as if it were his family affairs and his two sons Lokanath and Ranganath and his daughter were appointed as agents of the Company for some years. When Pandit Godavaris Misra resigned his position as the Chief Agent of the Company in November, 1941 his elder son Lokanath was appointed as the Chief Agent for some months. From 1-8-1942, however, defendant 2 Gopinath Misra was appointed as the Chief Agent and continued in that capacity till 1946. But even during that period the family of Pandit Godavaris Misra continued to take active part in the management of the Company at Cuttack and his son Lokanath continued to remain interested in the Company even on the date on which Pandit Godavaris Misra deposed before the lower Court (15-11-46).

Defendant 2 Gopinath Misra, though not a relation of Pandit Godavaris Misra, had worked with him for about fifteen or twenty years assisting him in several capacities and used to be given some remuneration in the early stages of his career. The plaintiff alleged that Gopinath Misra was merely a cook of Pandit Godavaris Misra. This was, however, denied; but it is admitted that Gopinath Misra used to drive the motor-car of Pandit Godavaris Misra now and then. It was also admitted by D. W. 3 that Gopinath learnt car driving for the convenience of Pandit Godavaris Misra. It is also admitted that Gopinath used to look after the garden of Pandit Godavaris Misra on some occasions, has been associated with him since his boyhood and had lived in his house for about ten years. Gopinath was also running a cloth shop in which Pandit Godavaris Misra's son Ranganath was a partner. It is also admitted that Gopinath does not know English and can just sign his name with some difficulty in that language. Gopinath was also working as an agent of the Insurance Company till his appointment as Chief Agent on 1-8-1942.

(4) Pandit Godavaris Misra was one of the leading Congressmen and a member of the then Orissa Legislative Assembly. The Maharaja of Parlakhemedi was also a member of the Assembly but was in the Opposition. Sometime in 1941 Pandit Godavaris Misra and a few Congress members of the Assembly seceded from the Congress Party, organised a new Party known as the Swaraj party and formed a Coalition Ministry with the Maharaja of Parlakhemedi as the Prime Minister. Pandit Godavaris Misra became Minister in that Coalition Ministry and it was on account of his becoming a Minister that he resigned his post as the Chief Agent of the Insurance Company. The plaintiff was a Congress worker of Ganjam district who also joined the Swaraj Party at the time of the secession. But after August 1942, he left the Swaraj

Party and again joined the Congress. While he was in the Swaraj Party he was on good terms with Pandit Godavaris Misra and on several occasions he used to stay with him whenever he came to Cuttack.

(5) The Insurance Act, 1938 provides for the licensing of insurance agents (S. 42) who alone are entitled to commission from the Insurance Company for soliciting or procuring business. Life insurance business is defined in S. 2(11) of that Act as "the business of effecting contracts of insurance for the granting of annuities upon human life". The maximum amount of commission payable to an insurance agent is limited to 40 per cent. of the first year's premium by sub-s. (2) of S. 40 of the Act. A person who is appointed by the Company to employ insurance agents and to supervise their work is known as the Chief Agent and he is also entitled to an overriding commission for the insurance business secured by all agents working under him. The main work of the insurance agent for which he is entitled to his commission consists in his 'soliciting or procuring insurance business' that is to say, canvassing on behalf of the Company with various persons and inducing them to take out Policies. Where the person whose policy he is anxious to secure is rich and influential there is no objection to his approaching that person through the latter's friends.

Sometimes the Chief Agent and the Branch Manager of the Company also may assist him; but on that account the right of the insurance agent to his commission will not be in any way jeopardised. Once a person agrees to take out a policy the next step is to induce him to sign the proposal form, then to get him medically examined and forward the proposal form and the medical examination report to the Company along with a confidential report from the agent himself. When the proposal is finally accepted by the Company the proponent is required to pay the full premium and the agent's commission is based on a certain percentage (not exceeding 40 per cent) of the premium. The actual percentage payable to an insurance agent is generally fixed in accordance with the terms of the contract entered into between him and the Company at the time of his appointment as an insurance agent. In the present case the contract of the plaintiff's appointment (Ex. 12) shows that the percentage varies with the total amount of completed business secured through the agent. Thus if the total business is not more than Rs. 20,000/- the percentage of commission is only 30 whereas if it is above Rs. 50,000/- it is 40.

(6) The plaintiff's case was that he had approached the Maharaja of Parlakhemedi on some occasions and requested him to take out a policy through him and the Maharaja had expressed his willingness. He had also requested Pandit Godavaris Misra (his leader) to speak to the Maharaja on his behalf on the subject. As already pointed out, Pandit Godavaris Misra had himself worked as the Chief Agent of the Insurance Company for several years and was thus as much interested as the plaintiff himself to expand the business of the Company. Moreover, from 1941 he had become a colleague of the Maharaja in the Coalition Ministry and was thus in a position to influence him. As a result of their combined efforts the Maharaja agreed to take out a Policy and in pursuance of the agreement wrote out the proposal form (Ex J) on 28-7-42. The Manager of the Calcutta Branch of the Insurance Company named Mr. Bagchi had also come to Cuttack on that day and was present when the proposal form was signed by the Maharaja. Strangely enough the column in the proposal form in which the agent's name and address should be written was left blank. But it is admitted that it was the plaintiff who sent the agent's confidential report to the Company in respect of the proposal of the Maharaja.

The medical examination of the Maharaja appears to have been done by one Dr. P. C. Roy at 10-30 a.m. on that day and by Dr. H. Bose (D.W. 1) at 5 p.m. on the same day. The plaintiff alleged that soon afterwards he went to the Dak Bungalow where Mr. Bagchi was staying accompanied by Pandit Godavaris Misra and there the latter threatened that unless he gave a statement in writing giving up his claim to the commission on the policy of the Maharaja he (Godavaris Babu) would induce the Maharaja to cancel the proposal and insure through another agent. Mr. Bagchi also asked the plaintiff to accept the suggestion of Godavaris Babu. Being overawed and under their undue influence the plaintiff in his own hand wrote out a document (Ex. C) in the following terms:

"

CUTTACK.
Dated 27-8-1942.

To
THE BRANCH MANAGER,
LAKSHMI INSURANCE CO., CALCUTTA.

Dear Sir,

The 1st year and the renewal commissions payable to me on the case for one lakh introduced today on the life of the Hon'ble Sri Sri Sri Krishna Chandra Gajapati Narayan Deo of Parlakhemedi may be paid to the Chief Agent, Orissa, who is really responsible for this case. I undertake to discharge the Commission Bills made out in my name regarding this case for favour of payment to the said Chief Agent. It is, however, understood that I shall be entitled to the higher rate of commission if this case is accepted and paid for i.e., completed.

Yours faithfully,
BALARAM PANDA.
AGENT."

In this document the plaintiff not only directed the Company to pay the entire commission to the Chief Agent but also admitted that the Chief Agent was "really responsible for this case". The name of the Chief Agent was, however, not noted in the letter. But the plaintiff's case is that though defendant 2 Gopinath Misra was then a nominal Chief Agent in the books of the Company he was merely a name-lender on behalf of Pandit Godavaris Misra who notwithstanding his being a Minister in the Coalition Ministry was anxious to continue the business in the name of defendant 2. The next day, however, the plaintiff met one Mr. G. S. B. Rao, an Inspector of another Insurance Company (P. W. 3) and told him how he had been coerced into relinquishing the entire claim to the commission on the Policy of the Maharaja. Then on the advice of Mr. Rao he wrote a letter to the Company cancelling the directions given by him in Ex. C. Presumably the letter Ex. C was not immediately sent to the Head Office of the Company & remained at Cuttack for some time. Consequently the Company continued to write in its letters Ex. 5 dated 16-11-43 and Ex. 6, D. 24-9-43 that it was the plaintiff who was the agent who had secured the policy of the Maharaja. The commission was duly credited to his account. In the meantime, however, the plaintiff had been arrested and detained in Berhammur Jail from 5-12-42 to 2-9-43. While he was in jail an attempt was made by Pandit Godavaris Misra's sons and defendant 2 to secure his signature on the bills so that they could appropriate the entire commission. But the plaintiff was too care-

ful to be caught in the trap. On his return from jail he wrote another letter (Ex. 16) dated 18-9-43 to the Head Office of the Company claiming the entire commission on the policy. Subsequently, however, the Company expressed its inability to pay the commission to him in view of his letter Ex. C directing that the payment of the entire commission should be made to the Chief Agent. Hence the present litigation.

(7) The Company who is defendant 1 stated that it was prepared to pay the amount to the rightful claimant and practically left it to the Court to decide as to who was entitled to the commission. Defendant 2 is the main contestant in the case and he alleged that the policy of the Maharaja was secured by him, doubtless with the help of Pandit Godavaris Misra. But as at that time this defendant was also the Chief Agent and he was anxious to secure not only the agent's commission but also the overriding commission of the Chief Agent he induced the plaintiff to lend his name as the agent for this business though in fact the plaintiff did nothing. The plaintiff was also benefited by such an arrangement inasmuch as this business would be shown in his account thereby increasing the rate of his commission in respect of other Policies secured by him. It was further contended that Ex. C was not brought out by threat or undue coercion and that it was voluntarily executed by the plaintiff for the mutual advantage of himself and defendant 2 though subsequently he thought it fit to resile from the agreement with a view to claim the whole of the commission.

(8) Thus the admitted position is that it was the plaintiff who, as the agent of the Company, sent the confidential report about the Maharaja of Parlakhemedi in respect of this business. But for such confidential report the Company would not have accepted the proposal of the Maharaja. In the Company's books the plaintiff was shown as the agent in respect of this business and the commission was credited to his account. But for the document Ex. C the Company would, in due course, have paid the entire commission to the plaintiff.

(9) The lower appellate Court has approached the case from a wrong perspective. It thought that it was the plaintiff's duty to prove that the Policy was secured through his efforts. Though doubtless as the plaintiff in the case the primary duty of proving his case rests on him, in the present case in view of the admitted position that the plaintiff was shown as the agent in respect of the business the burden shifts on defendant 2 to show that the plaintiff was merely a name-lender. Apparent things should be taken as real until the contrary is proved. The various circumstances on which the lower appellate Court has relied to discredit the plaintiff's claim if approached from this perspective would be found to be inconclusive and not sufficient to establish that the plaintiff was merely a name-lender. Moreover, the lower appellate Court failed to follow the rule repeatedly laid down regarding the extent of interference by an appellate Court on a finding of fact arrived at by a trial Court as regards appreciation of oral evidence. This rule was recently reiterated by the Supreme Court in — 'Sarju Pershad v. Jwaleshwari', A. I. R. 1951 SC 120 (A) as follows:

> "The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact:"

The finding of the lower appellate Court is not, therefore, binding on us.

(10) To establish that the plaintiff was not the real agent in respect of this business the defendants have relied on the following circumstances.

(i) certain admissions made by the plaintiff in his cross-examination which show that he was not present when the proposal form was filled up by the Maharaja and when he was medically examined:

(ii) the admission made by the plaintiff in Ex. C to the effect that the Chief Agent was 'really responsible for this case';

(iii) the evidence of the defence witnesses.

(11) The plaintiff was unable to state during his cross-examination as to whose name was given by the Maharaja as his nominee in the proposal form. He could not say who filled up the entries in that form. He was also unable to say who was referred to as the intimate friend in the proposal form from whom the Company might obtain the usual friend's report. He also stated that he filled up the column in the proposal form giving out his name as the agent in respect of this business. These statements indicate that he was not present when the proposal form (Ex. A) was written out by the Maharaja. The column containing the agents name was left blank in that form. The friend referred to in the form is Hon'ble Mr. A. S. Khan, one of the Ministers in the Coalition Cabinet and the nominee as given out by the proponent is his own son Raj Kumar Madhab Sunder Gajapati Narayan Deo. The plaintiff's inability to mention these facts correctly is inconsistent with his having been present when the form was signed. Similarly his statement that one Dr. Sen and one Dr. Acharya medically examined the Maharaja cannot be believed inasmuch as the medical reports (Exs. F and G) show that one Dr. Bose (D. W. 1) conducted the medical examination. The attempt made on behalf of the plaintiff to show that the proposal form (Ex. J.) and the medical reports (Exs. F and G) were not the real ones that were sent at that time and that these were substituted later on, can hardly be believed. But the mere fact that the plaintiff was not present when the proposal form was signed by the proponent or during the medical examinations will not necessarily show that he could not possibly have been the agent. The fact that he was at Cuttack on that day and was interested in this business is clear from the admission that it was he who sent the confidential report as agent to the Company in respect of the Maharaja. (After considering the evidence his Lordship concluded:) I see no reason to disturb the trial Court's finding that it was through the plaintiff's agency that the business was secured. The absence of his name in the proposal form (Ex. A) cannot be given much significance because defendant 2 admitted in his cross-examination that neither he nor the Company attached any importance to the omission inasmuch as the agent's confidential report was sent by the plaintiff and by none else. Hence there could be no doubt as to who the agent was. The actual presence during the signing of the proposal form and active efforts in introducing the Medical Officers to the proponent are not decisive on the question as to who the agent was though they are ordinarily taken into consideration for that purpose.

In a Patna case reported in — 'Satgur Das v. Bombay Life Assurance Co Ltd', 201 Ind Cas 289

(Pat) (B) it was held that where the insurance policy was effected substantially through the efforts of an agent but the technical completion of the contract was brought about by anotner person the former alone was entitled to the commission. The test in all these cases is whose efforts were responsible for the proponent agreeing to effect the contract of insurance with the Company in respect of the sum. The Maharaja's signing the proposal form and getting himself medically examined are merely technicalities to be completed. But if as stated by the plaintiff it was he who first requested the Maharaja and induced him to agree though he sought the help of an influential person like Pandit Godavaris Misra to assist him, his claim cannot be defeated merely because he was not present when technical formalities for effecting the contract were made, especially when the admitted position of the defendants was that the plaintiff signed the confidential report as the agent and in the Company's papers this Policy was shown as having been secured through the Agency of the plaintiff and the commission was also credited to his account.

(12-13) The evidence of defendants' witnesses also is not sufficient to disprove the plaintiff's case or to establish that he was only a name-lender in respect of this business. (Then his Lordship adverted to the evidence of defendant 2, Gopinath Misra, the only other witness to disprove the plaintiff's case, observed that it was difficult to believe how a semi-illiterate person (viz. defendant 2) who had no knowledge of insurance business would ever be able to canvass as an agent, convince the propenents about the merits of the Lakshmi Insurance Company or persuade them to agree to take out any Policy, that he was equally incompetent to be the Chief Agent of the Company so as to control the activities of the various agents and concluded that he was inclined to accept the finding of the trial Court that defendant 2 was himself a mere name-lender and that the real Chief Agent of the Company in August 1942 was either Pandit Godavaris Misra himself or his son Lokanath who for reasons best known to them set up defendant 2 as the nominal Chief Agent.

(14) I now take up Ex. C which is the main strength of the defendant's case. It is admittedly in the handwriting of the plaintiff and in it the plaintiff admitted that the Chief Agent was really responsible for securing the policy from the Maharaja. The name of the Chief Agent was not mentioned. The plaintiff's statement that it was obtained from him by coercion and undue influence might not have been established. But the question for consideration at present is whether the plaintiff's statement that the Chief Agent was really responsible for securing the policy is itself sufficient to discredit his evidence that he canvassed with the Maharaja for securing the Policy though he sought the help of an influential person like Pandit Godavaris Misra. I am, however, unable to find any material inconsistency between the two versions. The real Chief Agent as already pointed out was either Pandit Godavaris Misra or his son Loknath, Pandit Godavaris Misra was then occupying a very influential position being a colleague of the Maharaja and was long associated with the affairs of the Company in Orissa. The plaintiff sought his aid to induce the Maharaja to take out the Policy and Godavaris Babu admitted that he spoke to the Maharaja to insure with the Company. Therefore, even if the plaintiff admitted that the Chief agent was really responsible for this business, it is a true statement in the sense that but for Godavaris Babu's speaking to the Maharaja the latter may not have taken the Policy. But it does not disprove the plaintiff's case that he was the agent inasmuch as he had initially requested the Maharaja and prepared the ground. It is also wholly insufficient to show that the plaintiff was a mere name-lender. The following answers given by D. W. 4 in his cross-examination are material in this connection.

> "Except when there is mutual understanding or consent by the agent in writing, the agent alone is entitled to get the commission even though the Policy is secured without his endeavours or intervention. For assisting any agent for procuring business, the Chief Agent cannot get any remuneration. Whenever any business is secured the agent earns the commission whether he secures it through his own efforts or not."

These answers show that an agent does not forfeit his right to commission merely because he was frank enough to admit that it was the efforts of the Chief Agent that were mainly responsible for securing the Policy. At that time the plaintiff and Pandit Godavaris Misra were on friendly terms and Pandit Godavaris Misra admitted that he had recommended the plaintiff for appointment as an agent of the Company and that the plaintiff used to stop at times with him at Cuttack. I, therefore, find nothing in Ex. C which materially contradicts the evidence of the plaintiff so far as his claim to be the agent of the Company in respect of this business is concerned.

(15) The next question for consideration is whether Ex. C, would amount in law to an assignment of the commission due to the plaintiff from the Company in respect of the business in favour of the Chief Agent so as to disentitle him from any relief in this litigation. Both the Courts have held that it may amount to pay order and not an assignment though they have given divergent reasons for taking this view. Mr. Mohapatra on behalf of the defendants also seriously did not contest the legal position that Ex. C would not amount to an assignment. An assignment of an actionable claim must conform strictly to the provisions of Section 130, T. P. Act as pointed out by the Patna High Court in — 'B. N. Railway Employees Urban Bank Ltd. v. Eric Walter Seager', A. I. R. 1942 Pat 207 (C). The letter Ex. C does not, in terms show that the plaintiff was transferring his interest in the commission to the Chief Agent. It was not addressed to the Chief Agent at all. It is just an order to the Branch Manager of the Company to pay the commission due to the plaintiff to the Chief Agent. Both the Courts rightly relied on — 'Doraisami v. Doraiswami', A. I. R. 1925 Mad 753 (D) and held that to effectuate an assignment there must be words of transfer in the instrument. Exhibit C is merely a pay order and it is open to the plaintiff to cancel the same. The fact that he subsequently cancelled it by writing to the Company was admitted by the Company (defendant 1) in its written statement.

There is some discrepancy as regards the actual date when the cancellation order was sent by the plaintiff. But there seems no doubt that the cancellation order was sent long before the plaintiff was sent to jail in December, 1943. This inference follows from a perusal of Ex. 5 which is a letter from the Company to the plaintiff dated 16-11-43. There the Company assured him that as the agency was in his name the question of payment of commission to any other agent did not arise and that the payment would be made to him in due course. This letter was written on the 16th November obviously with a view to alley his anxiety about payment being made to some one else. Thus there is adequate corroboration of the plaintiff's case

that he cancelled Ex. C. Its effect as a pay order disappears and the plaintiff's claim to the commission cannot be defeated.

(16) The lower appellate Court has made some observations about the plaintiff being a party to a fraud practised on the Insurance Company and that he should not be allowed to take advantage of his own fraud. The question of fraud does not arise in view of the aforesaid finding. The plaintiff is the agent who secured this business through the intervention of the real Chief Agent Pandit Godavaris Misra was decisive. The plaintiff was thus entitled to his commission. It is true that on 27-8-42 he agreed to the commission being taken by the Chief Agent and consequently wrote Ex. C it is immaterial whether he wrote it voluntarily or due to coercion and undue influence. Its legal effect is that of a pay order and as soon as he cancelled it it ceased to be operative. By writing that letter he was not attempting to commit any fraud on the Insurance Company because as an agent he was entitled to his commission and he could validly direct its payment to anyone else. Such a direction would not amount to fraud on S. 40 (2), Insurance Act. Doubtless if the defendant's case about the circumstances under which Ex. C. was written had been accepted it may amount to fraud on Section 40 (2) inasmuch as the Chief Agent who himself does the work of an agent may not be entitled to more than 40 per cent of the commission and the document was primarily intended to give him not only the agent's commission but also the overriding commission in violation of the provisions of the statute. But once the defendant's case has been shown to be not believable there can be no question of fraud nor can it be said that the plaintiff attempted to take advantage of his own fraud.

(17) I would, therefore, allow the appeal, set aside the judgment of the lower appellate Court and affirm the judgment of the trial Court. The appellant is entitled to costs throughout.

(18) MOHAPATRA, J.: I agree.

B/V.S.B. Appeal allowed.

A.I.R. 1954 ORISSA 49 (Vol. 41, C. N. 14)

PANIGRAHI AND NARASIMHAM JJ.

Gouranga Mohapatra, Petitioner v. State.

Criminal Revn. No. 368 of 1951, D/- 21-1-1953, from order of S. J., Cuttack, D/- 27-8-1951.

(a) Criminal P. C. (1898), Ss. 161(3), 162, 537 — Record of statement — 'B' fully corroborates 'A' — Effect.

Where an investigating officer, instead of recording the statement of a witness fully under S. 161(3), Cr. P. C., simply states that B fully corroborates A, an earlier witness, whose statement is recorded in full, it cannot be contended that the evidence given by B at the trial should be altogether ignored for that reason. It is possible that in many cases the Police Officer may have had no time to record the statement of a witness in extenso, but that by itself is no reason for ruling out the evidence of that witness. Of course there may be cases in which a Police Officer may deliberately refrain from recording statements if he is not quite sure of the material that he gets during investigation, but no authority goes to the extent of laying down that the evidence of a witness given at the trial should be altogether ruled out of consideration, merely because of inadequate recording of his statement under S. 162. AIR 1945 Nag 1, Distinguished; AIR 1948 Mad 23, Ref. (Para 6)

Per Narasimham J.: Though the actual statement made by B before the Officer was not in the case Diary, the accused had before him the statement of A and he was also aware of the fact that, according to the Police Diary, B fully corroborated A. He was, therefore, entitled to assume that the statement of B before the Police was incidental with that of A, and on that assumption to cross-examine B as well and to contradict him by his previous statement before the Police. There can thus be no question of any prejudice to the accused in cross-examining B for the purpose of eliciting contradictions, if any, as permitted by S. 162, Cr. P. C. Thus the failure of the Police in this case to record their statements separately, as required by sub-s. (3) of S. 161, was at best a mere irregularity which was clearly curable under S. 537, Criminal P. C. (Para 13)

Anno: Cr. P. C., S. 161 N. 6; S. 162 N. 8; S. 537 N. 14.

(b) Criminal P. C. (1898), S. 161(3) — Object of.

The provision of sub-s. (3) was introduced only to stop the mischief of certain Investigating Officer, who prepared their case Diary in such a way that no assistance could be obtained either by the Court or the accused from the record. (Para 6)

(c) Criminal P. C. (1898), S. 439 — Enhancement of sentence — (Penal Code (1860), Ss. 53, 326).

A dastardly attack was made on the Assistant Manager of a colliery by a labourer who happened to be an active member of the Labour Union, for the reason that he did not get the post he wanted. The labourer was sentenced to 6 months' rigorous imprisonment under S. 326, Penal Code.

Held that a deterrent sentence was called for in the case, as unless such acts were put down no colliery could work, particularly as such attacks might too often be made in the pits when absolutely no evidence would be available. The sentence was therefore enhanced to one and a half year's R. I. (Para 10)

Anno: Cr. P. C., S. 439 N. 29; I. P. C., S. 53 N. 1; S. 326 N. 9

S. Misra, for Petitioner; Asst. Govt. Advocate and A. B. Roy, for the State.

CASES REFERRED:

(A) ('45) AIR 1945 Nag 1: 46 Cri LJ 448 (Pr 6)
(B) ('48) AIR 1948 Mad 23: 48 Cri LJ 973 (Pr 6)

PANIGRAHI J.:

The petitioner, Gouranga Mohapatra, has been convicted under S. 326, I. P. C. and sentenced to undergo rigorous imprisonment of six months and to pay a fine of Rs. 100/- in default, to undergo rigorous imprisonment of three months more.

(2) The case against the petitioner was that he was an employee in the M. & S. M. colliery at Talcher and that he bore a grudge against P. W. 1, Mr. N. K. Bhattacharya, the Assistant Manager of the colliery, as the latter refused to re-

commend him for promotion to the post of Munshi. It is said that on 20-11-49, at about 7-30 A.M. Mr. Bhattacharya (P. W. 1) was going round the colliery, as usual, and went to the Token Office in the course of his daily supervision work. It is said that at that time, the petitioner appeared with a pick-axe and gave him a violent stroke, on his left buttocks, resulting in a grievous injury.

(3) The plea of the accused was that the whole prosecution case was foisted against him owing to differences between him and P. W. 1 and that he took no part at all in the assault against P. W. 1.

(4) The prosecution examined sixteen witnesses in support of the complainant's version. The trying Magistrate accepted their version and found the petitioner guilty of the offence with which he was charged and sentenced him as above. On appeal, the learned Sessions Judge substantially agreed with the view taken by the trying Magistrate, of the evidence, and affirmed the conviction as well as the sentence. The petitioner came to this Court in revision, but at the time of admission the Court directed issue of notice calling upon the petitioner to show cause why the sentence passed by the trying Magistrate should not be enhanced. Learned counsel appearing for the petitioner has taken us through the evidence in great detail and has argued the case for the petitioner at great length.

(5) Admittedly, the petitioner was having some grievance against the Assistant Manager (P. W. 1) on account of the fact that the latter refused to recommend him for the post of Munshi to which he was aspiring. It appears from Ext.-b, that P. W. 1 reported against the petitioner, complaining that he never did his work satisfactorily, that he had no knowledge of English, and that he never worked as a trolley-man. It was further pointed out therein that the petitioner was an agitator and that he used to figure as a witness for the Colliery Labour Union. This report was made to the Manager on 18-9-1949, about two months before the occurrence took place. According to the prosecution, when P. W. 1 was at a corner in front of the Token Office the petitioner assaulted him from behind with a pick-axe and struck him on his left buttock. P. W. 1 immediately turned round and saw that the petitioner had receded a few steps, holding a miner's pick, which has been exhibited as M. O. I.

It also appears that the petitioner while going away, was muttering to himself: "Oh, Oh". P. W. 1 who turned round questioned him why he struck him, but the petitioner did not reply. He then called P. W. 4, Rama Sahoo who was then standing at a distance of about 39 feet from the place of occurrence and asked him to see what happened. P. W. 4 immediately came running to the spot and noticed that blood was coming out of the site of the wound, inflicted on P. W. 1. Thereafter, P. W. 4, together with P. W. 6, Surendra Narayan Sinha, overman of the Colliery, carried P. W. 1 to the hospital where P. W. 13 treated him. A report was sent to the police (Ext. 4) and in due course the petitioner was charge-sheeted. On the advice of the local doctor, P. W. 1 left for Calcutta on the very same day, for treatment in the Kar Medical College Hospital, and was treated there by P. Ws. 15 and 16 till he was discharged on 20-12-49.

The direct eye-witnesses to the occurrence are P. W. 2 (Bauribandhu Padhan) and P. W. 3 (Rabi Sahu). They both speak to having witnessed the occurrence. P. W. 2 was at a distance of about 35 feet near the railway line and saw the petitioner giving a blow with the pick-axe. He corroborates P. W. 1 in all the details as to how the assault took place. P. W. 3 was similarly standing very close to the spot and witnessed the occurrence from a distance of 20 feet. He also corroborates P. W. 1 regarding the manner in which the assault was made.

(6) Learned counsel for the petitioner complains that the statement of P. W. 3 under S. 162, Cr. P. C. was not recorded by the Investigating Officer in full and therefore his evidence should be ruled out from the case. The Investigating Officer examined P. W. 3, but merely recorded in his diary that this witness fully corroborated the statement of P. W. 2 (Bauribandhu).

We were referred to the case reported in — 'Baliram Tikaram v. Emperor', AIR 1945 Nag 1 (A), in support of the contention that in such a case the evidence of a witness whose statement has not been fully recorded, under S. 162, should be left out of consideration. That was a case in which the police records had been destroyed and there was no evidence at all of any investigation or examination. But I am not prepared to accede to the contention that in all cases where a police Officer merely makes a record of his opinion of a witness examined by him under S. 162, without recording the statement in full, the evidence given by that witness at the trial should be altogether ignored. It is possible that in many cases the police Officer may have had no time to record the statements of a witness in extenso, but that by itself is no reason for ruling out the evidence of that witness. I am of course aware that there may be cases in which a Police Officer may deliberately refrain from recording statements if he is not quite sure of the material that he gets during investigation. But this is not a case of that kind, and we have not been shown any authority which goes to the extent of laying down that the evidence of a witness given at the trial should be altogether ruled out of consideration, merely because of inadequate recording of his statement under S. 162.

On the other side of the line there is a decision of the Madras High Court reported in — 'In re, B. Subbar Reddi', AIR 1948 Mad 23 (B), where it was held by a Division Bench of that Court, that the new provision introduced by S. 161(3) does not justify the view that the evidence of the witness should be altogether rejected. That provision was introduced only to stop the mischief of certain investigating officers, who prepared their Case Diary in such a way that no assistance could be obtained either by the Court or the accused from the record. In this case, however, we are satisfied that the record is not open to any such objection, so as to give room for thinking that it would vitiate the trial.

(7-9) (His Lordship then referred to the evidence adduced by the parties and proceeded as follows:) We do not see any reason to differ from the view taken by the Court below about the reliability of the prosecution witnesses and are satisfied that the offence, with which the petitioner has been charged, has been brought home to him to the hilt. We are also satisfied that there is no reason whatever to suspect the bona fides of P. W. 1 so as to incline us to believe that the case has been fabricated against the accused on account of alleged ill-feeling between him and P. W. 1. We would accordingly confirm the conviction of the petitioner under S. 326, I. P. C. as the injury has been proved to be grievous and was caused by a deadly weapon.

(10) Regarding the sentence to be awarded in this case we are definitely of opinion that a sentence of six months' rigorous imprisonment is far too inadequate in the circumstances of the case. When this petition came up for admission, the Court issued notice of enhancement of sentence. It was a dastardly attack made on the Assistant Manager, by a labourer who happened to be an active member of the Labour Union, the reason for the attack being that he did not get the post he wanted. Unless such acts are put down no colliery can work, particularly as such attacks may too often be made in the pits when absolutely no evidence will be available. We therefore think that a deterrent sentence is called for and we would accordingly enhance the sentence to one and a half year's rigorous imprisonment. But we do not think there is any justification for imposing a fine in addition to the sentence of imprisonment as the petitioner is said to be a poor man. Subject to these modifications in the sentence the revision is dismissed.

(11) NARASIMHAM J.: I agree with the order proposed by my learned brother but wish to say a few words regarding non-compliance with the provisions of sub-s. (3) of S. 161, Cr. P. C.

(12) It appears from the evidence of the Sub Inspector of Police (P. W. 14) that during Police investigation he questioned the two principal eye-witnesses, namely Bauribandhu (P. W. 2) and Rabi Sahu (P. W. 3). He recorded the statement of Bauribandhu fully, but failed to record the statement of Rabi Sahu and merely made a note in the diary to the effect that he "fully corroborated" the statement of Bauribandhu. Mr. Misra, learned counsel for the petitioner, argued that a record of this type contravenes the express provisions of sub-s. (3) of S. 161, Cr. P. C. as inserted by the amendment made in 1945, and that, consequently, the entire evidence in Court of Rabi Sahu (P. W. 3) should be ignored inasmuch as the petitioner was denied an opportunity to cross-examine this witness, with special reference to his statement made before the Police, as permitted by S. 162, Cr. P. C.

(13) I am however not satisfied that any material prejudice has been caused to the petitioner in his cross-examination of P. W. 3. Though the actual statement made by P. W. 3 before the Investigating Officer was not in the Case diary, the petitioner had before him the statement of Bauribandhu Padhan (P. W. 2) made before the police and he was also aware of the fact that, according to the police diary, Rabi Sahu (P. W. 3) fully corroborated Bauribandhu Padhan (P. W. 2). He was therefore entitled to assume that the statement of Rabi Sahu before the Police was identical with that of Bauribandhu, and, on that assumption, to cross-examine Rabi Sahu as well and to contradict him by his previous statement before the Police. There can thus be no question of any prejudice to the petitioner in cross-examining Rabi Sahu for the purpose of eliciting contradictions if any as permitted by S. 162, Cr. P. C. The cross-examination of Bauribandhu and Rabi Sahu shows that practically no questions were put to them as regards their previous statements to the Police, during investigation, with a view to bring out any contradictions. Consequently no prejudice has been caused to the petitioner by the failure of the Police to record their statements separately, as required by sub-s. (3) of S. 161, Cr. P. C. It is at best a mere irregularity, as pointed out by my learned brother, which is clearly curable under S. 537, Cr. P. C.

B/D.R.R. Revision dismissed.

A.I.R. 1954 ORISSA 51 (Vol. 41, C. N. 15)

MOHAPATRA J.

Bhaskar Sarap and others, Defendants-Appellants v. Dinabandhu Panda, Plaintiff-Respondent.

Second Appeal No. 454 of 1948, D/- 7-10-1952, from decision of Sub-J., Sambalpur, D/- 30-7-1948.

(a) Tenancy Laws — C. P. Tenancy Act (11 of 1898), S. 94 — Suit under — Nature.

The suit contemplated under S. 94 is a suit by the tenant who has been dispossessed by the landlord. AIR 1947 Pat 424 and AIR 1945 Nag 78, Distinguished. (Para 4)

(b) Limitation Act (1908), Art. 144 — Plea of adverse possession — Burden of proof — (Adverse possession — Burden of proof).

If the defendant asserts title to the property by virtue of possession he has got to prove a matured title by 12 years of adverse possession. (Para 7)

Anno: Lim. Act, Arts. 142-144 N. 87.

M. S. Rao, for Appellants; G. K. Misra, for Respondent.

CASES REFERRED:

(A) ('47) AIR 1947 Pat 424: 25 Pat 764 (Pr 5)
(B) ('45) AIR 1945 Nag 78: ILR (1944) Nag 753 (Pr 5)

JUDGMENT: This is the defendants' second appeal against the reversing judgment of Sri P. C. De, Subordinate Judge of Sambalpur. The plaintiff's case was one for declaration of title and for recovery of possession of the suit lands appertaining to H. S. plot Nos. 750 and 774. The plaintiff claimed an area of 1.52 acres out of plot No. 750, the total area of which is 3.40 acres and the entire plot of 774. He based his claim upon an unregistered lease-deed which purported to have been granted by the landlord in his favour on 15-4-1939 and further on a registered lease-deed (Ex. 3) granted by the same landlord on 5-11-43.

(2) The defence was that, in fact, the disputed lands were leased out to the predecessors-in-interest of the defendants by virtue of four leases of the years 1912, 1915, 1916 and 1921, and that since then they have been in possession of them. They had also taken up the plea of limitation.

(3) The trial Court dismissed the suit finding that the plaintiff was not able to prove his title and that the unregistered lease-deed of the year 1939 was suspicious. The learned appellate Court, in a well-discussed judgment, reversed the finding of the trial Court. He found that the disputed lands were not covered by the title-deeds proved by the defendants and that the title of the plaintiff was fully established by virtue of the registered lease-deed of 1943. He had also discussed the question of possession and found that the defendants had not been able to prove title by adverse possession for 12 years.

(4) Mr. M. S. Rao, appearing on behalf of the appellants, has first urged that the suit must be thrown out as barred by limitation as provided for under S. 94, C. P. Tenancy Act, 1898. The section runs thus:

> "94 (1) The period of limitation for a suit instituted by a tenant other than absolute-occupancy tenant to recover possession of land from which he has been ejected shall be two years from the date on which he is ejected."

This special point of limitation was never taken in any of the Courts below and has now been

taken for the first time in this Second Appeal. On examination of S. 94 it appears to me that the Act itself governs the relationship between the landlord and the tenant, and that the suit, contemplated under S. 94, is a suit when the tenant has been dispossessed by the landlord. I feel strengthened in my view by S. 92 of the said Act which also provides for summary procedure for recovery of possession on an application made to the Revenue Officer within one year from the date of his ejectment.

(5) Mr. Rao strongly relies upon two decisions reported in — 'Madhuban Ganda v. Basant Khetri', AIR 1947 Pat 424 (A) and — 'Ambadas v. Dattatraya', AIR 1945 Nag 78 (B). Both these cases are governed by Art. 1 of Sch. 2, C. P. Tenancy Act, 1920. The language of Art. 1, Sch. 2 is distinctly different from the language of Sec. 94 of Act of 1898. Article 1 of Sch. 2 runs thus:

> "For possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession 'by any person'."

The words "by any person" make the whole difference on account of which their Lordships in these two cases laid down the principle that even though the tenant would be dispossessed by a stranger-trespasser, the suit would have to be brought within the special period of limitation provided for in C. P. Tenancy Act, 1920 and not under the provisions of Art. 142, Limitation Act. Without further discussing the question we find that that question does not really arise in the present case in as much as the registered lease-deed which is relied upon by the plaintiff as the document of his tenancy rights is dated 5-11-43 and the present suit has been brought within two years from his title deed, that is, on 26-7-45.

(6) Mr. Rao contends that the learned lower appellate Court has misdirected himself in not examining the evidence from the point of view whether he was dispossessed within two years of his possession. In my view when he has proved his title within two years of the suit, the question of extinguishment of his title by lapse of time, as provided for even under Art. 1 of Sch. 2, does not arise.

(7) The further point urged by Mr. Rao is that the lower appellate Court has completely misdirected himself in having wrongly thrown the onus on the defendant to prove his adverse possession for 12 years. His contention is that the plaintiff having brought a suit for declaration of title and for recovery of possession the suit even if it is governed by Art. 142, Limitation Act, he (the plaintiff) has got to prove his possession and dispossession within 12 years. This argument of Mr. Rao completely ignores the most important feature that both the documents, relied on by the plaintiff and specially the registered document of the 1943, are within 2 years of the suit. As such, the learned lower appellate Court took the right view that if the defendant asserts title to the property by virtue of possession he has got to prove a matured title by 12 years of adverse possession. The second point taken by Mr. Rao has, therefore, no substance.

(8) It is further urged by Mr. Rao by reference to deposition of the landlord who has been examined as a witness on behalf of the plaintiff that the landlord maintains a register of leases granted by him and that on account of the non-production of that register the lower appellate Court ought to have drawn an inference against the plaintiff. Now the lower appellate Court having examined the title deeds of four years, referred to above, relied on by the defendant has come to a definite finding that in fact they do not appertain to the disputed lands, and, as such, the defendants have failed to prove title to the property by virtue of those deeds. He has further found that the disputed lands are clearly covered by registered lease deed Ex. 3. In view of these materials, in my opinion, the lower appellate Court was justified in not attaching importance to the non-production of the register by the landlord.

(9) The appeal, therefore, fails and dismissed with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1954 ORISSA 52 (Vol. 41, C. N. 16)

RAY C. J. AND JAGANNADHADAS J.

Arjun Sukla, Plaintiff-Appellant v. Jujesthi Sukla and another, Defendants-Respondents.

Second Appeal No. 118 of 1947, D/- 15-12-1949, from order of Addl. Sub-J., Cuttack, D/- 23-12-1946.

Evidence Act (1872), S. 32(3) — Nature of interest required.

The interest that is predicated in S. 32 (3) must be one which relates to the pecuniary or proprietary interest of the person making it. It is not a kind of interest which a man may feel about a friend or a relation and it is in no sense sufficient to say that there may be some future contingency that may be affected by the statement. It must be the present pecuniary or proprietary interest of the person making the statement that must be affected by the statement, in order that the same may be admissible. (Para 3)

Anno: Ev. Act, S. 32 N. 18.

S. N. Sengupta, for Appellant; S. Misra, for Respondents.

JAGANNADHADAS J.:

Plaintiff is the appellant in this second appeal. It arises out of a suit for partition in respect of 253 acres of homestead land in Cuttack town bearing plot No. 74 in Khata No. 553 of the current settlement. The plaintiff claims title to a ten annas-eight-pies share thereof. He claims five-annas four pies share under a deed of gift, Ext. 1, dated 7-1-41 and the other five-annas-four pies under a sale-deed, Ext. 2 dated 9-6-1944. Both the courts below have decreed the plaintiff's suit in respect of a five-annas-four-pies share, but have dismissed it in respect of the other five-annas-four-pies share. The plaintiff has accordingly brought the second appeal in respect of the five-annas-four-pies share for which his suit has been dismissed.

(2) The suit-plot originally belonged to three brothers, Nakfodi, Gangai and Chaitan. Defendant 1 is the son of Nakfodi. The plaintiff's case is that all the three brothers were separated and he claims five annas four pies share under Ext. 1 from the brother Chaitan, and the five annas four pies share under Ext. 2 from the daughter of Gangai. The case of the contesting first defendant is that at the family partition, Chaitan alone separated, but that the other two brothers remained joint, and that on Gangai's death his share survived to his branch and that he was accordingly entitled to the five annas four pies share of Gangai. The question, therefore, ultimately is one as to this disputed fact. namely, whether at the family partition all the three brothers became separated inter se or only the brother Chaitan separated,

while the other two brothers continued to remain joint.

(3) Both the courts below have accepted the first defendant's case on this question of fact. The point raised by the counsel for the appellant in this second appeal is that this concurrent finding of both the courts below is largely based upon the admission of one inadmissible item of evidence, namely, the recital in the gift-deed, Ext. 1. It may be mentioned that both sides gave also oral evidence of this disputed fact. As regards the documentary evidence, there were, in favour of the plaintiff's case two settlement entries, Exts. 3 and 3-A of which Ex. 3-A shows the land entered in the name of the two brothers, Jujesthi & Chaitan and of Nila Bewa, the widow of Gangai. This is relied on by the plaintiff as a strong item of evidence in his favour.

As against that the defendant relies upon entries in the Municipal Registers of the years 1926-27 and 1934-35 which show only the names of Jujesthi and Chaitan, without any mention either of the widow, Nila Bewa or her daughter Bacha, D-2 the vendor under Ext. 2.

What, however, has influenced both the courts below most is a recital in the gift-deed, Ext. 1. As already stated that was a document, executed by the brother Chaitan in favour of the plaintiff who was his sister's son, and whom, it would appear he was bringing him up as his foster-son. In that document, he has, while conveying his own five annas four pies share, made an incidental recital that the other ten annas eight pies share belongs to the first defendant, Jujesthi. In so reciting, he has made a reference to how Jujesthi became vested with that ten annas eight pies share. Both the courts below have taken that recital to mean that it amounts to an assertion that at the date of the original partition between the three brothers, the two shares of Nakfodi and Gangai remained joint and that only Chaitan's share was separated and they have treated this recital as admissible under S. 32, Evidence Act, on the footing of its being a statement by Chaitan against his interest.

The recital has been read to us and it does not at all appear to be a recital categorically asserting that there has been a partition only of Chaitan leaving the other two brothers joint at the time of the original partition as asserted in the first defendant's case. But apart from the meaning of that recital, the view taken by the courts below that it is a statement against the interest of the executant thereof and that, therefore, it is admissible under S. 32, Evidence Act appears to be clearly unsupportable. The courts below seem to think that because in a future contingency the plaintiff might be an heir to the property, if the two brothers Nakfodi and Gangai were separate as the plaintiff claims, & because Chaitan was interested in his foster-son. as he called the plaintiff, the statement by Chaitan must be taken as against his interest. The courts below are obviously making a confusion between the interest required for the admissibility of a statement under S. 32 and the interest that is relevant in judging the credibility of a statement and the weight to be attached to it.

The interest that is predicated in S. 32(3) must be one which relates to the pecuniary or proprietary interest of the person making it. It is not a kind of interest which a man may feel about a friend or a relation and it is in no sense sufficient to say that there may be some future contingency that may be affected by the statement. It must be the present pecuniary or proprietary interest of the person making the statement that must be affected by the statement in order that the same may be admissible.

(4) Learned counsel for the respondent tried to support the admissibility of this statement by showing that one of the boundaries in the document is stated to be the "present" land of Jujesthi and he tried ingeniously to argue that, in stating the boundary to be the "present" land of Jujesthi, the executant must be taken to have referred to the recitals, which he has made in the body of the document itself as constituting part of the description of the boundary, i.e., by the use of the words "present land of Jujesthi". Even if the recitals are so imported into the description of the boundary, it is obvious that what he is seeking to use, is not the statement of the boundary, but the statement as to the circumstances under which the latter itself is said to have become the property of Jujesthi. That is, once again using the recitals themselves which as shown above, are inadmissible. This is, apart from the conflict that exists in the various High Courts as to whether a statement of the boundary is or is not admissible under S. 32.

We have, therefore, no doubt in our mind that the recital in Ex. 1 is not admissible on the question as to whether the three brothers were separated inter se or only Chaitan was separate from the other two. The judgments of the courts below make it quite clear that they attach the utmost importance to this recital in coming to the conclusion on the disputed question. It is not possible for us to say whether excluding this statement, the courts below would necessarily have come to a conclusion in favour of the first defendant and against the plaintiff on this disputed question of fact. The courts below have got to see whether excluding this the rest of the evidence is enough to rebut the statutory presumption in favour of the current settlement entry, Ext. 3(A). In the circumstances, the judgments of the courts below are set aside and the case will go back to the lower appellate court for reconsideration of the question at issue on the existing material.

(5) Costs will abide the result.

RAY C. J.:

(6) I agree. I think it will be useful to make a few observations with regard to Municipal assessment registers, Exts. A and A-1, as in my view, both the courts below have misdirected themselves in appreciating their probative value. The basis on which their inferences from those documents are founded is evidenced from this passage from the judgment of the trial court which has been endorsed by the appellate court, though not in so clear terms. The court says:

> "During both these assessments it has been found that the entire disputed land formed only two holdings 530 and 531 during the first assessment and 590 and 591 (probably mistake for 690 and 691) during the second assessment, one recorded in the name of Chaitan and the other recorded in the name of Jujesthi. If Nila Bewa and after her death her daughter defendant 2 were in separate possession of their house on the disputed land as is alleged in the plaint and deposed to by the witnesses, there is no explanation as to why her name has not been recorded or her house assessed as a separate holding".

(7) The emphasis is upon the circumstance that Nila Bewa's name was omitted from the Municipal assessment register, though the entire land and all the houses situated thereon were assessed. If this last assumption is wrong a different consideration would arise. It appears that in the Municipal as-

sessment register, Ext. A-1, each of the holdings 530 and 531 is in respect of two rooms only. Either there is no clear evidence as to how many rooms in all were on the homestead of the family, or the evidence furnished by the map, Ext. (B) is contrary to the above assumption. On the map it appears that there were six rooms besides three Chalias (side Projections from thatches of houses) and each of the said two rooms appears to lie in different separated blocks. If this was the state of things at the time of assessment, it is clear that two houses belonging to either Nakfodi or Dhobei, whoever might be living at the time were omitted from assessment.

(3) Coming to the next assessment register, Ext A-3, it appears that holding No. 690 corresponding to previous holding No. 530 comprised two rooms while the holding No. 691 corresponding to previous holding No. 531 comprised three rooms; two rooms and three rooms are stated to be on the average. There being no controversy with regard to number of rooms comprising holding No. 690 I shall dismiss that out of consideration, but with regard to holding No. 691 with reference to the map, Ext. (B) it may well be said without any fear of contradiction that three rooms on the average would not mean more than two bed rooms with two Chalias on both sides. This would similarly exclude out of consideration one bed-room, one kitchen, and one Chalia which might in all probability be the share of the third block.

(9) I shall not, however, be understood to say that these documents are to be under-estimated with regard to their evidentiary value, but all attention should be paid to the contents of the documents in order to determine whether these registers do include all the houses on the homestead of the family. The municipal assessment head clerk says that the assessment is made on the basis of houses and not on vacant sites. Another circumstance to which no attention has been paid by any of the courts below must be taken into account. The said assessment clerk, at present law-clerk of the Municipality, has shown that at the time of the later Municipal assessment, there was an objection filed in relation to the assessment of holding No. 691 which is a holding recorded in the name of Jujesthi. He further deposed that the objection petition and the order passed on it are available in the Municipal office. While giving the finding on facts the lower appellate court should pay attention to these circumstances though I would not like to fetter his discretion otherwise in the matter.

C/M.K.S. Order accordingly.

A.I.R. 1954 ORISSA 54 (Vol. 41, C. N. 17)

NARASIMHAM AND MOHAPATRA JJ.

Smt. Haramani and another, Defendants-Appellants v. Dinabandhu Misra, Plaintiff-Respondent.

Second Appeal No. 522 of 1948, D/- 20-7-1953, from decision of Dist. J., Ganjam-Nayagarh, D/- 25-8-1948.

(a) Judicial precedents — Obiter dictum — (Civil P. C. (1908), Pre.).

Even the obiter dictum of a Superior Court is binding on a subordinate Court. (Para 7)

Anno: C. P. C., Pre. N. 15.

(b) Judicial Precedents — Obiter dictum and prima facie view — (Civil P. C. (1908), Pre.).

There is a real distinction between an obiter dictum of a superior Court and a prima facie view taken by the superior Court. A "prima facie" view expressed on any question of law by a Judge is only his tentative view based on first impression whereas his "obiter dictum" is an expression of his 'definite' opinion, though it was not necessary for the decision of the case before him. (Para 8)

Anno: C. P. C., Pre. N. 15.

(c) Interpretation of statutes — Retrospective effect — (Civil P. C. (1908), Pre.).

Cases of hardship cannot be any ground for giving such a construction to an Act so as to affect vested rights unless there are express words taking away such rights. (Para 11)

Anno: C. P. C., Pre. N. 3.

(d) Hindu Women's Rights to Property Act (1937), S. 3(2) — Applicability to pre-1937 widow.

Where the entire joint family property devolved on the sole surviving coparcener prior to the date of the commencement of Act the widow of another coparcener who died long before 1937 is not entitled to the benefits of S. 3(2). AIR 1945 FC 25, Foll.; AIR 1953 Orissa 240, Rel. on. AIR 1951 Orissa 378 (SB), Distinguished. (Paras 8, 9, 12, 13)

Anno: H. W. R. P. Act, S. 3 N. 1.

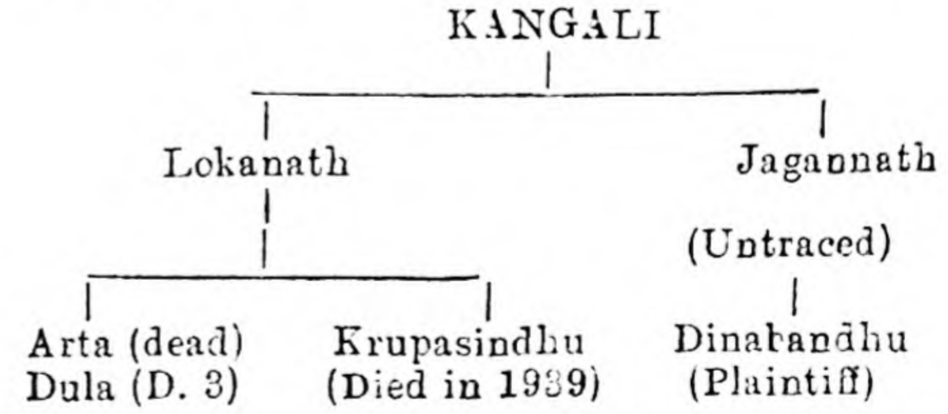
H. Mohapatra, for Appellants; S. K. Dey, for Respondent.

CASES REFERRED:

(A) ('51) AIR 1951 Orissa 378: ILR (1951) Cut 177 (SB) (Prs 4, 13)
(B) ('53) AIR 1953 Orissa 240: ILR (1953) Cut 24 (Prs 5, 8, 12, 13)
(C) ('45) AIR 1945 FC 25: ILR (1945) Kar FC 39 (Prs 6, 7, 13)
(D) ('43) AIR 1943 PC 196: ILR (1944) Bom 116 (PC) (Pr 10)

NARASIMHAM J.:

This second appeal is by defendants 1 and 2 against the concurrent decisions of the two lower Courts declaring the plaintiff's title to the disputed property and directing that he should recover possession of the same from defendants 1 and 2. The following pedigree will be helpful in understanding this litigation.



Defendants 1 and 2 are alienees from defendant 3.

(2) The plaintiff's case was that the family remained joint, that Arta died sometime in 1920, that Krupasindhu died in 1939 issueless, his wife having predeceased him, and that the entire joint family property devolved on the plaintiff by survivorship. Defendant 3 being the widow of a deceased coparcener was entitled only to maintenance and that the Kabala executed by her in favour of defendants 1 and 2 on 23-2-40 in respect of the joint family property was invalid and did not convey any title to them. The main defence of defendants

1 and 2 was that Jagannath, the father of the plaintiff, had been given away in adoption to one Madhab Das and that consequently the plaintiff had absolutely no interest in the joint family property which devolved on the descendants of Lokanath only. It was further alleged that Arta survived Krupasindhu and became the sole coparcener, that soon after his death defendant 3 succeeded to the entire property as his widow and that she executed the Kabala in question in favour of defendants 1 and 2 for legal necessities.

(3) The trial Court's finding was that Madhab Das was the maternal grand-father of Jagannath and Lokanath and though Jagannath was given in adoption to Madhab Das that adoption was invalid in North Orissa, the paries being Brahmins of Puri district. It further held that there was a division of status between the plaintiff on the one hand and Arta and Krupasindhu on the other as early as 1919 and the disputed property belonged to the descendants of Lokanath only. The trial Court rejected the plaintiff's (sic) statement that Arta survived Krupasindhu and held that Arta died long before 1927 and that after the said death of Krupasindhu the plaintiff as the nearest agnate succeeded to his property in preference to the widow of a predecesed coparcener (Arta). The sale-deed executed by defendant 3 in favour of defendants 1 and 2 was therefore declared to be invalid and plaintiff's suit was decreed.

In the lower appellate Court though the respondent had filed a cross-objection challenging the finding of the trial Court to the effect that Jagannath was adopted by Madhab and that the plaintiff was separate from Arta and Krupasindhu, at the time of hearing the cross-objection was not pressed in respect of these two issues. The lower appellate Court therefore discussed mainly the question as to whether the adoption of Jagannath by Madhab was invalid and agreed with the trial Court's finding in this respect. It further held that Arta predeceased Krupasindhu and that consequently defendant 3 was not entitled to anything else but maintenance out of the joint family property of Arta and Krupasindhu. The finding of the lower Court about the invalidity of the Kabala was, however, maintained and the appeal was dismissed.

(4) In pressing the second appeal Mr. H. Mohapatra relied mainly on the provisions of the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the Act) as construed by this Court in a special Bench decision reported in — 'Radhi Bewa v. Bhagawan Sahu', AIR 1951 Orissa 378 (SB) (A). Mr. Mohapatra urged that in view of the plaintiff's own case that he, Arta and Krupasindhu were all joint, defendant 3 as the widow of a predeceased coparcener would be entitled to a share in the joint family property by virtue of the aforesaid Special Bench decision inasmuch as on the date of the commencement of the Act (1937) the coparcenary had not been disrupted by partition between Krupasindhu and Dinabandhu.

This argument, however, is not available to him because whatever might have been the nature of the claim put forward by the plaintiff in his plaint, the finding of the trial Court was that the plaintiff had separated from Krupasindhu and Arta as early as 1919. This finding was not challenged either before the lower appellate Court or before the High Court in the grounds of appeal. On the other hand, in ground No. 5 this finding was itself relied upon to show that the alienation made by defendant 3 was valid. The defendants themselves had put forward the story of separation and the finding of both the Courts must be taken to have concluded this matter.

(5) Mr. Mohapatra next contended that on the findings of both the lower Courts, Krupasindhu was the sole surviving coparcener on the date of the commencement of the Act and that the principles laid down in the said Special Bench decision would apply with full force in favour of a predeceased coparcener's widow irrespective of whether on the date of the passing of the Act the joint family consisted of a single coparcener or more than one coparcener. Hence the question of law for decision in this appeal is whether a pre-1937 Hindu widow is entitled to the interest which her husband had in the joint family property which had devolved on a sole coparcener prior to the date of the commencement of the Act.

In a later Division Bench decision of this Court reported in — 'Nanda Kishore v. Sukti Dibya', AIR 1953 Orissa 240 (B), the earlier Special Bench decision was discussed and distinguished by my learned brother Mohapatra J. who held that the aforesaid decision had no application to a pre-1937 widow when the joint family property had devolved on a sole coparcener prior to the date of commencement of the Act. Panigrahi J. (as he then was) though agreeing with Mohapatra J. as regards the order proposed to be passed in that case did not express his concurrence with the view taken by him on the question of law but expressed his dissent from the view taken by the majority in the aforesaid Special Bench case. I may, however, point out that the Special Bench decision is binding on all Judges of this Court and on all subordinate Courts unless and until it is overruled either by a larger Bench or by a superior Court and should be followed.

(6) With respect, I would agree with my learned brother Mohapatra J. that the Special Bench decision has no application to a case where the entire joint family property had devolved on a sole surviving coparcener prior to the date of commencement of the Act. The principle which guided the Special Bench in giving limited retroactive effect to the Act was that a remedial Act should be given its maximum effect even though the meaning of the language used in the Act may fall short of the whole object of the Legislature; but that such a construction should not be adopted where it offends another well-known rule of statutory construction, namely, that retrospective effect should not be given to a statute so as to affect "vested rights" unless the statute expressly says so or such an inference follows by necessary implication.

Applying this principle and taking note of the absence of any express words in the Act giving retrospective effect to sub-s. (2) of S. 3, the Special Bench held that the said sub-s. (2) would also apply to a widow whose husband died prior to the date of commencement of the Act so long as the joint family property had not vested in anyone. Such vesting may occur either due to partition of the joint family property prior to the date of commencement of the Act or by valid alienation or when the property passes to a sole surviving coparcener.

The case of a sole surviving coparcener was discussed and the observations of the Federal Court in — 'Umayal Achi v. Lakshmi Achi', AIR 1945 FC 25 (C) were fully considered. That Federal Court decision was distinguished on the ground that it referred to the case of a sole surviving coparcener in whom the entire property vested prior to the date of the commencement of the Act & consequently retroactive construction should not be given to the Act so as to adversely affect his vested rights.

(7) The present case is fully covered by the decision of the Federal Court in — 'AIR 1945 FC 25 (C). In that case also the dispute was between the widow of a coparcener who died prior to 1937 and the widow of one Arunachalam who was the sole surviving coparcener of the family on the date of the commencement of the Act. The claim of the pre-1937 widow was made not on the basis of sub-s. (2) of S. 3 of the Act but on sub-s. (1) of that section on the ground that the joint family property in the hands of the sole surviving coparcener was his separate property within the meaning of that sub-section. After rejecting this argument Varadachariar J. discussed the import of sub-s. (2) of S. 3 of the Act and observed:

"It is true that on the above view, the plaintiff in the present case will derive no benefit from the Act, though she happens to be the widow of a predeceased son. But that is due to the circumstance that her husband died before her passing of the Act."

This observation may be an obiter dictum inasmuch as the learned counsel for the predeceased son's widow did not base his claim on sub-s. (2) of S. 3 and hence any observation about the applicability of that sub-section to the plaintiff was not necessary for the decision of that case. But as is well known even the obiter dictum of a superior Court is binding on a subordinate Court

(8) But there is a real distinction between an obiter dictum of a superior Court and a prima facie view taken by the superior Court. After making the aforesaid observations Varadachariar J pointed out some instances of hardship and observed:

"The possibility of such varying consequences cannot be allowed to control the natural and reasonable interpretation of the Act. It is 'prima facie' prospective and its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement, because these alone could presumably have been within its contemplation".

It will be noticed that though the learned Judge expressed in unambiguous terms that the widow of the predeceased son in that case would derive no benefit from the Act because her husband died before the passing of the Act, while expressing his view as to whether the Act was prospective or retrospective he significantly used the word "prima facie" making it absolutely clear that on this larger question he was only giving his prima facie view. The word "prima facie" as explained in the Oxford Dictionary means:

A. At first sight; on the face of it; as appears at first without investigation.

B. Arising at first sight; based or founded on the first impression."

A "prima facie" view expressed on any question of law by a Judge is only his tentative view based on first impression whereas his "obiter dictum" is an expression of his 'definite' opinion, though it was not necessary for the decision of the case before him. The word "prima facie" cannot be construed to mean "manifestly" as appears to have been done by one of the Judges in — 'AIR 1953 Orissa 240 at p. 243 (B). Hence the observations of Varadachariar J. as regards the inapplicability of sub-s. (2) of S. 3 of the Act to the case of a pre-1937 widow, when the joint family property had devolved on a sole surviving coparcener on the date of the passing of the Act is binding on us — though obiter dicta — whereas his view on the larger question as to whether the Act was "prospective" under all circumstances, was expressly stated to be his "prima facie" view and required fuller investigation. The Special Bench, therefore, thought that they could examine this question more fully and give their decision thereon.

(9) The facts of the present case are almost identical with those of the Federal Court decision mentioned above. Defendant 3's husband died before the passing of the Act and the entire joint family property had devolved on her husband's brother Krupasindhu who was then the sole surviving coparcener. She could, therefore derive no benefit from the Act.

(10) It is true that though the joint family property may vest in a sole surviving coparcener his rights in the property are not identical with the rights of a Hindu in his self-acquired property. As pointed out in — 'Anant Bhikappa v. Shankar Ramchandra', AIR 1943 PC 196 (D), the adoption by the widow of a collateral coparcener would divest him of a part of his interest and to that extent would impair the completeness of the interest; but his rights over the property are identical with the rights of a coparcener over the joint family property that had vested in him after partition. In both these instances the property undoubtedly "vests in him" though it is subject to the contingency of being partially divested due to other circumstances, such as birth of a son in future in both the cases or adoption by the widow of a deceased collateral coparcener in the former case.

In considering whether the limited retroactive construction put on the Act by the Special Bench can apply to the case of a sole surviving coparcener the question is not whether his rights over the joint family property are as complete as those of a Hindu over his self-acquired property but whether the property "vests in him" so as to bar such retroactive construction. Property may "vest" in an individual even though he may not have all the rights of a full owner over the property. In the aforesaid Privy Council decision their Lordships expressly used the expressions "vested" and "de-vested" while referring to the property of a sole coparcener and the effect of adoption by the widow of a predeceased collateral on that property, thereby making it clear that property may vest in an individual even though his rights over the same may not be as complete as those of a Hindu over his self-acquired property.

The Special Bench expressly refused to give limited retroactive effect to a case where the joint family property had been partitioned amongst the coparceners prior to the commencement of the Act and the position of a sole coparcener is identical with that of a coparcener who has obtained his share of the joint family property after partition and the same reasonings for which the Special Bench held that its decision would not affect the former would apply with full force in respect of the latter. There are several passages in the judgment of the majority of Judges in the Special Bench case in support of this view and it is hardly necessary to quote them at length here.

(11) Mr. Mohapatra, however, rightly drew our attention to an anomaly and hardship that would arise by not giving full retroactive effect. Suppose there are two Hindu families in which the last male holders were A and B though both had a son who died prior to 1937 leaving a widow C. A's property was all self-acquired whereas B's property was all ancestral which devolved on him as the sole surviving coparcener. Prior to 1937, A was not under a legal obligation to maintain his son's widow though he was under a moral obligation whereas B was under a legal obligation to maintain his son's widow. After the passing of the

Act, by virtue of sub-s. (1) of S. 3 as construed in the aforesaid decision of the Federal Court his son's widow would after his death inherit a share of his property in like manner as her husband. In the latter case, however, if such retroactive effect is not given to the Act the predeceased son's widow who was always entitled to maintenance even before 1937 would get no better rights after the passing of the Act.

It seems anomalous and illogical that a widowed daughter-in-law who was not legally entitled to maintenance before 1937 should suddenly get a share in her father-in-law's property whereas another widowed daughter-in-law who was entitled to maintenance before 1937 would derive no benefit from the Act. Cases of hardship of this type are bound to arise & as pointed out by Varadachariar J. in the aforesaid Federal Court decision "one can imagine several instances of hardship which the Act may be unable to remedy." But that cannot be any ground for giving such a construction to the Act so as to affect vested rights unless there are express words taking away such rights.

(12) I would, therefore, hold that there is nothing in the Special Bench decision of this Court to justify the view that the benefits of sub-section (2) of Section 3 of the Act can be obtained by a pre-1937 widow where the entire joint family property had devolved on a sole coparcener prior to the passing of the Act. Such a case was clearly excluded from the scope of that decision and is fully covered by the observations of Varadachariar J. in the Federal Court decision mentioned above. I would, with respect, agree with the reasons given by Mohapatra J. in — 'AIR 1953 Orissa 240 (B). The result is that defendant 3 had no interest in the joint family property (except her right of maintenance) which after the death of the sole surviving coparcener Krupasindhu in 1939 was inherited by the plaintiff Dinabandhu. Her sale-deed in favour of defendants 1 and 2 cannot convey any title to them. The appeal is, therefore, dismissed with costs and the orders of the lower Courts are confirmed.

(13) MOHAPATRA J. : I agree that the appeal must be dismissed with costs inasmuch as defendant 3 had no interest in the property to convey in favour of defendants 1 and 2, her husband Arta having died long before 1937 in a state of jointness with Krupasindhu and the entire properties devolved upon Krupasindhu, the sole coparcener on the death of her husband. Where the entire joint family property devolved on the sole surviving coparcener prior to the date of the commencement of the Hindu Women's Rights to Property Act, the widow of a coparcener who died long before 1937 is excluded from the scope of the decision of the Special Bench of our Court reported in — 'AIR 1951 Orissa 373 (SB) (A)'. I would adopt the same reasons as I had given in my judgment in the case reported in — 'AIR 1953 Orissa 240 (B)'. Such a case is fuly covered by the observations of Justice Varadachariar in the Federal Court decision reported in — 'AIR 1945 FC 25 (C)'.

B/D.H.Z. Appeal dismissed.

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MOHAPATRA AND MOHANTY JJ.

Harekrishna Mahatab, Petitioner v. Balkrishna Kar and another, Opposite Party.

Original Criminal Misc. Case No. 9 of 1952, D/-17-9-1953.

Contempt of Courts Act (1952), Ss. 4 and 1 — Scope.

The contempt for court proceedings, being a summary and very arbitrary method of dealing with individuals, should be sparingly initiated and a person should not be convicted unless his conviction is essentially in the interest of justice. There must be a substantial contempt, that is, something which tends in a substantial manner to interfere with the course of justice, to prejudice the public against one of the parties in a proceeding. (Para 6)

The freedom of the journalist in the matter of the application of the law is on no better level than that of an independent citizen. On the contrary, the responsibility is certainly heavier on the editor where the editor and the printer are both parties to the litigation pending decision and the paper has a fair circulation amongst the people. (Para 23)

A public man is bound to be criticised by various parties in the country who do not see eye to eye with the methods and objectives of the party to which he belongs, and it can never be suggested for a moment that the law of contempt of court has got to be interpreted in the way that as soon as a suit for defamation is filed by him he becomes completely immune from all public criticisms, which may sometimes be very scathing. Mere attacks on or abuse of a party, his witnesses or solicitor does not amount to contempt if it does not interfere with the course of justice. The parties in such cases are left to remedy by appropriate action. (Paras 10, 4)

A mere appeal to all the papers and also the people in general that the real truth and the whole truth should be brought out before the Court, without an assertion justifying the articles which are the subject matter of the defamation suit or that what are contained therein are true, or a mere expression of gratitude to the public in a general way for the support they give the paper in the pursuit of its policy, or a general exposition of the mission and function of the paper which has no reference to the plaintiff or his case as such will not constitute contempt. (Paras 20, 19, 10)

But at the same time as a party in the suit for defamation he has filed the plaintiff has got the right to have the fairest trial in the cleanest possible atmosphere and no one has the right to put any impediments in the due course of justice. If there be a categorical assertion in the matter published as to the truth of the case of the defence, that will be deemed as an impediment in the course of justice. Similarly where the defendant expresses in a vulgar and indecent way that in the result the plaintiff will be getting only the hair, that is, trash, as a result of the case that constitutes a technical offence even though it would not substantially affect the due course of justice. (Paras 10, 17, 21)

Held that the articles concerned in the case did not cause substantial obstruction in the due course of administration of justice as to record punishment or committal or fine and hence the accused was let off with a warning. (Paras 25, 26)

B. M. Patnaik, H. Sen and S. Patnaik, for Petitioner; M. S. Mohanty and A. Das, for Opposite Party.

CASES REFERRED:

(A) (1742) 26 ER 683: 2 Atk 469 (Pr 4)
(B) (1930) 1930-2 Ch 368: 99 LJ Ch 560 (Pr 4)
(C) (1903) 1903-2 KB 432: 72 LJKB 839 (Pr 4)
(D) ('28) AIR 1938 Mad 248: 39 Cri LJ 328 (Pr 5)

(E) ('43) AIR 1943 Lah 329: 45 Cri LJ 445 (FB) (Pr 6)
(F) ('31) AIR 1931 Cal 257: 32 Cri LJ 675 (Pr 6)
(G) ('45) AIR 1945 Lah 206: 47 Cri LJ 115 (Pr 6)
(H) ('41) AIR 1941 Pat 185: 42 Cri LJ 225 (Pr 8)
(I) ('38) AIR 1938 Cal 772: ILR (1938) 2 Cal 447 (Pr 9)
(J) (1881) 1881-17 Ch D 49: 50 LJ Ch 406 (Pr 17)
(K) ('14) AIR 1914 PC 116: 41 Ind App 149: 15 Cri LJ 309 (PC) (Pr 23)
(L) ('53) AIR 1953 Orissa 249: ILR (1953) Cut 283: 1953 Cri LJ 1491 (Pr 23)

MOHAPATRA J.:

The present contempt proceedings were started on an application filed by Shri H. K. Mahatab who was the Chief Minister of the State of Orissa and thereafter a Union Minister in the Central Cabinet. He is at present a Member of the Parliament. The petition is against opposite party No. 1, Balakrishna Kar, Editor, Matrubhumi, and Proprietor of Saraswata Press. Opposite party No. 2, Rama Chandra Kar is the Printer and Publisher of Matrubhumi. Matrubhumi is a daily Oriya paper having a fair circulation in the State of Orissa. It has its weekly issue also.

The opposite parties, in their paper Matrubhumi, had published several articles criticising the conduct of Shri Mahatab while he was the Chief Minister of Orissa and while he was a Member of the Central Cabinet of the charges of several corrupt practices, bribery, dishonesty and some anti-social and unpatriotic acts on account of which Shri Mahatab had filed a suit for defamation in Original Suit No. 189 of 1952 in the Court of the Subordinate Judge of Cuttak on 3-9-1952 against the opposite parties on the allegation that the opposite parties, with a view to humiliate the petitioner and damage his political career and to bring him down in the estimation of the people in his Constituency and of the general public, have been deliberately and persistently editing, printing and publishing maliciously false and highly defamatory matters in the several issues of the Oriya paper Matrubhumi. The petitioner had valued the suit at a lakh of rupees.

(2) The present petition is to the effect that while the said suit is pending, the opposite parties are still continuing and persisting in writing editorial and publishing articles with the deliberate intention of organising and mobilising public opinion in favour of the opposite parties and against the petitioner, vilifying and abusing the present petitioner in very filthy language, prejudicing mankind against the petitioner and making comments on the merits of the case pending before the Subordinate Judge of Cuttack and further asserting that the opposite parties are perfectly right and justified in their conduct and the petitioner has no merit in his case before the Subordinate Judge. These publications, according to the petitioner, are deliberately intended and have a strong tendency to interfere with the due course of justice in the original suit between the parties.

On this petition, notice was issued to the opposite parties on 18-12-1952, 14-1-1953 and 21-1-1953 to show cause why they should not be punished or otherwise suitably dealt with according to law for contempt of Court for having published articles in the Daily and Weekly issues of Matrubhumi. The dates of the issues are given in the notice as 5-9-1952; 7-9-1952; 8-9-1952; 11-9-1952; 13-9-1952; 15-9-1952; 16-9-1952; 6-10-1952 and 13-10-1952. The portions which were deemed prima facie to bring the articles within the mischief of contempt were underlined in red ink.

(3) The main plea taken before us by the opposite parties is that the articles do not constitute contempt. They had never the intention of vilifying or abusing the plaintiff in the suit nor did they assert regarding the merits of the case. The articles have no tendency to prejudice mankind against the plaintiff. Before examining each of these articles to see whether all or any of them comes within the mischief of the law of contempt, let us examine the position of law on this particular branch of the subject.

(4) More than 200 years ago, the law was very succinctly put by Lord Hardwicke in — 'Re Read and Huggonson; Reach v. Garyan', (1742) 26 ER 683 (A) in the following terms:

> "Nothing is more incumbent upon the Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."

He further added:

> "There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

During the period of last 200 years, this has been sufficiently clarified, explained, elaborated and crystallised by several judicial pronouncements both in England and India. In — 'William Thomas Shipping Co. Ltd., In re', 1930-2 Ch 368 (B) Maugham J. observed:

> "I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to for a like reason."

The law on the subject is clear and it is stated in Oswald's Contempt of Court, 3rd Edition, p. 91:

> "All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempt. Offences of this nature are of three kinds—namely those which (1) scandalise the Court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Courts, its Judges, Officers, or proceedings; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party, his witnesses or solicitor, constitute contempt, though a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action."

It appears to have been clarified in the above quotation that mere attacks on or abuse of a party, his witnesses or solicitor does not amount to contempt if it does not interfere with the course of justice. The parties in such cases are left to remedy by appropriate action. In — 'Reg v. Parke', 1903-2 KB 432 (C), Wills J. made the following pertinent observations:

> "The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the

Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of Court'."

(5) Let me next come to some of the Indian decisions on the point and I will first refer to a judgment of two very eminent Judges of India, Leach C. J. and Madhavan Nair J. (as he then was) of the Madras High Court, reported in the case of — 'Krishna Yachendra v. Rama Naidu', AIR 1938 Mad 248 (D). There two persons published in a newspaper an article which stated the case of the defendants in a suit instituted by a Raja against certain ryots and was pending decision in the Court and inferred that it was true and accused the Raja, the plaintiff in the case, as having ruined the defendants and of having concocted false criminal cases against them and further accused the plaintiff of using his influence maliciously and to the detriment of the defendants and closed the article with an appeal for assistance for defendants. Leach C. J. in his judgment observes that it constitutes a grave contempt, but the defendants having expressed regret, it was considered not necessary to take any action in the matter.

Their Lordships held that the article constituted contempt, the main reason, as it appears, being that the article contained an inference that the defendants' case was true and the Raja also had concocted false criminal cases against the defendants. It would be worthwhile to mention that their Lordships accepted the position of law as correct as quoted at p. 91 of Oswald's Contempt of Court, 3rd Edition.

(6) The next is a Full Court decision of the Lahore High Court reported in — 'Subrahmanyan Editor Tribune In re', AIR 1943 Lah 329 (FB) (E), the leading judgment being of Harries C. J. It was the famous Tribune Case of Lahore wherein their Lordships found that the Editor was not guilty of the publication of the articles. The articles were three in number, the first article being headed as "Arrest made on flimsy grounds", the second article purporting to be a report of certain criminal proceedings which was headed as "The arrest of Mr. A. C. Bali", the third was headed as "Lawyer insulted". The articles were published on the arrest of one Mr. Bali by Mr. Henderson, a police official.

Harries C. J. in his judgment at p. 337 made observations as follows:

> "A criticism of an executive officer, no matter how severe, cannot amount to contempt of Court unless such criticism contains matter calculated substantially to interfere with the due course of justice. It is one thing to say during the pendency of proceedings that an executive officer should not have taken a certain course. It is quite different thing to say that the course he took was wholly illegal. The main theme of all these quotations is that Mr. Henderson should not have taken the course which he did and that the arrest under R. 129, Defence of India Rules, was a very harsh way of dealing with Mr. Bali's offence, if any."

At p. 337, the position has been made clear relying on a previous decision reported in — 'Ananta Lal Singh v. A. H. Watson', AIR 1931 Cal 257 (F) that

> "before a Court will take notice of such a publication the Court must be satisfied that the matter published tended substantially to interfere with the due course of justice or was calculated substantially to create prejudice in the public mind. The Court will not take action where the offending matter amounts to what is sometimes referred to as a technical contempt, that is, in a case involving the main question of propriety where the tendency of the article to do harm is slight and the character and circumstances of the comment is otherwise such that it can appropriately be ignored."

Indeed, the contempt of Court proceedings are a summary and very arbitrary method of dealing with individuals. That being so, contempt proceedings should be sparingly initiated and a person should not be convicted unless his conviction is essentialy in the interest of justice. There must be a substantial contempt, that is, something which tends in a substantial manner to interfere with the course of justice to prejudice the public against one of the parties in a proceeding. It is clear, therefore, that we have to examine in these articles whether there has been a substantial contempt in this sense as expounded by their Lordships. It has got to be noted that in this Full Bench case also the proposition of law enunciated in Oswald's Contempt of Court at page 91 quoted above was accepted.

Mr. Patnaik, appearing on behalf of the petitioner, had placed strong reliance on a decision of their Lordships of the Lahore High Court reported in — 'Emperor v. Khushal Chand', AIR 1945 Lah 206 (G), where it was held that

> "where the articles published are deliberately designed to create an atmosphere of sympathy for the offenders and to mobilise public opinion in their favour and are calculated to produce the impression that the offenders are not to blame and that they are being persecuted as they happen to belong to a particular community the articles would amount to contempt of Court as it is a contempt of Court to prejudice mankind for or against the party to the cause before the cause is heard."

(7) Mr. Patnaik contends that the present articles do come within the observations made in this Lahore case. In this case, certain butchers were carrying beef in their carts in front of the Durgiana Temple at Amritsar when they were attacked by five Hindu young men, three of whom were armed with hatchets while the other two were armed with hocky sticks. The police were immediately communicated with & a case under Section 307/148, Penal Code was started. About a week later, two articles appeared in vernacular newspapers of wide circulation, 1 headed "Anxiety among the Hindus of Amritsar" and the other article "Police Raj in Amritsar". These articles were alleged to have commented on the merits and demerits of a pending case.

Their Lordships observed that these articles contain in a sensational form a number of statements highly favourable to the assailants of the butchers on matters which are to be adjudicated upon by the Court by which the case is to be tried. Their Lordships further observed:

> "They are unquestionably calculated to produce the impression that the offenders are not to blame and that they are being persecuted as they happen to belong to a particular community. As stated above it is a contempt to prejudice the mankind against the party to the cause before the causes are heard."

To my mind as it appears, their Lordships' decision was mainly dependent on the feature as quoted above that the articles discussed about the merits of the case and created an atmosphere in favour of the accused on the merits.

(8) We have also another decision of Harries C. J. in the case reported in — 'Supdt. and Remembrancer of Legal Affairs v. Murali Manohar Prasad', AIR 1941 Pat 165 (H). He confirmed the view of law as appearing in the cases already cited by me in observing:

"Any act done or writing published, which is calculated to interfere with the due course of justice, is a contempt of Court, and writings prejudicing the public for or against a party are similarly contempt. No intention to interfere with the due course of justice or to prejudice the public need be established if the effect of the article or articles complained of is to create prejudice or is to interfere with the due course of justice. The question of intention is irrelevant in considering whether the offence has been committed, though of course, it is a most important matter in considering the appropriate sentence to be imposed."

This is the famous Searchlight case where Mr. Murali Manohar Prasad was called upon to show cause why he should not be proceeded for contempt for having published an article headed as "Brutal assault on Indian" on the incident of 26-7-1940 at Dinapore which resulted in the death of a young Indian. There was another article also which was headed as "Alleged fatal assault by a Tommy". The case was imminent to be filed and in these articles there were comments on the case. Their Lordships made some pertinent observations which may have application to the present case which run as follows:

"The writer is entitled to comment and comment severely upon incidents which he thinks deserve comment. If his comment is unjustified persons injured by such comment have ample redress under the law of India. Comments generally on these incidents cannot amount to contempt. But no one has a right to prejudge the case and to state what he regards to be the true facts whilst the case is pending."

These observations indicate that the substance of the offence is to create an atmosphere in favour of either of the parties by asserting the truth or falsity of the case on merits. Their Lordships in this case also reiterated the view that:

"A mere technical contempt of Court is not sufficient to warrant High Court interfering and convicting the opposite party. There must be something more than a mere technical contempt; there must be a substantial contempt; that is, something which tends in a substantial manner to interfere with the course of justice or tends substantially to prejudice the public against party."

(9) Mr. Patnaik has also relied upon a decision reported in — 'Suresh Chandra v. Biswa Nath', AIR 1938 Cal 772 (I). Here the title suit was instituted purporting to be on behalf of the local public for a declaration that certain land claimed by the defendant was a pathway.

During the pendency of this suit, the plaintiff published a notice calling upon the public to attend a meeting to determine the course of action to be followed. The notice stated that the disputed land which had been used by general public from time immemorial was under risk of being closed. The resolution in the meeting and an article in a newspaper also asserted that the land was being used by the public and protested against the attempt of defendant of closing it. The notice, the resolution at the meeting and the article were held to amount to contempt as they would prejudice the public against the defendant. In this case, as we see there was distinct assertion as to the truth of the case of the plaintiffs that it is a public pathway and that the public are using it from time immemorial. In that view of the matter their Lordships found it to be a case of contempt.

(10) With the background of the above decisions, therefore, we shall have to examine each of these articles as to how far they will be held by law to be contempt. We shall have to remember in this connexion also that Shri Mahatab is a public worker for a pretty long time with very wide public activities throughout the whole of India though particularly in the State of Orissa. As a public man, he is bound to be criticised by various parties in the country who do not see eye to eye with the methods and objectives of the party to which Mahatab belongs. To me, as it appears, it can never be suggested for a moment that the law of contempt of Court has got to be interpreted in the way that as soon as such a suit filed by Sri Mahatab, he becomes completely immune from all public criticisms, which may sometimes be very scathing, but at the same time we have got to bear in mind that as a party in the suit for defamation he has got the right to have the fairest trial in the cleanest possible atmosphere and no one has the right to put any impediments in the due course of justice.

We are, therefore, confronted with the difficult task of examining how far these articles are justified by way of comments and criticisms on the public activities of Mahatab or how far they have exceeded the limit and are calculated substantially to impede the due course of justice. The first article that we shall deal with is the Daily issue of Matrubhumi dated 5-9-1952 headed as "Populace will give the reply" wherein the editor has expounded the general mission of the paper which he describes as pointing out to the mistakes and follies of the administration. It is reiterated there that by publishing repeatedly how corruption has entered into the very vitals of administration, the administration has become a curse instead of a boon. The paper has accused many persons who are at the helm of administration. The paper will pursue the mission of theirs until the corruptions and malpractices are completely eradicated from the country.

It further goes on to say that by publishing this, Matrubhumi has faced the great wrath of architects of the destiny of Orissa. If the editor of Matrubhumi in pursuit of this mission has exposed the corruption and follies of the man in charge of administration, the people will give a reply. In our opinion, this seems to be quite a general exposition of the mission and function of the paper which seems to be quite welcome. It has no reference to Mahatab or his case and, as such, is an innocent publication.

(11) The next one I mean to take up is the Sunday issue of Matrubhumi dated 7-9-1952 wherein the paper publishes the views of the Secretary of the Orissa Socialist Party Shri Banka Behari Das. Indeed this article has a direct reference to the defamation suit. Shri Banka Behari expresses himself in the way that he is not surprised at the news that Shri Mahatab has brought a suit for defamation against Matrubhumi. Capitalists and bankrupt politicians take recourse to such measures of bringing suits without agitating in the papers. The suit, accord-

ing to him, is a challenge to the papers in general and to the public on whom lie the duty of bringing all the materials before Court. It is important to note that he categorically asserts in this article that now that the matter is before the Court, it is not for him to express any opinion whatsoever and that the Court will determine the real position.

I do not think that it is offensive to call on the papers and on the people to place all the materials before the Court who alone, according to him, is competent to decide the real truth. It cannot be said that he only means that the public are to place before the Court only the materials and evidence which are against Mahatab and not those in favour of him, Mr. Patnaik, while commenting on this article, relied upon the two phrases 'Capitalists' and 'Bankrupt Politicians' used in the article. To call a man a capitalist is neither offensive nor defamatory. By calling Mahatab a bankrupt politician, he is criticising his political views and not his status in society which may have some reflexion on the question of assessment of his value of reputation relevant for the parties to the defamation suit.

(12) The next one is the publication of a letter written by Shri Raj Ballav Misra to the editor, Matrubhumi, wherein he congratulates the editor on the institution of the defamation suit against him on account of the reason that this is an occasion where the real truth will come out. He also asserts the position that whether Mahatab has been defamed and whether the editor is liable to punishment, is entirely in the hands of the Court to decide, but the object of his felicitation is that the matter has got to be thrashed out in Court. This seems to be equally inoffensive.

(13) The next article is the editorial of Matrubhumi in the Daily issue dated Monday, 8-9-1952, headed as "Matrubhumi will remain unmoved". The entire translation of the impugned article is given below as it is the editorial and the entire responsibility is with the present opposite parties:

> "In the meantime more than one defamation cases have been filed in different Courts against 'Matrubhumi'. Everybody more or less knows the history how our motherland (Matrubhumi) was previously attacked from all sides and our motherland (Matrubhumi) was battered to pieces as a result of this attack. Even after the attainment of independence cruel attack is made from all sides on the prestige of the motherland; and it is sad that some self-styled leaders alleging themselves as servant and worshipper of the motherland, having nurtured themselves with the bread and butter of the motherland, are helping it like a handle to an axe. By hook or by crook to make their high position higher they are putting their own interest higher than the national interest.
>
> On account of their devotion to personal interest like this Singhbhum has gone. The land on the west like Bastar and Jaspur has gone and many predominantly Oriya parts in the south are in the clutches of Madras. Sareikala and Kharsuan have slipped out of hand even after coming. It is true that to the outsiders, Utkal province comprising of political Orissa and merged States has raised its head as a separate State in Independent India, but in its midst the fortune of non-Oriyas over Oriyas has crossed all bounds in broad daylight. To judge like this the prestige of our motherland is being spoiled in broad day-light on everybody's face, everyday, every moment.
>
> To expose those who are defaming the motherland like this and those tip-top so-called civilised people in the leadership who are assisting them, 'Matrubhumi' was born. Otherwise there was no necessity of 'Matrubhumi' when more than one daily and weekly is being published in the Country.
>
> The innumerable readers bear witness to how far 'Matrubhumi' has been successful in its short existence to proceed in the object for which it first appeared. 'Matrubhumi' is determined to bear it smiling even if somebody hits the cruel weapon to thunderbolt over it, in the prosecution of its object to expose those who pollute the limited present and great future of the nation and sacrifice the common interest at the cost of their personal interest. In the prosecution of its object, its motion is not retarded and will never be retarded. If because in its horoscope to retreat someone thinks that it has defamed somebody to save the prestige of the nation and people. Rather it will devote all its energy in a redoubled vigour in the service of the deaf and dumb millions of the nation. This is the solemn and final promise of 'Matrubhumi' to the countrymen in its dark days."

(14) It begins with a general observation that more than one defamation cases have been filed in different Courts against Matrubhumi. Thereafter the editor has vindicated and justified the existence of the paper in pursuit of the mission which is to expose the selfish politicians who are at the helm of affairs and are making abuse of their positions. But the editor goes further in asserting that if by way of protecting the interest and fame of the country and the nation anybody thinks that he has been defamed, the editor will not move back an inch and will devote himself in the service of the country with redoubled vigour. Indeed while asserting his boldness and determination in pursuit of the mission he has asserted in a way that the publications on account of which the defamation cases have been brought are justified.

This assertion justifying his conduct, which gave rise to cases which are pending decision of the Court, is to my mind going beyond the permissible law of fair comment and bringing it within the mischief of the law of contempt. Indeed the article has no special and particular reference to Mahatab or to the case brought by him. But nevertheless the editor in a general way has made deliberate assertions justifying his conduct which has given rise to defamation cases and this is definitely contempt.

(15) On that very issue there is a publication of another humorous comment taken from some other paper. The comment is by way of a conversation between a grandson and grandfather and is headed as 'Subtle calculations of a blunt mind.' The comment headed as above indeed has reflexions on the reputation of Mahatab in a humorous way. It is not indeed a fair comment on the public activities of Mahatab without any reference whatsoever to the case, but has direct connexion to the allegations of the defamation by Mahatab. But nevertheless it does not seem to be a serious reflexion on his reputation and no notice need be taken.

(16) We will next take up an 'Appeal' published by some leading men of the locality calling upon the editors to make it a common cause and calling upon the public to constitute a defence committee for defending the cases that are being brought against the editors, printers and publishers, parti-

cularly those brought against Matrubhumi and Krushak. A full text of the Appeal published in the issue of Matrubhumi dated, Thursday, 11-9-52, is given below:

"The duty of a newspaper in an independent country is great. The prime duty of newspaper is to point out to the countrymen the mistakes and follies of the administration and to guide the countrymen in the correct path by discussing the evil and corruption in the society. There is no use for a newspaper to exist if it cannot achieve this end. But it is natural of anti-social elements to attempt the total extinction of a newspaper while the newspaper proceeds to achieve its end.

Today some newspaper in execution of its duty has become the prey of anger of someone and others will follow suit. In this field newspaper and journalists should unite to resist this injustice.

"Four cases have been filed against 'Krushak' and 'Matrubhumi'. There is also apprehension of some others in future. It is absolutely necessary for all progressive newspapers and journalists to unite, in a concerted action, to save "Matrubhumi" & "Krusaka" from total extinction considering them as their own. Therefore, we propose that people of the country should immediately form a resistance committee."

(17) In this connexion, it will be worthwhile to make a reference to the case reported in — 'Plating Co. v. Farquharson', 1881-17 Ch D 49 (J). There an injunction was granted restraining the defendants in that suit from infringing a patent for nickel-plating against which they had notice of appeal and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal and also an advertisement offering a reward of 100 pounds to any one who could produce documentary evidence that nickel plating was done before 1869. The plaintiffs having moved against the defendants for contempt of Court the advertisement being an interference with the course of justice it was held that the persons engaged in the trade of plating had a common interest in resisting the claims of the plaintiffs. Therefore, the advertisement calling upon them to contribute to the expenses of defending the proceedings was open to no objection.

The advertisement offering a reward for documentary evidence was also found to be inoffensive. The principle seems to be quite clear that a mere appeal to the persons who have got a common cause with the defendants to combine and contribute towards the expenses of litigation is inoffensive. But if there be a categorical assertion as to the truth of the case of the defence it will be deemed as an impediment in the due course of justice. Judged from this point of view, we will particularly consider the sentence "today some newspaper in execution of its duty has become the prey of anger of someone and others will follow suit. In this field newspaper and journalists should unite to resist this injustice," does imply indirectly that the newspaper which has been the victim of anger of someone is justified in its conduct. In our opinion, this assertion is not justified, but as there is no direct and distinct reference to the case, in question, we do not want to take notice of it.

(18) There is also another 'Appeal' equally which was published in the issue of Matrubhumi dated 16-9-1952, which is reproduced below:

"A number of defamation cases have been instituted against Matrubhumi and Krushak in the Civil and Criminal Courts and more cases are being threatened. It appears that some persons with vested interests, occupying the highest position in the State, plan to give such heavy blows on the newspapers, which are springing in the State to serve the people, that instead of rising the papers will be completely crushed.

So it is the duty of the general public to save from the imminent danger, the newspapers who have come forward to save interests of the people. For that purpose it is necessary for us to take concerted action. A meeting will be held to determine what is the duty of the public in this matter and thereafter to decide a concerted course of action. It is requested that you will oblige us by attending the meeting."

The terms of the Appeal being too general, we are not also inclined to take notice of it.

(19) One of the impugned articles is a publication in which the Editor, Matrubhumi, expresses his heartfelt gratitude to the persons who are supporting Matrubhumi against the concerted attempts of the people to frustrate the pursuits of the paper in fulfilling its mission in exposing the malpractices and corruptions that have permeated the various phases of the administration of the day. The editor states that by pursuing his mission he has been the eyesore of many people who occupy high position by hook or by crook. In my opinion, this is a mere expression of gratitude made in a general way and itself does not constitute an offence.

(20) I will next take up an article published in the issue dated 13-9-1952, headed as 'Problem for all newspapers' — 'Concerted action is necessary against the terrorising attack of the Congress.' This article is a reproduction of the views expressed by Mohan Das, Editor of Nua Dunia on 12-9-52. In this article, Mohan Das refers to two cases filed against Matrubhumi and Krushak. He asserts there that the cases are sub judice and that it is not proper for him to express his opinion on the subject. But nevertheless what he wants is that the whole truth will come out and the real culprit be punished. He further states that this is indeed what is wanted by all the papers of Orissa and the public too. He expresses his felicitations that the matter has come within the cognisance of the Court of justice and the parties will make out the whole case before the Court.

He further goes on to say that the Congress ought to know that by this the other papers will not be bowed down. He, therefore, concludes that this is a task before all the papers of Orissa and also the people in general that the real truth and the whole truth should be brought out before the Court. In our opinion, there being no assertion justifying the cases which are the subject matter of the defamation suit or that what are contained therein are true but it being an appeal for a concerted action on the part of all the papers for bringing out the whole truth, it does not constitute the offence of contempt.

(21) The next article is one published in the issue dated 15-9-1952, headed as "Subtle calculations of a blunt mind'. It refers to a case between Balakrishna, that is, the Editor of Matrubhumi, and H. K. Mahatab in the High Court. It expresses in a vulgar and indecent way that in the result Harekrishna will be getting only the hair, that is, trash, as a result of the case. This short paragraph is neither fair nor comment. It speaks only about the bad taste of a journalist which is to be highly deprecated inasmuch as it will create a bad taste among the reading public of Orissa in so far as it has the effect of vilifying

or abusing Mahatab who is a party to a cause in a vulgar language without any sense of decency or justification. It does constitute a technical offence even though it would not substantially affect the due course of justice.

(22) The next item is the long article appearing in the issue of Matrubhumi dated 13-10-1952. It is a reproduction of the reply given by Shri Binode Kanongo, Editor of Krushak, to the open letter of Satyapriya Babu assuming that this Satyapriya Babu is a Congress M. L. A. and the Secretary of the Congress Party in the Assembly. This article reproduced below refers to the defamation cases against both Krushak and Matrubhumi. This is an appeal to the public for support, sympathy and help in the matter of defending their cases on the basis that it is the mission of the paper to expose all truths.

Read as above, the article does signify that while the writer asserts that the Editors of Krushak and Matrubhumi are anxious for exposing the whole truth, he intends to mobilise public opinion and enlist public sympathy in the case on the basis that what they have published in the papers which are the subject matter of the defamation cases are true and justifiable and that there have been deliberate attempts on the part of Mahatab and Bijayananda Patnaik in the matter of suppression of truth. In this view, therefore, in our opinion it does constitute an attempt at prejudging the issues involved in the defamation case and prejudicing the mankind. Even though this is not the editorial of Matrubhumi, they are certainly responsible for having published it when they know fully well that this article contains matters regarding the defamation case of Mahatab against Matrubhumi. The article does create an impression that Editors are in the right and Mahatab and Bijayananda Babu are in the wrong.

The article runs thus:

"Let the President of the Provincial Congress reply.

Strong Conspiracy to Suppress Truth.

Fitting reply of the Editor of 'Krushak' regarding the open letter of Satyapriya Babu.

"I read the open letter which Sreejukta Satyapriya Mohanty has published in the newspaper regarding the 'Krushak' and 'Matrubhumi' Sahayak Committee. Who is this Satyapriya Mohanty? No address of his has been given in the open letter or in the newspaper. From a perusal of the open letter it is natural to think he is a Congress M. L. A. and is the Secretary of the Congress Assembly Party. On that assumption I am giving this reply.

"Though Satyapriya Babu has written that he is an ordinary tax-payer, but in truth he is not that. He is a man of position (STHALABHISHAKTA) of the Congress. So without merely stating about legal consultation, if he had written the letter after consulting a lawyer, he would have been able to tell some truths.

"He has tried to persuade people that Mahatab and Bijoyananda are merely ordinary individuals, and that they have been defamed and further that the Editors and Printers of 'Matrubhumi' and 'Krushak' have defamed them in their personal capacity. So nobody has got to bother about that.

"Are Mahatab, Bijoyananda Patnaik or Satyapriya Mohanty mere individuals?' The teeming millions of innocent tax-payers have sent them by votes as their rulers. Is it merely for the gratification of their personal lusts?

It cannot be the intention of any newspaper. Discussion of the personal lives of Mahatab or Bijoy Babu cannot be the intention of any newspaper. Nobody would gain by that. Neither have we contemplated the waste of our time by discussion of their personal lives.

But how Mahatab and Bijoya Babu occupying the position of Minister and Director of many Public Companies on the strength of their representative capacity, have utilised the wealth of the people along with that the confidence of the country-men and the great suspicion which has arisen in the minds of the people, we as mouthpiece of the general tax-payers and countrymen, as a duty of the newspapers and for the purpose of safeguarding the interests of the general tax-payers have exposed the same. There is no doubt that if our country-men help us they will know more truths about this matter. At least the truths or otherwise about the subject-matter of the litigation will be known in the Court if people help us to fight out the case. Out of fear for this, it is natural for attempts to be made on behalf of the Congress Secretary that nobody should help us. Satyapriya Babu will have to admit that Congress-men have reached the stage of attempting to conceal truth.

"The very fact that Satyapriya Babu, occupying the position of Congress M. L. A. and Secretary, has posed as an ordinary tax-payer in the open letter, proves that this case is not the personal case of Mahatab and Bijoya Babu. It is their collective or party case. Does not Srijukta Parija's statement that the publication of the news in the Prajatantra that the Secretary of the Provincial Congress Committee Banamali Patnaik is taking steps in the case of Mahatab, make everything clear to the people? Is Banamali Patnaik mere individual or the Secretary of the Utkal Congress? The letter of Satyapriya Babu and the taking of steps by Banamali Patnaik make it known to all that this move is not personal. This is a great conspiracy against all country-men.

"Again Satyapriya Babu has said that the country became independent. When the Country was under the British, such Relief Committees were being formed to expose truth or falsity in the Courts. It is not proper now to make any such attempt in an independent country and in an independent High Court. When country became independent Satyapriya Babu was not there. It would not have been possible to make any such work in support of I. N. A. Relief Committee. When all the people of India were fighting against the foreign power, facing bullets and rotting in the jail, Satyapriya Babu was busy carrying on propaganda in support of the British in the capacity of Puri War Front Leader.

Satyapriya Babu must now realise that when the teeming tax-payers were fighting with blood and tears for the independence of the country, they were not apprehending that on the attainment of independence Sri Bijoyananda Patnaik will become businessman with the wealth of the taxpayers, earned by the sweat of their brow, or others on becoming Ministers would forget the country-men or that the War Front propagandists will become the office-bearers of the Congress. So what doubt is there that Satyapriya Babu will try to cover up the truth? It is certain that it has become absolutely necessary that the condition which the country has reached requires that truths about those who have

entered into the administrative machinery should be published. Country is going to be crushed by the conspiracy of power and money. No individual institution or Government have ever been able to suppress public opinion by the weight of law, regulation, greed for money or litigation. The support which we have got from our countrymen, in spite of the attempts of Satyapriya Babu is our pride.

"Again Satyapriya Babu has said that Mahatab and Bijoyananda Patnaik have instituted only three cases. The others have been filed by their Barrister as contempt of Court proceedings. Before writing such a great falsehood, it would have been better if Satyapriya Babu had asked the Barrister of Mahatab. Barrister would be prepared to say that he had filed the cases on his behalf. I am an accused. Number of contempt of Court proceedings have been instituted against me. But the Barrister has not instituted the same. Jagatkrushna Das, agent of Bijoyananda Patnaik, has filed the cases against me and my friends.

Again although the contempt of Court proceedings are to be instituted in the High Court, they have been filed in the Court of the Subordinate Judge and Sub-Divisional Officer. So it is not true to say that Barrister has filed these cases as a citizen. In the language of Satyapriya Babu these cases have not been instituted orally but in writing and Court-fee has been affixed. We do not know if the Barrister has taken fees from Mahatab and Bijoy Babu for drafting and filing the cases. But there is no difficulty to understand that Barrister has not spent money from his own pocket for the court-fees.

"Satyapriya Babu has written that in the contempt of Court proceedings, Court is the prosecutor. It is not necessary for any body to institute. In any cognizable case (i.e. theft) State is the prosecutor. Satyapriya Babu is certainly not unaware that in our country many persons with a view to satisfy their grudge file Criminal cases in Courts. High Court itself is to take up contempt of Court cases. But this case has been instituted by the agent of Bijoynanda in other Courts instead of in the High Court. Everybody would know why this has been done after the case is over. The move on behalf of the Congress that nobody should help us in our defence, that countrymen should (sic not) help us in proving truth in Court of law, that even if we are not guilty countrymen should not help us in our defence, is extremely ridiculous when the business friends Bijoyananda Patnaik and Mahatab of Satyapriya Babu's party are trying to suppress truth by putting patriotic newspapers like Krushak and Matrubhumi in the dock.

"Lastly my appeal to the President of the Congress Committee Sri Biswanath Das is that he should enlighten the public as to what the Congress Committee or Congress Assembly Party has got to do with the litigation. Let him consider whether it is proper to utilise the name of Congress Committee in the litigation."

(23) Some arguments were advanced on behalf of the opposite parties that the case of an editor or a printer ought to be viewed in a more liberal way in the matter of application of the laws of contempt of Court in the advent of democracy in our country inasmuch as the Press has a very great responsibility for contributing to the successful building up of democratic traditions in the country by way of exposing corruption and maladministration which are more or less rampant in every phase of the administration all round. We can answer this question simply by a reference to the decision of their Lordships of the Privy Council reported in — 'Channing Arnold v. King Emperor', AIR 1914 PC 116 (K), wherein the principle has been clearly laid down as follows:

"The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever height the subject in general way may go, so also may the journalist; but apart from statute law his privilege is no better, and no higher."

This question was raised and decided in the judgment in the case of — 'Bijoyananda Patnaik v. Balakrushna Kar', reported in AIR 1953 Orissa 249 (L) to which decision I was a party. We have to accept simply the view taken there that the freedom in this respect of the journalist is of no better level than that of an independent citizen. On the contrary, in the present case, the responsibility is certainly heavier on the editor inasmuch as the editor and the printer are both parties to the litigation pending decision and that the paper has a fair circulation amongst the people of Orissa.

(24) To conclude, therefore, we find that the article dated 13-10-1952 and the editorial dated 8-9-1952 do constitute the offence of contempt of Court inasmuch as the opposite parties, in deliberately attempting to mobilise the public opinion in their favour and call upon the people at large and the pressmen in general to support their cause, which, according to them, is the common cause for the pressmen and the public, have asserted the position that they are right in the stand taken in the publications which are the subject matter of the pending action for defamation and that Mahatab is in the wrong. It appears, therefore, quite clear to our mind that by these two aforesaid articles by expressing their own views by the editorial of 8-9-1952, and by facilitating circulation and publication of similar views expressed in another paper in the issue of Matrubhumi (Weekly) dated 13-9-1952, (at page 9, Col. 4) the opposite parties have prejudiced the mankind to some extent against the plaintiff in the suit.

The article dated 13-10-1952 wherein there was indecent abuse of Mahatab as a party to the litigation by far exceeded all limits of fair comments and is nothing but a mere vilification of a party to a cause with reference to the proceedings and as such comes within the mischief of the law of contempt.

(25) But, as in our view, the articles are not calculated to cause such a substantial obstruction in the due course of justice as to record a punishment of committal or fine, we are inclined to take a lenient view for the last time in the case.

(26) While expressing our strong disapproval of the conduct of the opposite parties and particularly in view of the situation that they being parties to the litigation had taken advantage of their position as editor and printer, we warn them that we will be compelled to take a very serious view in the case of repetition of the offence. We would, therefore, make the rule absolute and direct no more punishment beyond the above observations. The opposite parties will, however, pay the costs of the petitioner. The hearing fee is assessed at Rs. 150/- (Rupees one hundred and fifty).

(27) MOHANTY J.: I agree.

B/M.K.S. Rule made absolute

A.I.R. 1954 ORISSA 65 (Vol. 41, C. N. 19)

PANIGRAHI C. J.

Rusi Biswal, Petitioner v. Nakhyatramalini Devi and others, Opposite Party.

Criminal Revn. No. 17 of 1953, D/- 24-8-1953, from order of 1st Class Magistrate, Jaipur, D/- 31-12-1952.

(a) Criminal P. C. (1898), Ss. 342 and 537 — Scope.

The section does not limit the power of Court to examine the accused at any particular stage. It can examine him as often as it thinks it necessary to do so, to enable him to explain any circumstances appearing against him in the evidence. Object of the section is to see whether accused can give an innocent explanation of the facts spoken to against him. Court is not prevented from examining the accused even after the defence evidence has been recorded — Accused exempted under S. 205 represented by Mukhtear — Latter examined on accused's behalf but not signing statement — Court can examine accused a second time when that fact was brought to its notice, even after the defence evidence had been recorded — Even if the procedure is not in strict compliance with S. 342 the defect is curable under S. 537 — Complainant when he had not complained about it at the time of the examination cannot afterwards object to the procedure on the ground of failure of justice having been occasioned thereby. (Para 4)

Anno: Cr. P. C., S. 342 N. 2, 35; S. 537 N. 13.

(b) Criminal P. C. (1898), Ss. 342 and 533 — Effect of non-compliance with the section.

Where there has been a substantial compliance with the requirements of Section 342 and the accused has been examined, any technical error or omission to have his signature appended to the statement is only a curable irregularity and would not vitiate the trial. AIR 1925 Cal 480(1), distinguished. AIR 1927 Cal 330; AIR 1921 Pat 374; AIR 1940 Pat 295, Rel. on. (Para 5)

Anno: Cr. P. C., S. 342 N. 35; S. 533 N. 3.

(c) Criminal P. C. (1898), Ss. 342 and 205 — Examination of pleader of accused.

Accused a respectable lady observing Purdah — Her statement one of denial of offence which could be made by her mukhtear, without prejudicing case of complainant — Held that to insist on her personal appearance would involve unnecessary waste of time and harassment to her. It is not obligatory on the magistrate to direct the personal attendance of the accused who has been exempted under S. 205 at any stage, including examination under S. 342. If he is satisfied that the examination of the Mukhtear on behalf of the accused is sufficient, the non-examination of the accused personally would not render the trial illegal. AIR 1934 Bom 212; AIR 1927 Rang 73 Rel. on. (Para 6)

Anno: Cr. P. C., S. 342 N. 17; S. 205 N. 10, 7.

R. K. Patnaik, for Petitioner; S. Mohanty and G. B. Mohanty, for Opposite Party.

CASES REFERRED:

(A) ('25) AIR 1925 Cal 480(1): 51 Cal 933: 26 Cri LJ 261 (Pr 5)

(B) ('27) AIR 1927 Cal 330: 31 Cal WN 337: 28 Cri LJ 347 (Pr 5)

(C) ('21) AIR 1921 Pat 374: 22 Cri LJ 460 (Pr 5)

(D) ('40) AIR 1940 Pat 295: 41 Cri LJ 267 (Pr 5)

(E) ('34) AIR 1934 Bom 212: 35 Cri LJ 1035 (Pr 6)

(F) ('27) AIR 1927 Rang 73: 28 Cri LJ 226 (Pr 6)

ORDER: This is a revision directed against an order of Sri M. A. Khan, Magistrate First Class, Jajpur, dated 31-12-52, whereby he examined an accused person under Section 342, Cr. P. C., after the examination of the defence witnesses had been completed.

The petitioner is the complainant in a case under Sections 447 and 426 I. P. C. There were five accused persons, of whom the first accused Nakhyatramalini Dei (Opposite party 1) is a purdanashin lady. She was being represented at the trial by 'Mukhetear, M. M. Jena, and her personal attendance was dispensed with under Section 205, Cr. P. C. On 17-10-52, the Mukhtear was examined on her behalf. But unfortunately, it appears that he did not sign the statement he made under Section 342.

The case was posted to 30-12-52, for the examination of defence witnesses and some of them were examined on that date. The case came up for arguments on the next day, namely, 31-12-52. On that day, it was brought to the notice of the Court that the Mukhtear had not signed the statement under Section 342, Cr. P. C. It appears that the Mukhtear had died on 11-11-52 and this fact also was brought to the notice of the Court on 31-12-52. It is apparent from these facts, therefore, that the first accused Nakhyatramalini was not represented at the trial when the defence evidence was recorded. The Magistrate accordingly passed the following order:

"After 17-10-52 till yesterday (30-12-52) when the defence witnesses were examined nothing important took place. So, the accused going unrepresented does not matter much. Mukhtear Sri L. B. Das signs her Vakalatnama today and submits a petition under Section 205, Cr. P. C., for her to-day. This is allowed and accepted. Let him represent her.

Sri L. B. Das, Mukhtear, is examined to-day under Section 342, Cr. P. C. representing the accused Nakhyatramalini Dei under Section 205, Cr. P. C. He declines to adduce any evidence or to recall and examine any of the defence witnesses examined yesterday."

(2) The statement itself is almost the same as was made by Mukhtear M. M. Jena who had represented the accused Nakhyatramalini earlier till his death on 11-11-1952.

(3) The grievance of the complainant, however, is that the procedure adopted by the trying Magistrate in examining the accused a second time renders the trial illegal and vitiates it and, therefore, that order should be quashed.

(4) Secion 342, Cr. P. C., enables the Court to "put any questions to the accused at any stage of an enquiry or trial for the purpose of enabling the accused to explain the circumstances appearing in the evidence against him."

The section is wide in its language and does not limit the power of the Court to examine the accused at any particular stage. The Court can examine him as often as it thinks it necessary to do so, to enable the accused person to explain any circumstances appearing against him in the evi-

dence, the object of the section being to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in the language of the Section which would prevent the Court from examining the accused even after the defence evidence has been recorded; and even if the statement had not been signed by the Mukhtear it was open to the Court to examine the accused after the defence evidence had been recorded, if anything needed explanation. I am, therefore, unable to find anything illegal in the procedure adopted by the Magistrate.

Even if it can be said that the order passed by him is not in accordance with the strict interpretation of Section 342, Cr. P. C., all that he has done may amount only to an irregularity which is curable under Section 537 of the Code. It was open to the complainant who was represented by pleaders to point out the irregularity at an earlier stage in the proceeding. Not having done so it appears to me that the objection now taken has no force and the petitioner can have no reasonable cause to complain of any failure of justice having been occasioned by the irregularity of procedure adopted by the Magistrate.

(5) Learned counsel for the petitioner relied on the case of — 'Surendra Lal v. Isamaddi', A. I. R. 1925 Cal 480 (1) (A) in support of his contention that the trial itself is vitiated for the reason that the accused was examined after the defence witnesses had been examined. In that case the accused had not been examined at all till after the defence witnesses were examined. There was thus no compliance at all with the provisions of Section 342, Cr. P. C. In such circumstances their Lordships held that an examination under Section 342, Cr. P. C., is obligatory at the close of the prosecution and before the accused had entered upon his defence.

It is undoubtedly true that the accused must be examined before he is called upon to enter on his defence. But examination and signing the statement, are two different matters. If the accused has been examined, then undoubtedly there is sufficient compliance with the provisions of S. 342, Cr. P. C. The failure to append the signature is nothing more than an irregularity. Section 364 says that the record shall be signed by the accused and the Magistrate, and non-compliance with the provisions is curable under Section 533, Cr. P. C Such a statement is made admissible under Section 533 if the error has not injured the accused person as to his defence on the merits of his case. The decision reported in 'AIR 1925 Cal 480(1) (A) is easily distinguishable as that was a case where there was no examination at all under Section 342, Cr. P. C., and not one where there was only an omission to append the signature to the statement.

In a later case of the same High Court reported in — 'Tamezkhan v. Rajjabali Mir', A. I. R. 1927 Cal 330 (B) (where the facts were similar to the present case) Cumming, J. held that

"the failure to comply with the provisions of S. 342 was curable under Section 537, Cr. P. C."

In that case also, all the accused persons except Tamajuddin had been examined at the conclusion of the defence evidence. In — 'Ramnath Rai v. Emperor', A. I. R. 1921 Pat 374 (C) the accused were examined after the examination in chief of some of the witnesses and the framing of the charge. Jwala Prasad held that there was not a sufficient compliance with the provisions of Section 342 but refused to direct a retrial as it would cause further harassment to the accused. He also observed that the accused would make the very same statement as they had made before, even if they were examined a second time.

To the same effect is the case reported in — 'Feroze Kazi v. Emperor', AIR 1940 Pat 295 (D). There the question whether a failure to observe the provisions of Section 342, Cr. P. C., is merely an irregularity or an illegality was left open. I am not, however, prepared to go so far as to lay down that where an accused person is not examined at all under Section 342, Cr. P. C., the trial would not be vitiated, but where there has been a substantial compliance with the requirements of that Section any technical error or omission to have the signature of the accused appended to the statement, is only a curable irregularity and would not vitiate the trial.

(6) The next question is whether the accused should have been personally examined or whether the examination of the Mukhtear who had been permitted to appear for her, is sufficient compliance with the Section. The Bombay High Court appears to have taken the view that Section 342, Cr. P. C., should be read as subject to the provisions of S. 205. In — 'Emperor v. Jaffar Cassum Moosa', A. I. R. 1934 Bom. 212 (E) Beaumont C. J. following an earlier decision of that Court held that the Magistrate was not bound to examine the accused personally if permission had been given under S. 205, Cr. P. C. to exempt him from personal appearance. Section 205, Criminal Procedure Code reads as follows: (His Lordship quoted the provisions of the section and stated). Sub-section (2) only gives a discretion to the Magistrate to direct the personal attendance of the accused at any stage of the proceedings. It is not obligatory on him, therefore, to direct the personal attendance of the accused at any stage, including examination under Section 342. If the Magistrate is satisfied that the examination of the Mukhtear on behalf of the accused is sufficient, the non-examination of the accused personally would not render the trial illegal.

There is also a single Judge decision of the Rangoon High Court in — 'Po Nyein Maung v. Haka Singh', A. I. R. 1927 Rang. 73 (F) where it was held that women may be permitted to answer examination through their pleaders, and that the benefit of Section 205, Cr. P. C., might be extended throughout the trial except when a judgment, accompanied by a sentence of imprisonment, is to be delivered.

It is needless to point out here that Section 342, Cr. P. C., is a provision intended for the benefit of the accused and that the accused is not bound to make any statement. It would be ridiculous to suggest that even for the purpose of recording a refusal to make a statement, the personal attendance of the accused should be insisted upon. In this case, in particular, the first accused is said to be a respectable lady observing purdah. Her statement was a complete denial of the offence. This could as well be made through her pleader, without prejudicing the case of the complainant, and to insist on her personal attendance would involve unnecessary waste of time and harassment to the accused.

(7) This petition is without merit and is dismissed.

B/M.K.S. Petition dismissed.

A.I.R. 1954 ORISSA 67 (Vol. 41, C. N. 20)

PANIGRAHI C. J. AND NARASIMHAM J.

Dandapani Das, Petitioner v. Mohan Nayak and others, Opposite Party.

O. J. C. No. 30 of 1953, D/- 10-9-1953.

(a) Constitution of India, Art. 227 — Election Tribunal — Superintendence over.

The language of Art. 227 is comprehensive enough to enable the High Court to exercise its powers of superintendence over the election tribunal appointed under the Representation of the People Act, 1951. (Para 4)

(b) Constitution of India, Art. 227 — Power of superintendence — Limits of.

Though the power of superintendence would include judicial review, the power is not unlimited and cannot be employed to correct every form of hardship. The ordinary rule is that the superior Court having power of superintendence would seldom interfere on questions affecting the merits of the decision except when the matter comes up on appeal. (Para 4)

(c) Evidence Act (1872), S. 167 — Admission of inadmissible evidence — Effect — (Civil P. C. (1908), S. 107).

The mere fact that some evidence which may not be strictly admissible has been admitted, is no ground for setting aside the decision of an inferior Court. Section 167, Evidence Act provides for such contingencies. It is true that in appraising evidence different Judges may, at times, entertain different opinions, but even on an appeal the superior Court is bound to respect the findings of the trial Court on questions of fact, and hence the mere admission of inadmissible evidence on an insignificant fact, is not sufficient to warrant the conclusion that the trial Court was in error in taking the view that it did. (Paras 4, 5)

Anno: Evidence Act, S. 167 N. 1, 6; Civil P. C., S. 107 N. 13, 14.

(d) Constitution of India, Art. 226 — Writ of certiorari — When can be issued.

A writ of certiorari cannot be granted to quash a decision of an inferior Court acting within its jurisdiction, on the ground that the decision is wrong. It is not open to the High Court to canvass the reasoning of the impugned decision, unless it can be shown that the authority which passed that order acted without jurisdiction, or in excess of it, or in violation of the principles of natural justice. AIR 1952 SC 319, Rel. on. (Para 7)

The correct rule is that there must be an error apparent on the face of the record or of the order impugned; or that the error should be admitted in the face of the Court; and the error, must be an error of law which affects the jurisdiction of the tribunal. The mere fact that two views are possible on a question of fact would not be sufficient to hold that the order of the tribunal is bad and to justify the issue of a writ of certiorari to quash that order. Case law referred. (Para 10)

(e) Constitution of India, Art. 226 — Proceedings within special jurisdiction — Issue of writ of certiorari.

A writ of certiorari can be issued only in respect of matters which are within the jurisdiction of the High Court. Where an inferior Court is one of civil jurisdiction, but by statute or custom it administers a law peculiar to its own forum, in respect of some particular matter and so possesses to this limited extent jurisdiction which the superior Court does not possess, certiorari will not issue to remove proceedings which come within that special jurisdiction. (Para 11)

(f) Constitution of India, Arts. 226, 227 — Scope of — Order of ad hoc tribunals.

Per Narasimham J.: The limitations imposed on the High Court in exercising its powers of issuing a writ of certiorari under Art. 226 may not apply with full force when the Court exercises its powers under Art. 227. Article 227 seems to be wide enough to enable the High Court not only to set aside the order of the inferior tribunal in appropriate cases but also to give adequate relief where the circumstances of the case justify the exercise of this extraordinary power. The fact that the Tribunal is an ad hoc Tribunal and ceases to exist after giving its decision does not make any difference as regards the exercise of this power. (Paras 16, 17)

H. Mohapatra and R. N. Misra, for Petitioner; P. V. B. Rao and B. Mohapatra, for Opposite Party.

CASES REFERRED

(A) ('52) AIR 1952 SC 192: 1952 SCR 583 (SC) (Prs 7, 10 15)
(B) ('52) AIR 1952 SC 319: 1952 SCR 696 (SC) (Prs 7, 10, 15)
(C) ('52) AIR 1952 SC 179: 1952 SCR 519 (SC) (Prs 7, 15)
(D) (1952) 1952-1 All ER 122 (Prs 9, 10, 15)
(E) (1922) 1922-2 AC 128: 91 LJPC 146 (Pr 9)
(F) (1857) 1 H & N 703: 156 ER 1384 (Pr 11)
(G) ('47) AIR 1947 PC 19: ILR (1947) 1 Cal 32 (PC) (Pr 14)
(H) ('52) AIR 1952 Orissa 244: ILR (1951) Cut 603 (Pr 16)
(I) ('33) AIR 1933 Cal 132: 34 Cri LJ 299 (Pr 16)
(J) ('28) AIR 1928 Pat 111: 105 Ind Cas 131 (Pr 16)
(K) ('51) AIR 1951 Assam 106: 52 Cri LJ 966 (Pr 16)

PANIGRAHI C. J.

This case raises a short, but important point relating to the jurisdiction and powers of the High Court under Arts. 226 and 227 of the Constitution.

(2) The petitioner states that in January 1952 he had been returned as a member of the Orissa State Legislative Assembly, to represent the scheduled castes in the Berhampur Constituency. Opposite party No. 1, Mohan Nayak filed an election petition under S. 81, Representation of the People Act (Act 43 of 1951) challenging the validity of the election of the petitioner, along with some others his contention being that the election of returned candidates was void on the grounds stated in Ss. 100 and 101 of the said Act. The election petition filed by opposite party No. 1 was referred to a tribunal constituted under the Act, for trial and was registered as Election Case No. 4 of 1952. The Tribunal, by its order dated 17-3-1953, declared the election wholly void under S. 101(a), (b) and (c), Representation of the People Act & directed that the present petitioner should be disqualified from being a member of either the Parliament or the State Legislature, for a period of six years under S. 140 of the said Act. This order of the Tribunal was published on 26-3-1953 under S. 106 of the Act. The present petition was filed on 30-3-1953 under Arts. 226 and 227 of the Constitution and we are asked to issue a writ of certiorari on the Election Tri-

bunal and quash its aforesaid decision in exercise of the powers vested in us under Art. 226.

(3) In an able argument presented by Mr. Mohapatra, learned counsel for the petitioner, two points have been pressed upon us. Firstly, that the Tribunal admitted inadmissible evidence &, therefore, acted in excess of its jurisdiction, secondly that apart from jurisdiction the reasoning adopted by the tribunal is not such as to justify the conclusion drawn by them and that the order requires to be set aside on that ground.

(4) As regards the first contention it has been assumed, for purposes of the proceedings in this case, that the language of Art. 227 is comprehensive enough to enable this Court to exercise its powers of superintendence over the election tribunal. It is also fairly well-settled, and the position has not been seriously controverted, that superintendence would include judicial review, though it must be borne in mind that the power of superintendence is not unlimited and cannot be employed to correct every form of hardship. The ordinary rule is that the superior Court having power of superintendence would seldom interfere on questions affecting the merits of the decision except when the matter comes up on appeal. On the other hand every tribunal which has to decide rights after taking evidence, is amenable to the writ of certiorari. The Election Tribunal exercises judicial functions and is directed to follow the recognised law of procedure. If, therefore, any error of law or of procedure has been committed, the order can be brought up to the superior Court for being quashed. In this respect no distinction can be drawn between civil and criminal proceedings. Learned Counsel, therefore, contended that writ of certiorari is a more appropriate remedy under Art. 226, in a case of this kind. The question is whether such a remedy is available.

(5) The mere fact that some evidence which may not be strictly admissible has been admitted, is no ground for setting aside the decision of an inferior Court. Section 167, Evidence Act provides for such contingencies and says that improper admission of evidence is not itself a ground for the reversal of a decision if it shall appear to the Court that, independently of the evidence objected to, there was sufficient evidence to justify that decision.

The main attack of learned counsel is that the evidence of P. Ws. 7, 8 and 9 should not have been accepted. The tribunal, however, appears to have relied not only on the evidence of these three witnesses but also on the evidence of P. Ws. 12, 14, 24 and 25, in arriving at their conclusion that there had been a resort to coercion practised by one group over another. P. Ws. 7, 8, and 9 deposed that they were present at a meeting held at Sukinda and witnessed the taking of solemn declaration and a decision. The tribunal regarded the taking of an oath before a deity as an improbability and disposed of that part of the evidence as artificial. In discussing the value to be attached to the evidence of P. Ws. 7, 8 and 9 the Tribunal observed:

> "The intrinsic value of the evidence of P. Ws. 7, 8 and 9 lies in the fact that the ex-communication of the Bouris of that village, as deposed to by them is admitted on respondent's side as per the proceedings of the Tarini Hill meeting. (Ext. 27) ..... The cause for the ex-communication is the fact that the Bouris of Bhowanipur did not fall in line with the views of the other bouris of the Taluk in the matter of voting for respondents 1 and 2."

The tribunal substantially accepted the case of the petitioner before them, that the other Bauris of Bhawanipur had been ex-communicated on account of their refusal to vote for the petitioner before us. After referring to the evidence given by some of the witnesses for the respondent, the tribunal held that

> "the evidence of P. Ws. 7 and 9 about the Sukinda meeting in the afternoon of the 20th, the taking of a decision of vote for respondents 1 and 2 on the morning of the 21st December and the feeding of the Bauris on the night of 20th December, is worth believing."

It was quite within the competence of the tribunal to believe one set of witnesses in preference to another set. Moreover, as the tribunal have pointed out, there was other evidence on the point, namely the evidence of P. Ws. 12, 14, 24 and 25 which evidence was probabilised by witness No. 16 for respondent No. 1. We have gone through the evidence of some of these witnesses in order to satisfy ourselves whether there was anything inherently improbable or absurd in it so as to induce a Court to discard it altogether. We find no reason either to exclude the evidence or to disbelieve it. It is true that in appraising evidence different Judges may, at times, entertain different opinions, but even on an appeal the superior Court is bound to respect the findings of the trial Court on questions of fact. We are, therefore, unable to accede to the proposition that the mere admission of inadmissible evidence on an insignificant fact, is sufficient to warrant the conclusion that the tribunal was in error in taking the view that they did. The first contention must therefore be overruled.

(6) The second and the more important point debated before us is as to the function of this Court under Art. 226 and its power to issue a writ of certiorari and quash the order of the Tribunal. Learned counsel's argument is that the issue of a writ of Certiorari is not limited only to question of jurisdiction, and that the writ is far more extensive in its scope and amplitude and would include the power to interfere even in a case where the reasoning adopted by the Court or tribunal, or authority whose order is being impugned, is erroneous.

(7) There have been two recent decisions of the Supreme Court in which the scope of Art. 226 has been discussed. In —'Veerappa Pillai v. Raman and Raman Ltd.', reported in AIR 1952 SC 192 (A) it was held that the writs referred to in Art. 226 are intended to enable the High Court to issue them

> "in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of the record, and such act or omission or error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."

The question whether the writs mentioned in Art. 226 are analogous to the writs issued by the English Courts subject to all the limitations or restrictions imposed on them by those Courts.

did not directly arise in that case; and the question whether the High Court is at liberty to issue any suitable directions or orders or writs, untrammelled by any conditions if the interests of justice so required it, was left open.

In — 'Ibrahim Aboobakar v. Custodian General of Evacuee Property New Delhi', reported in AIR 1952 SC 319 (B), the Full Court ruled that a writ of certiorari cannot be granted to quash a decision of an inferior Court acting within its jurisdiction, on the ground that the decision is wrong. It was laid down that

> "it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it, or in violation of the principles of natural justice. Want of jurisdiction may arise from the nature of the subject-matter so that the inferior Court might not have authority to enter on the inquiry or some part of it. It may also arise from the absence of some essential preliminary, or upon the existence of some particular facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it. But once it is held that the Court has jurisdiction, but while exercising it, it has made a mistake, the wronged party can only take the course prescribed by law for setting matters right, inasmuch as a Court has jurisdiction to decide rightly as well as wrongly."

In view of this categorical statement of the law by the Supreme Court, it is no longer open to us to canvass the reasoning of the impugned decision, unless it can be shown that the authority which passed that order acted without jurisdiction, or in excess of it, or in violation of the principles of natural justice.

This was only a reiteration of the principle laid down in an earlier case reported in — 'Parry and Co., Ltd. v. Commercial Employees Association Madras', AIR 1952 SC 179 (C). In that case, Mukherjee J., while setting aside an order of the Madras High Court, observed:

> "The Commissioner was certainly bound to decide the question, & he did decide that. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which entirely lies within the jurisdiction of the Labour Commissioner to decide it, and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice."

(8) It may thus be taken as well settled so far as Indian Courts are concerned, that a writ of certiorari will not issue merely on the ground that the tribunal came to an erroneous conclusion unless it also affects its jurisdiction. It is not seriously contended before us that the election tribunal has no jurisdiction to decide whether a corrupt practice had been indulged in, in this case. The reasoning adopted by the tribunal may or may not be appealing, that has no relevancy but the tribunal had certainly jurisdiction to decide the matter one way or the other. There is no appeal provided under the Representation of the People Act, and the functions of an appellate Court cannot be extended to proceedings where the propriety of the issue of a writ is under consideration.

(9) Great stress was laid by learned counsel on a recent decision of the Court of Appeal in England, in — 'R. v. Northumberland Compensation Appeal Tribunal', reported in 1952-1 All ER 122 (D). In that case there was an error of law apparent on the face of the record and certiorari was the only remedy available to correct that error. Denning L. J. observed:

> "If the tribunal does state its reasons and these reasons are wrong in law certiorari lies to quash the decision."

It is this observation which forms the sheet anchor of learned counsel's argument. But it should be remembered that the facts of that case justified the above observation; and it should not be taken to be of universal application. It was a mistake of law that the tribunal committed in that case, and the tribunal also admitted it before the Court of King's Bench. I am willing to accede to the proposition that, in a supervisory capacity, this Court has jurisdiction to control all inferior tribunals to see that they observe the law. But in order to justify interference the error of law must be apparent. Even in such cases the Superior Court does not substitute its own views for those of the tribunal as a Court of Appeal would do. It leaves it to the tribunal to hear the matter again and, in a proper case may command it to do so. If the order of the tribunal is a 'speaking order', and gives reasons for its judgment, the Court of King's Bench would on certiorari enquire into its correctness and if the reasons were wrong quash the decision. The superior Court is bound by the record and is to see that the inferior Court has not transgressed its jurisdiction. It cannot, and will not interfere if what has been done is within jurisdiction. The supervision is, therefore, confined to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; and the other is the observance of the law in the course of its exercise — 'Rex v. Nat Bells Liquors Ltd.', 1922-2 AC 128 (E). After discussing instances where the writ of certiorari was issued in civil and criminal matters and orders of statutory tribunals and arbitrators Denning L. J. summed up his review as follows:

> "It will have been seen that throughout all the cases there is one governing rule — certiorari is only available to quash a decision for an error of law, if the error appears on the face of the record."

It was accordingly held that an error openly admitted in the face of the Court as was done in that case — as well as an error that appears on the face of the record can be corrected by certiorari — Morris L. J. did not go so far as that and sounded a note of caution. The Lord Justice observed at p. 133 of the report:

> "It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct an error of law where revealed on the face of an order, or decision, or irregularity or absence or excess of jurisdiction where shown."

(10) It was pointed out that the above decision of the Court of Appeal in 1951 was not brought to the notice of their Lordships of the Supreme Court when — 'Verrappa Pillai's case (A)' and — 'Ebrahim Aboo Bakar's case (B)', were before them. That may be so, but I do not think that the principle enunciated by their Lordships of the Supreme Court is, in any way affected by the

decision of the Court of Appeal in — 'R. v. Northunberland Compensation Appeal Tribunal (D)'. The correct rule, as I understand it, is that there must be an error apparent on the face of the record or of the order impugned; or that the error should be admitted in the face of the Court; and the error, must be an error of law which affects the jurisdiction of the tribunal. The mere fact that two views are possible on a question of fact would not be sufficient to hold that the order of the tribunal is bad and to justify the issue of a writ of certiorari to quash that order.

(11) It must also be pointed out that when the superior Court quashes an order of the tribunal on the ground of an apparent error of law, in a proceeding like this, it has no jurisdiction to substitute its own decision. All that it can do is to send back the record to the tribunal for their final order. Learned counsel for the petitioner wanted us merely to record an order that the decision of the tribunal is quashed. But such an order would leave the election petition itself undisposed of. Even if we discovered any error of law it may well be that we may remit it to the tribunal for a fresh disposal, after expressing our opinion that the order pronounced by the tribunal is wrong in law. But it does not lie in our power to make a declaration that the election of the petitioner is valid, or to make a declaration that there was no corrupt practice resorted to by the petitioner. Such a declaration can only be given by the tribunal set up in accordance with the provisions of the Representation of the People Act.

The petitioner before the tribunal, in the election case was one Mohan Nayak (who is opposite party No. 1 in the present proceeding) and he prayed for a declaration by the tribunal that he and opposite party No. 3 had been duly elected. Is it within the competence of this Court to give such a declaration? And can we set aside the election of the petitioner before us and opposite party No. 2 on the ground that there was no free election? These are matters entirely within the exclusive jurisdiction of the election tribunal and it is that body alone which, under the law, is competent to decide. When the rule nisi was issued in this case the tribunal had ceased to function and the records were sent for from the Court of the District Judge, in whose custody they are kept under S. 103, Representation of the People Act, 1951. In such circumstances, even if we issue a writ of certiorari we are unable to direct the tribunal to resume their proceedings — (per Bramwell B.,) — in — 'Weston v. Sneyd' (1857) 1 H & N 703 (F). This would be an additional reason for refusing to grant the relief prayed for by the petitioners. In this connexion, I would quote a passage from Halsbury (Vol. IX, Second Edition, p. 854, para 1445) :

> "Certiorari will not be granted where, if the writ were subsequently quashed, the inferior Court could not be ordered by a writ of procedendo to resume the proceedings."

Paragraph 1447 says :

> "Where an inferior Court is one of Civil Jurisdiction, but by statute or custom it administers a law peculiar to its own forum, in respect of some particular matter and so possesses to this limited extent jurisdiction which the superior Court does not possess, certiorari will not issue to remove proceedings which come within that special jurisdiction."

This shows that writ can be issued only in respect of matters which are within the jurisdiction of this Court. A declaration about the validity or otherwise of an election is exclusively within the province of the election tribunal and it would appear from the above quotation that a writ of certiorari will not lie.

(12) On a consideration of the above principles I would direct that the petition should be dismissed, but would not mulct the petitioner with costs.

NARASIMHAM J. :

(13) I agree that the petition should be dismissed without costs.

(14) The petitioner invoked the jurisdiction of this Court not only under Art. 226 of the Constitution but also under Art. 227. The order under challenge is that of the Election Tribunal, Ganjam, Nayagarh, which set aside the petitioner's election mainly on the ground that the petitioner was guilty of corrupt practice or undue influence, coercion and intimidation. The petitioner is a member of the scheduled castes (Bauris). He was appointed as the headman of the Bauris by a solemn ceremony held shortly before the date of the last election from Berhampur constituency. The Tribunal believed the opposite-party's (No 1) version that on the 20th and 21st of December, 1951 a meeting of the Bauris of the locality was held in a tope near the temple of Narshingha Mohapravu at village Sukinda and a solemn decision was taken to the effect that all Bauris should vote for the petitioner on pain of excommunication and fine to those who did not follow this decision. The Tribunal also believed the evidence led on the side of the opposite party to show that the aforesaid decision was communicated to all the Bauris of the constituency through their respective Mutha heads and Bholo Bhais. Though there was no direct evidence to show that any Bauri voter was coerced into giving his vote to the petitioner on account of this threat of excommunication and fine, there was evidence before the Tribunal to establish the fact that many of the Bauri Voters who originally agreed to give their votes to opposite-party No. 1 suddenly changed their mind and gave their votes to the petitioner. There was also some evidence before Tribunal to the effect that some of the Bauris of village Bhabanipur (vide the evidence of P. Ws. 7, 8 and 9) who did not follow the caste mandate mentioned above were subsequently excommunicated. An attempt was made on the side of the opposite party to show by evidence that the excommunication of those Bauris was due to other reasons. But the Tribunal did not accept that evidence. There was, however, the evidence of two witnesses (P. Ws. 24 and 32) to show that at public meetings held at two places the Bauris were informed of the decision of their caste and threatened with excommunication and fine if they did not vote for the petitioner. The tribunal also relied on the evidence led by opposite party No. 1 to the effect that the Bauri voters (who were not called as witnesses before the Tribunal) informed him and his supporters that they dared not vote for them in view of the caste mandate. This piece of evidence was challenged as being hearsay and consequently inadmissible. The Tribunal, however, relied on — 'Bibhabati Devi v. Ramendra Narayan', AIR 1947 PC 19 (G) and held that the reasons given by the Bauris who were not voting for opposite party No. 1 would be admissible even though those Bauris were not cited as witnesses in the proceeding. Mr. Mohapatra strenuously contended that this view of the Tribunal was wrong in law and that the entire finding on the question of undue influence, coercion and intimidation was vitiated by the same. Assuming, without deciding that the statements

made by those Bauris who were not witnesses in the cases as to why they changed their mind and refused to vote for opposite party No. 1 are inadmissible, as hearsay, there is still some evidence on the basis of which the Tribunal was justified in coming to a finding about undue influence, coercion and intimidation. The meeting of the Bauris on the 20th and 21st December, 1951, and the resolution to vote for the petitioner on pain of excommunication and fine have been proved by direct evidence which has been accepted. Similarly, the fact that the threat of excommunication and fine was disseminated amongst all Bauris of the constituency was proved by the evidence of two witnesses who spoke about two instances of such dissemination. There was also direct evidence before the Tribunal to show that though many Bauris originally desired to vote for opposite party No. 1 they later on changed their mind and refused to vote for him. Doubtless, there may not be direct evidence to show the reasons why the Bauris changed their mind. But on the aforesaid pieces of evidence a Court of fact like the Tribunal was justified in coming to a fair inference that the sudden change in the attitude of the Bauris of the locality was caused by threat of excommunication and fine as decided in the meeting of their caste held on the 20th and 21st December, 1951.

(15) The extent of the jurisdiction of this Court under Art. 226 to interfere with the order of the Tribunal was canvassed at some length. My Lord has referred to the decisions cited in this connection, especially the recent decisions of their Lordships of the Supreme Court in — 'AIR 1952 SC 192 (A)'; — 'AIR 1952 SC 319 (B)' and — 'AIR 1952 SC 179 (C). It was urged by Mr. Mohapatra that those decisions may require revision in view of the decision of the Court of Appeal in — '1952-1 All ER 122 (D)', where the previous view held in England regarding the limited nature of the jurisdiction under certiorari was slightly modified and it was held that certiorari to quash the decision of statutory Tribunal lay, not only where the Tribunal had exceeded its jurisdiction, but also where an error of law appeared on the face of the record. This decision was perhaps not cited before their Lordships of the Supreme Court in the aforesaid decisions. It is, however, for their Lordships of the Supreme Court to decide in an appropriate proceeding whether the powers of the High Court under Art. 226 in an application for the issue of a writ of certiorari are wider than what they have been pleased to lay down in the three decisions mentioned above.

(16) The petitioner has relied on Art. 227 also. That Article has not yet come up for construction before their Lordships of the Supreme Court. Hence, I see no reason why the view taken by a Division Bench of this Court regarding the scope of that Article in — 'Jadumani Behara v. Jadumani Sahu', AIR 1952 Orissa 244 (H), should not be followed. The Election Tribunal is undoubtedly a judicial tribunal and it clearly comes within the scope of the superintending powers of this Court under Art. 227. In that case it was held relying on — 'Manmatha Nath v. Emperor', AIR 1933 Cal 132 (I); — 'Mt. Maharup Kuer v. Mahabir Singh', AIR 1928 Pat 111 (J) and — 'Israil Khan v. State', AIR 1951 Assam 106 (K), that though this Court will not constitute itself into a Court of Appeal it may interfere if the order of the Tribunal is bad on the face of it or with a view to prevent obvious miscarriage of justice where the lower Court has acted in abuse of its jurisdiction.

The limitations imposed on this Court in exercising its powers of issuing a writ of certiorari under Art. 226 may not apply with full force when the Court exercises its powers under Art. 227.

(17) In the aforesaid Division Bench decision of this Court, the order of the Election Tribunal constituted under the Orissa Municipal Act, 1950 (Ss. 21 to 24) was set aside and final orders were passed granting the relief asked for. Art. 227 seems to be wide enough to enable this Court not only to set aside the order of the inferior Tribunal in appropriate cases but also to give adequate relief where the circumstances of the case justify the exercise of this extraordinary power. The fact that the Tribunal is an ad hoc Tribunal and ceased to exist after giving its decision does not make any difference as regards the exercise of this power.

(18) This question, however, is somewhat academic in the present case because even if it is assumed that our powers under Art. 227 are wider than those under Art. 226 I am not satisfied that the petitioner has made out a case for interference. The only substantial point of law that was urged was the erroneous view taken by the Tribunal as regards hearsay evidence. I have already shown that even if that is excluded there was still some evidence which would justify the finding of the Tribunal. There is thus absolutely no case for interference with the order of the Tribunal.

A/D.R.R. Petition dismissed.

A.I.R. 1954 ORISSA 71 (Vol. 41, C. N. 21)

PANIGRAHI C. J. AND NARASIMHAM J.

Pitamhari Dibya, Petitioner v. Chandrasekhar Praharaj and others, Opposite-Parties.

Supreme Court Appeal No. 14 of 1953, D/-1-9-1953.

(a) Civil P. C. (1908), O. 45 R. 7 — Extension of time — (Supreme Court Rules (1950), O. 12 R. 3).

A rule of procedure fixing time should ordinarily be held to be obligatory and cannot, without strong reasons, be deemed to be directory unless the power of extending the time is given to the Courts. It would therefore appear that the Court has no discretion to extend the time beyond 150 days prescribed under O. 45 R. 7. But the Court is bound to give effect to the rule of the Supreme Court in preference to the provisions of the Civil Procedure Code when a conflict between the two arises. Therefore, the Court has power to extend the time by virtue of the express provision in R. 5 of the Supreme Court Rules. But this power should be exercised with great caution only where there are cogent reasons for doing so. (Paras 4 and 6)

Anno: C. P. C., O. 45 R. 7 N. 7 Pts. 8 to 13.

(b) Civil P. C. (1908), O. 45 R. 7 — Date of decree.

There is no warrant for excluding the time occupied in getting a certified copy of the decree. (Para 7)

Anno: C. P. C., O. 45 R. 7 N. 3.

(c) Civil P. C. (1908), O. 45 R. 7 — Reason of Rule.

The reason of the rule appears to be to expedite Supreme Court appeals and to

minimise the time occupied in satisfying the preliminary requirements. (Para 8)
Anno: C. P. C., O. 45 R. 7 N. 2.

(d) Civil P. C. (1908), O. 45 R. 7 Proviso 1 — "At the time of granting the certificate".

The expression "at the time of granting the certificate" in the proviso should be read as being limited to the time when the Court orders the issue of a certificate. (Para 8)
Anno: C. P. C., O. 45 R. 7 N. 6.

(e) Civil P. C. (1908), O. 45 R. 7, Proviso 1 — Substitution of property security.

Obiter: The averment that the applicant expected to raise money by mortgaging certain properties and the creditor declined to advance a loan at the last moment cannot be accepted as sufficient excuse for the delay in filing the application for substituting property security in place of cash security. (Para 9)
Anno: C. P. C., O. 45 R. 7 Notes 6 and 7.

H. Mohapatra and R. N. Misra, for Petitioner; C. M. Aharya, V. Pasayat, B. N. Misra and G. K. Misra, for Opposite Parties.

CASES REFERRED:

(A) ('53) AIR 1953 Orissa 315: (FA No 11 of 1947 (Ori)) (Pr 1)
(B) (1881) 8 QBD 9: 51 LJQB 110 (Pr 4)
(C) ('83-84) 11 Ind App 7: 10 Cal 557 (PC) (Pr 4)
(D) ('38) AIR 1938 Mad 796: ILR (1938) Mad 1007 (FB) (Prs 5, 9)
(E) ('39) AIR 1939 All 299: ILR (1939) All 549 (FB) (Pr 5)
(F) ('39) AIR 1939 Pat 667: 19 Pat 123 (FB) (Prs 5, 9)
(G) ('27) AIR 1927 Bom 217: 51 Bom 430 (FB) (Pr 5)
(H) ('50) SCA No 9 of 1950 (Orissa) (Prs 5, 9)
(I) ('50) AIR 1950 Cal 318: 54 Cal WN 476 (Pr 5)
(J) ('31) AIR 1931 Bom 278: 132 Ind Cas 438 (Pr 5)
(K) ('10) 14 Cal WN 420: 5 Ind Cas 844 (Pr 7)
(L) ('29) AIR 1929 Pat 431: 123 Ind Cas 769 (Pr 8)
(M) ('26) AIR 1926 Rang 44: 94 Ind Cas 590 (Pr 8)
(N) ('25) AIR 1925 Mad 449: 48 Mad 559 (Pr 8)
(O) ('39) 1939-2 Mad LJ 521 (Pr 8)

PANIGRAHI C. J.:

In this appeal the petitioner has filed an application under Rule 7 of Order 45, Civil P. C. and prays for permission to give property security in lieu of cash or Government securities. In order fully to appreciate the nature of this application a statement of the facts is necessary. The judgment of this Court in — 'Chandrasekhar Praharaj v. Pitambari Dibya', A. I. R. 1953 Orissa 315 (A); against which leave to appeal was sought was delivered on 28-1-53, decreeing the suit filed by the opposite parties. On 10-3-53, the petitioner applied for a certificate that the value and nature of the suit fulfilled the requirements of Section 110, Civil P. C. On 21-4-53 a Bench of this Court ordered the issue of a certificate as the requirements of Section 110 had been satisfied and two days later the certificate was signed by the learned Judges who ordered the issue of the same.

The petitioner thereafter moved the Court for stay of execution of the decree and we directed that half the costs incurred by the opposite parties in the lower court as well as in the appeal should be deposited as a condition precedent to the execution of the decree being stayed. On 20-7-53, the petitioner again applied for permission to give property security for the other half of the costs of the opposite party, and was granted one month's time to furnish property security for the unpaid half of the costs. On 6-8-53 the petitioner again applied for extension of time, fixed for depositing the costs of the opposite parties incurred in the lower court and we granted time accordingly till 10-8-53. On that date the petitioner filed the present application under Order 45 Rule 7, Civil P. C., praying that she be permitted to furnish property security for the costs of the respondent in lieu of cash or government securities.

This was, obviously a prayer to substitute property security for the costs of the respondent in the Supreme Court appeal, as contemplated in Order 45, Rule 7; and not the costs of the plaintiff already incurred in this court and in the trial court. The petitioner also tendered a draft security bond executed by one Jagabandhu Misra for Rs. 4000/- to meet the costs of the respondent that may be awarded by the Supreme Court. There is no separate prayer for extension of time for depositing, or for acceptance of security for depositing the printing costs. Paragraph 11 of the petition states that

> "the petitioner is an old lady and has already deposited more than Rs. 3000/- in pursuance of this Honourable Court's orders and that she has to deposit another Rs. 1750/- as estimated printing costs. She is not in a position to raise the necessary funds for furnishing security."

It is difficult to guess what the petitioner meant by alleging that she was not in a position to raise money for furnishing security. It would appear, however, from the order passed by the Court on 18-5-53 that the petitioner made an oral application for extending the time for depositing printing costs. The Court's order No. 15 dated 18-8-53 says: "The appellant prays for one month's time for depositing the printing costs." The petition for substituting property security in lieu of cash or Government security came up on 24-8-53 and was argued on 26-8-53.

(2) The questions for consideration are:

(i) Whether the Court has the option to extend the time beyond the period fixed by Order 45, Rule 7 of Civil P. C.: and

(ii) Whether the application filed on 10-8-53 for substitution of property security in place of cash security is competent.

(3) Order 45, Rule 7 lays down that

> "Where the certificate is granted, the applicant shall, within 90 days or such further period, not exceeding 60 days, as the Court may upon cause shown allow from the date of the decree complained of, or within 6 weeks from the date of grant of certificate, whichever is the later date, (a) furnish security in cash or in government securities for the costs of the respondent, and (b) deposit the amount required to defray the expenses of translating, transcribing, indexing and printing and transmitting to the Supreme Court a correct copy of the whole record of the suit..... provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished. Provided further that no adjournment shall be granted to the opposite party to contest the nature of such security."

The rule clearly lays down that the applicant shall furnish security in cash or in Government securities for the costs of the respondent within 90 days,

or within such period thereafter not exceeding 60 days from the date of the decree complained of, or within 6 weeks from the date of grant of certificate whichever is the later date. The certificate was granted on 21-4-53 and the last date for furnishing the security expired on 6-6-53. It is apparent that 90 days expired on 28-4-53 and the period of 150 days after the decree also expired on 28-6-53. The petitioner is undoubtedly entitled to the later date of the two, and should have furnished security on or before 29-6-53.

(4) The petitioner now prays for extension of time for furnishing security and for permission to offer property security in lieu of cash or Government security. The second prayer is governed by the first proviso to Rule 7 of Order 45, Civil P. C. which says that the Court at the time of granting the certificate may order on the ground of special hardship that some other form of security may be furnished. On a plain reading of this Rule, it would appear that the Court has no discretion to extend the time beyond 150 days prescribed under that Rule, or to consider the propriety of taking alternative security at any time after the grant of the certificate under that rule. A rule of procedure fixing time should ordinarily be held to be obligatory and cannot, without strong reasons, be deemed to be directory unless the power of extending the time is given to the Courts — 'See Barker v. Palmer (1881) 8 Q. B. D. 9 (B)'. The corresponding Section 602, Civil P. C. of the year 1882 was as follows:

> "If the certificate be granted, the applicant shall, within 6 months from the date of the decree complained of, or within 6 weeks from the grant of the certificate, whichever is the later date,
>
> (a) give security for the costs of the respondent."

It was held by the Judicial Committee in — 'Burjore v. Mst. Bhagana', 11 Ind App 7 (PC) (C) that these words relating to the giving of security were directory only, and were not to be departed from, without cogent reason.

(5) The question whether the Court has the power to extend the time under Order 45 Rule 7, Civil P. C. has been the subject-matter of a number of conflicting decisions of the various High Courts and the trend of the latest decisions is in favour of the Court's power to extend the time, provided there are cogent reasons for the exercise of that power. See — 'Ramayya v. Lakshmayya', AIR 1938 Mad 796 (FB) (D); — 'Bishnath Singh v. Court of Wards Estate, Sri Ram Chandra Naik Kaliya', A. I. R. 1939 All 299 (FB) (E); — 'Lachmeshwar Prasad v. Girdharilal', A. I. R. 1939 Pat 667 (FB) (F); — 'Nilkant Balwant v. Sachidanand Vidya Narsimha', A. I. R. 1927 Bom 217 (FB) (G) and an unreported decision of this Court in 'S. C. A. No. 9 of 1950 (H)'. The only decision to the contrary is that reported in — 'Purnendu Nath v. Radha Kanta Jew', A. I. R. 1950 Cal 318 (I) but that decision proceeded on the principle of 'stare decisis' in holding that the Court had no power to extend the time for making the deposit.

In that case, the amount required to defray the expenses of printing and translating had been deposited and property security was tendered within time, though not at the time of granting the certificate. Their Lordships held, in the peculiar circumstances of that case, that it could allow a different security if it was tendered within the time permitted in Order 45 Rule 7 provided the justice of the case required it. The Bombay High Court also allowed substitution of property security in the case reported in — 'Revanshidaya Sangaya v. Gudnaya Ningaya', AIR 1931 Bom 278 (J) where the appellant was a minor and the properties of his natural father and guardian had been attached in execution of a decree.

That was regarded as a special feature which justified the extension of time. It does not appear from that report whether the offer of property security was made within 150 days or beyond that period, as prescribed in Order 45, Rule 7, Civil P. C. That decision is no authority for the position taken by the petitioner in the instant case that she can come to Court at any time after the grant of the certificate and after the period prescribed by O. 45, Rule 7, Civil P. C.

(6) It will be noticed that Order 45 does not make any provision for failure of the appellant to furnish security, as required, within time. None of the rules of the Order says that the certificate shall be cancelled if the deposit is not made within time. This power is expressly conferred on the Court by Order 12, Rule 3, Supreme Court Rules, 1950, which says:

> "Where an appellant having obtained a certificate from the High Court fails to furnish security or make the deposit required, the Court may, on its own motion or on an application in that behalf made by the respondent's counsel, cancel the certificate or give such directions as to the costs of the appeal and the security entered into by the appellant as it shall think fit and should make such further order or other order as the justice of the case requires."

It was strongly urged before us that the words "make such further order or other order as the justice of the case requires" confer the power of extending the time beyond the limit fixed by R. 7 of Order 45. This contention, in my opinion, is well founded as we are bound to give effect to the rule of the Supreme Court in preference to the provisions of the Civil Procedure Code when a conflict between the two arises. Section 112, Civil P. C. expressly saves the power of the Supreme Court when it says that

> "nothing contained in the Code shall be deemed to interfere with any rules made by the Supreme Court for the time being in force for the presentation of appeals to that Court or their conduct before that Court."

I am, therefore, inclined to accept the contention that the Court has power to extend the time by virtue of the express provision in Rule 3 of the Supreme Court Rules. This rule is but a reproduction of Rule 9 of the Judicial Committee Rules which came into force on the same date, as the amended Rule 7 of Order 45, Civil P. C. It has, therefore, been held in numerous decisions that the Court may, in exceptional cases, extend the time for depositing printing costs of the respondent. But this power should be exercised with great caution only where there are cogent reasons for doing so.

(7) It was next urged that the date of the decree referred to in Rule 7 is the date when the decree was actually signed, namely, 10-3-53 and not the date of judgment. "Date of Decree" is defined in Order 20, Rule 7, Civil P. C. as follows:

> "The decree shall bear date, the date on which judgment was pronounced."

There is no warrant for excluding the time occupied in getting a certified copy of the decree as the language of the rule is clear beyond all doubt and admits of no controversy: see — 'Harendra Lal v. Sm. Hari Dasi Debi', 14 Cal WN 420 (K). A reference may be made to Order 13, Rule 3, Supreme Court Rules which provides for appeals by special leave and says that the petition shall be accompanied by a certified copy of the decree. Such

exclusion may be allowed for getting a certified copy of the decree in the case of appeals by special leave. But Rule 7 does not speak of a certified copy of the decree and the prescribed time runs from the date of the decree only. I would, therefore, hold that the time for the deposit expired on 28-6-53, though the Court has the discretion to extend the time in exceptional cases on grounds of hardship.

(8) The next question is whether the petitioner is entitled to ask for substitution of property security for cash security four months after the certificate was granted. The first proviso to Rule 7, Order 45, Civil P. C. confers the power upon the Court to accept some form of security other than cash, and this power is to be exercised "at the time of granting the certificate." The reason of the rule appears to be to expedite Supreme Court appeals and to minimise the time occupied in satisfying the preliminary requirements. Under the old Section 602, Civil P. C., the time allowed was six months for furnishing security for the costs of the respondent and depositing the printing costs. This period was reduced to 90 days with an option to the Court to extend the time upto 60 days more. The proviso to Rule 7 was added by the amending Act 26 of 1920.

Similar words are used in other provisions of the Code indicating as to when a power vested in the Court should be exercised. Order 20, Rule 11 says that the Court may, for any sufficient reason, at the time of passing the decree, order that such payment of amount decreed, shall be postponed. Sub-rule (2) of Rule 11 says that this power can be exercised even after the passing of the decree, only with the consent of the decree-holder. Order 21, Rule 11, similarly provides that the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court.

The expression "at the time of granting the certificate" in the proviso should therefore be read as being limited to the time when the Court orders the issue of a certificate. The language of the Code does not either expressly or by implication, indicate that the Court can exercise this power at any other time subsequent to the grant of the certificate. The further proviso to the rule which says that no adjournment shall be granted to the opposite parties to contest the nature of such security would indicate that all these matters should be decided at the time of granting the certificate. Having regard to the addition of the proviso in the amended Rule 7, it appears to me that the object of the Legislature was to cut down the period unnecessarily occupied in presenting the appeal to the Supreme Court and to leave no discretion with the Court to extend the time beyond what is expressly stated in the proviso. See — Kamala Kanta Singh v. Bindhumukhi Dassi', A. I. R. 1929, Pat 431 (L): — 'Ma Sein v. Sit Paung', AIR 1926 Rang 44 (M); — 'Arunachala Naidu v. S. R. Balakrishna and Co.'. A. I. R. 1925 Mad 449 (N); and — 'Sreeramamurty v. Rama Rao', 1939-2 Mad LJ 521 (O). I have, therefore, no hesitation in holding that this application filed on 10-8-53, nearly four months after the certificate was granted, is incompetent, and that we have no power to entertain the application at this belated stage.

(9) Assuming we could, is this a fit case in which extension of time should be granted? I am unable to discover any cogent reason for doing so. In the Full Bench case reported in 'AIR 1938 Mad 796 (FB) (D), there was a delay of four days in making the deposit and the circumstance in which the delay had occurred were beyond the control of the petitioners who were interested in small portions of the subject-matter of the appeal. The Full Bench accordingly condoned the delay. In —'S. C. A. No. 9 of 1950 (H)', a Bench of this Court excused the delay of two days as the petitioner had the money ready with him and all that he did was to file the challan two days beyond time. In the Full Bench case reported in — 'A. I. R. 1939 Pat 667 (F)'; the printing costs in respect of — 'F. C. A. No. 14 of 1939 had been tendered on the opening day after the long vacation and an application for extension of time to deposit the money was filed on the next day.

In — 'S. C. A. No. 10 of 1939 which was also decided in that case, the delay was said to be due to the fact that there was some difficulty in obtaining money. The Full Bench held that this was not a cogent reason why the Court should exercise its discretion and extend the time. The applicant before us says that she expected to raise money by mortgaging certain properties and that the creditor declined to advance a loan at the last moment. This averment, even if true, cannot be accepted as sufficient excuse for the delay in filing the application for substituting property security in place of cash security. The petitioner should have known, when she asked for the certificate, whether she would be able to make the necessary deposit towards printing costs and the costs of the respondent.

If the Court had permitted her to give property security at the time of granting the certificate, it may be that the delay in furnishing security will be viewed with favour by the Court. The sufficiency of the security offered is not admitted and has to be tested which process is bound to occupy more time. The circumstances of the case disclose extreme negligence and inordinate delay on the part of the applicant in prosecuting the appeal.

(10) We would accordingly hold that the petitioner has failed to furnish security or make the deposit required and would cancel the certificate already ordered on 21-4-53. The stay of execution of the decree is vacated. We make no order as to costs.

(11) NARASIMHAM J.: I agree.

A/V.R.B. Order accordingly.

A.I.R. 1954 ORISSA 74 (Vol. 41, C. N. 22)

PANIGRAHI C. J. AND MOHAPATRA J.

Chandrayya and others, Petitioners v. Member, Excise, Board of Revenue and another, Opposite Parties.

O. J. C. Nos. 46 and 48 of 1953, D/- 29-9 1953.

(a) Bihar and Orissa Excise Act (2 of 1915), S. 34 — Grant of license — Nature of the Act.

In putting the license of a liquor shop to auction the Collector is not performing any judicial or quasi-judicial act. He is not deciding any question of fact affecting the rights of parties. What he is doing is purely an administrative act for securing excise revenue to the best advantage of the State. 1951 AC 66 (PC), Ref. (Para 9)

(b) Constitution of India, Art. 226 — Mandamus — Issue of, to enforce contract — (Bihar and Orissa Excise Act (2 of 1915), Ss. 34, 35).

It is well settled that a right that accrues under a contract cannot be the subject of

mandamus. A writ of mandamus cannot be issued to carry out the terms of a contract. (Para 10)

Thus where the petitioners bid at an auction of license of certain liquor shops with the full knowledge of its terms and voluntarily accept a provisional settlement, they have no right to invoke the jurisdiction of the High Court under Art. 226, as the alleged rights of the petitioners are merely contractual. (Para 4)

H. Mohapatra and R. N. Misra, for Petitioners; Advocate-General and Asst. Govt. Advocate, for Opposite Parties.

CASE REFERRED:
(A) (1915) 1951 AC 66: 54 Cal WN 883 (PC) (Pr 9)

MOHAPATRA J.:

(O. J. C. 46/53)

This is a petition under Art. 226 of the Constitution of India presented by the three petitioners with a prayer for issue of a writ of mandamus or any other direction that may be deemed fit by this Court in the following circumstances:

The licenses for the retail vend of country spirit at five places mentioned in the petition in the district of Koraput were put to auction for annual settlement by the Collector. One Upendra Senapati was granted license in respect of three places and one S. Narasimhulu in respect of the other two. The licenses were to expire on 31-3-53. For the year commencing on 1-4-53 the auction took place on 4-3-53 in respect of the above-mentioned five places for realising fees for the licenses for the retail vend of country spirit. The bid of petitioner 1 was accepted by the Collector for the licenses of three places and the bids of petitioners 2 and 3 in respect of each of the other two places were also accepted by the Collector and accordingly on 30-3-53 licenses were granted to them for their respective shops for the period from 1-4-1953 to 31-3-1954, whereupon they are carrying on their business of selling country spirit. They further submit that on 9-3-1953, opposite party 1, that is, the Member, Board of Revenue (Excise) passed an ex parte order on an incompetent appeal filed by the two previous licensees that these shops should be put to auction again and the previous licensees would start the bid at a call of Rs. 3500 in respect of the five shops taken together. It is to be mentioned here that these two previous licensees were in arrears to Government and under the Rules they were not allowed to bid at the auction where the petitioner's bids were accepted. The Collector, therefore, passed an order on 30-3-1953 that as desired by the Board the country spirit shops at those five places which were provisionally settled previously would be put to resale in a lot with a starting bid of Rs. 3500/- of Upendra Senapati and S. Narasimhulu and that the resale would take place on 10-4-1953.

(2) The main ground on which the petitioners present the petition before us is that inasmuch as they were granted licenses for the year commencing on 1-4-1953, their rights under the licenses are complete and that further order for resale is in excess of jurisdiction of the Collector. The further ground taken by the petitioners is that the order passed by Opposite party 1 is incompetent.

(3) The opposite parties have filed a counter to the effect that in fact the disputed five shops were put to auction individually on 4-3-1953; but as the reserved fees were not obtained the shops were 'provisionally settled' with the petitioners who were granted only provisional licenses. Simultaneously with the making over of the provisional licenses to the present petitioners a notice of resale was also published to the effect that the five shops were to be put to auction again on 10-4-1953 and that the opposite parties had proceeded in accordance with law and the Collector had in the circumstances the power to put the shops to resale as the reserved fees were not obtained by the first auction.

(4) It is clear from the records that in fact the bids of the petitioners on 4-3-53 were accepted by the Collector only provisionally and that the petitioners were not only aware of the position but accepted the position with their eyes open. The most important record is the settlement register wherein the particular settlements after auction are entered almost simultaneously with the settlement. It appears from the settlement register that on 4-3-1953 the shops were settled with the petitioners provisionally and that the petitioners also consenting to the settlement put their signatures against the said entries. It is made further clear also that the licenses which were granted to the petitioners on the basis of which the petitioners have started their shops clearly show that they are provisional licensees. The petitioners accepted the licenses without any objection. Mr. Mohapatra, appearing on behalf of the petitioners, contends that at the time when the bid was accepted they (the petitioners) were not given to understand that it was only provisional. The contention does not stand to reason in view of the fact that the petitioners had signed the settlement register almost simultaneously with the closure of the bid. In this connexion, we should refer to the Sale Notification laying down the terms subject to which the sale would be conducted and the shops would be settled. In para. 4 it is mentioned as follows:

"The auction will be held subject to the following conditions:

1. The Collector does not bind himself to accept the highest or any bid. It is open to the Collector, in exceptional cases (e.g., when adequate fee is not offered), to accept a bid provisionally subject to the confirmation of the same by the Commissioner of Excise."

x x x x

The petitioners went to bid fully aware of these terms and when they voluntarily accepted the position that it was a provisional settlement with them, it does not seem to us that they have got the right to invoke our jurisdiction under Art. 226, the alleged rights of the petitioners being merely contractual ones.

(5) We will next refer to R. 109, Cl. (a) appearing at p. 140 of Vol. I of the Orissa Excise Manual — the Rules having been framed by the Board of Revenue under S. 90, Bihar and Orissa Excise Act, 2 of 1915. The Rule runs thus:

"109. (a) The fees for licenses for the retail vend of the following intoxicants shall be fixed by auction subject to a reserved fee sanctioned in each case by the Commissioner:

(1) Country spirit."

x x x x

It is further made clear from the instructions issued by the Board of Revenue in para. 98 appearing at p. 42 of Vol. III of the Orissa Excise Manual that

"the licenses are put to auction subject to a reserved fee, previously sanctioned by the Commissioner of Excise. This upset fee must be kept strictly confidential."

This instruction seems to be on the basis of administrative policy and convenience. Para. 99 of the instructions shows that

> "when the sanctioned upset fee is not obtained in any case, the Collector..... may, in his discretion, accept a lower fee provisionally, but the case must be reported to the Commissioner of Excise, and it must be understood that the settlement is not final....."

From the above consideration, therefore, it appears to be clear that there is enough provision in law that the Collector is empowered to settle the licenses only provisionally when the reserved fees are not reached. Mr. Mohapatra contends that the petitioners were not aware of the reserved fees; but as we have indicated above, under the instruction as a matter of administrative policy it is quite reasonable that the reserved fee is kept confidential. But nevertheless the position being that the Collector has the power in law to settle provisionally, and when the petitioners had accepted the settlement as provisional and had acted upon that provisional license there is no case for invoking our jurisdiction under Art. 226, particularly when the petitioner's rights are contractual rights.

(6) Mr. Mohapatra takes up the further point that the order passed by the Member, Board of Revenue (Excise) in appeal on 9-3-1953 on the application filed by the two defaulting licensees is incompetent and against the principles of natural justice that they were not given notice of it. We find that under the provisions of S. 8, Bihar and Orissa Excise Act, 1915, the Board of Revenue has got the general power of control over the Collector and further that in cases where reserved fee is not reached the power to sanction is also provided for. If, therefore, as desired by the Board, the Collector ordered a resale when the first sale was provisional no principle of natural justice is contravened. In consideration of these circumstances, therefore, we find that there is no merit in this petition. The petition, therefore, is dismissed with costs. Hearing fee is assessed at Rs. 100/- (one hundred rupees).

O. J. C. No. 48/53.

(7) This petition is also on similar facts and involves the same questions. This case is in respect of the retail vend of country spirit for the year 1953-54 at Bajrakabat in the town of Cuttack. Here also the petitioner obtained the provisional license and there was an order for fresh auction under same circumstances. The case is fully covered by the judgment passed in O. J. C. No. 46/53. The petition is, therefore, dismissed with costs. Hearing fee is assessed at Rs. 50/- (fifty rupees).

PANIGRAHI C. J.:

(8) I am of the same opinion and would like to add a few words. In putting the liquor shop to auction the Collector was not performing any judicial or quasi-judicial act. He was not deciding any question of fact affecting the rights of parties. What he was doing is purely an administrative act for securing excise revenue to the best advantage of the State. If he chose not to accept the bid of the petitioner it cannot be said that he was deciding any right. What he did was primarily an administrative act subject to the control of the Board of Revenue. In a similar case where a license was cancelled by the Controller of Textiles, Ceylon, the Judicial Committee held that the cancellation was purely an administrative act: see — 'Nakuda Ali v. M. F. De S. Jayaratne', 1951 AC 66 (A).

(9) Counsel for the petitioner urged that he had acquired a contractual right under the provisional license granted to him. If that be so it is well settled that a right that had accrued under a contract cannot be the subject of mandamus. It has not been shown that the Collector was under any duty to accept the bid of the petitioner in which case the question of appropriateness of a writ of mandamus could be considered. But if it be merely a contractual right mandamus will not issue to carry out the terms of the contract.

A/D.R.R. Petition dismissed.

A.I.R. 1954 ORISSA 76 (Vol. 41, C. N. 23)

PANIGRAHI C. J. AND MOHAPATRA J.

Gajendra Prasad Rautarai and others, Petitioners v. Chairman, Cuttack Municipality and another, Opposite Party.

O. J. C. No. 10 of 1953, D/- 6-10-1953.

(a) Constitution of India, Art. 226 — Writ of mandamus, when is not proper remedy — (Municipalities — Orissa Municipal Act (23 of 1950), S. 134(d)).

Where a writ of mandamus is sought to be issued against a Municipality on the contention that the provisions of S. 134 (d) being mandatory, unless provisions for cleansing of private latrines, urinals and cesspools are made, no tax shall be leviable, and if the tax is imposed without the said conservancy arrangements the taxation is bound to be declared as illegal, and the contention is met by the production of the records kept in the Municipal office showing that arrangements have been made for so cleansing, then it is not a fit case where the jurisdiction of the High Court under Art. 226 can be invoked. If the petitioners dispute the fact that the arrangements contemplated under S. 134 (d) have not been made, they may seek their remedy in appropriate proceedings. Where facts are disputed, they cannot be effectively determined in the writ proceeding. (Paras 4, 5)

(b) Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 106 — Increase in maximum rate of tax — Power of Municipality.

Section 106, Bihar and Orissa Municipal Act contemplates that the valuation and assessment lists once prepared will 'ordinarily' be in force for five years. But if on account of some extraordinary circumstances, such as, abnormal rises in the essential articles, costs of living, etc., the Legislature thinks it necessary to increase the maximum rate, the Municipality does not act in excess of jurisdiction or illegally increasing the maximum rate in accordance with law in force at the time, even though five years have not expired from the date of the preparation of the original valuation and assessment lists. (Para 6)

G. C. Das and A. K. Ray, for Petitioners; S. Misra and L. Mohapatra, for Opposite Party.

MOHAPATRA J.:

This petition under Art. 226 of the Indian Constitution has been filed on behalf of the villagers of village Gandarpur with a prayer for issue of a writ of mandamus or any other suitable

writ or direction under the following circumstances: That the village Gandarpur by Notification dated 7-2-1945, along with other villages was included within the Municipality of Cuttack; that thereafter in the year 1946 house-taxes were imposed on the villagers at the rate of 7½ per cent. of the valuation of the holdings and the villagers have been paying the house-taxes on the above rate since 1-4-1947; that by an Amending Act of Orissa the maximum rate of assessment of house-taxes was raised from 7½ per cent. to 12½ per cent. The petitioners' further case is that since April, 1950 the villagers were paying house-taxes at the rate of 12½ per cent. of the valuation of the holdings; that thereafter the Orissa Municipal Act having come into force from 16-4-1951, the maximum rate of house-tax was brought down from 12½ per cent. to 10½ per cent. of the valuation of the holdings; and that the villagers are paying house-taxes at the aforesaid rate in accordance with the provisions of the Orissa Municipal Act from 1-7-1951.

(2) The other part of the case of the petitioners is that latrine taxes in respect of the area in question, that is, village Gandarpur, having been imposed since May, 1950, the petitioners are paying latrine taxes from the next 'Kist' following the assessment of latrine-tax.

(3) Mr. G. C. Das, appearing on behalf of the petnrs., takes up the first point that inasmuch as no arrangement for cleansing of private latrines, urinals and cesspools of the village area has been made the imposition of latrine tax is illegal as contravening the provisions of S. 134, Orissa Municipal Act which is practically the same as the provisions of S. 86, Bihar and Orissa Municipal Act. Mr. Das particularly relies upon Cl. (d) of the said section. The section runs thus:

> "The imposition of the latrine tax shall be subject to the following restrictions, namely:
>
> x x x x
>
> (d) that the tax shall not be leviable in area until the Municipal Council have made provision for the cleansing of private latrines, urinals, and cesspools within such area, nor shall the tax be leviable for any quarter or portion of a quarter antecedent to the making of such provision."

His contention is that the provisions are mandatory to the effect that unless provisions for cleansing of private latrines, urinals and cesspools are made, no tax shall be leviable, and if, as in the present case, the tax is imposed without the said conservancy arrangements the taxation is bound to be declared as illegal.

(4) Mr. Misra, appearing on behalf of the Cuttack Municipality, has drawn our attention to the records kept in the Municipal Office showing that on 28-5-1950, the Tax Daroga submitted a report to the Executive Officer to the effect that in the new area, that is, the areas which had been newly included within the Cuttack Municipality (including village Gandarpur) arrangements have been made for cleansing private latrines, urinals, and cesspools, etc. He had submitted also a list of holdings containing private latrines. The Executive Officer having moved the District Magistrate on this basis, the District Magistrate on 30-5-1950 passed a resolution imposing latrine taxes at the maximum rate of 7½ per cent. on the valuation of the holding having found that arrangements had been made in the area for cleansing private latrines, urinals, and cesspools.

This resolution was passed by the District Magistrate during the period of supersession of the Cuttack Municipality. In the face of these records of the Municipality we are definitely of the view that the imposition of latrine taxes cannot be deemed to have contravened the provisions of S. 134 (d), Orissa Municipal Act or the provisions of S. 86 (d), Bihar and Orissa Municipal Act. We may note here that if in spite of these records of the Cuttack Municipality the petitioners will dispute the fact that the arrangements 'contemplated under S. 134 (d) have not been made, they may seek their remedy, if they are so advised, in appropriate proceedings wherein they may agitate the matter more elaborately and effectively by adducing evidence disproving the records of the Municipality. But in view of the position arising out of the records of the Municipality it is not a fit case where our jurisdiction under Art. 226 can be invoked.

(5) Regarding the house-tax, Mr. Das mainly relies upon the provisions of S. 106, Bihar and Orissa Municipal Act contending that when the valuation and assessment lists were prepared in the year 1946 imposing house taxes at the maximum rate of 7½ per cent. a further increase of the rate to 12½ per cent. from April, 1950, is illegal. Section 106 runs as follows:

> "106. (1) New valuation and assessment lists shall ordinarily be prepared, in the same manner as the originals lists, once in every five years.
>
> (2) Subject to any alteration or amendment made under S. 107 and to the result of any application under S. 116, every valuation and assessment entered in a valuation or assessment list shall be valid from the date on which the list takes effect in the municipality and until the first day of the April next following the completion of a new list."

The provisions of S. 106 are manifestly subject to the provisions of S. 107 which provides that the Commissioners may from time to time alter, or amend the assessment list in the case of buildings which have undergone additions, improvements etc. Mr. Misra contends that the Municipality has revalued the holdings which have undergone improvements which fact is denied by Mr. Das. Here again we are confronted with a disputed fact which cannot be effectively determined in this proceeding.

(6) Mr. Das further contends that once the rate was fixed in the year 1946, it cannot be increased within a period of five years. On account of the improvements the Municipality may increase the tax, but cannot increase the maximum rate and reassess accordingly. As we have indicated above, by an Amending Act of Orissa the maximum rate of 7½ per cent. was raised to 12½ per cent. to be given effect from 1-4-1950. In our view, what S. 106, Bihar and Orissa Municipal Act contemplates is that the valuation and assessment lists once prepared will 'ordinarily' be in force for five years, but if on account of some extraordinary circumstances, such as, abnormal rises in the essential articles, costs of living, etc. the Legislature thought it necessary to increase the maximum rate, we do not think the municipality acted in excess of jurisdiction or illegally in increasing the maximum rate in accordance with law in force at the time even though five years had not expired from the date of the preparation of the original valuation and assessment lists.

It has got to be observed here that in the new Act, that is, the Orissa Municipal Act which has taken effect from 16-4-1951, the prescribed maximum rate is 10 per cent. and the Municipality has taken proper and adequate steps to bring down the rate of the taxes accordingly and the

taxes that are being now realised do not contravene the maximum prescribed by law now in force. In this view of the matter, therefore, as the present taxes are in conformity with the legal maximum, there is no case for interference under Art. 226. If on any previous occasion the petitioners had paid any amount in excess of the legal dues, they may seek their remedy in an appropriate Court if they are so advised. In the above circumstances, therefore, the petition is dismissed with costs. Hearing fee is assessed at Rs. 100/- (One hundred rupees).

(7) PANIGRAHI C. J.: I agree.

A/V.S.B. Petition dismissed.

A.I.R. 1954 ORISSA 78 (Vol. 41, C. N. 24)

NARASIMHAM AND MOHAPATRA JJ.

Shyamsundar Nath Suthoo, Plaintiff-Appellant v. Raghunath Jiew Thakur and others, Defendants-Respondents.

Second Appeal No. 527 of 1948, D/- 13-8-1953, from decision of Sub. J., Cuttack, D/- 11-8-1948.

Limitation Act (1908), Arts. 142 and 144 — Adverse possession by shebait.

A shebait as such cannot claim any title by adverse possession in respect of the property of the deity. Hence where what was mortgaged was only the marfadari right and not the interest of the deity and the mortgagee in execution of his mortgage decree purchased that right accepting the position of a shebait, he cannot subsequently claim title by adverse possession against the deity: A.I.R. 1933 Cal 295 (SB), Rel. on. (Paras 4 and 5)

Anno: Limitation Act, Arts. 142 and 144 N. 46, 49 and 50.

M. S. Rao, for Appellant; L. Mohanty, B. Mohapatra and K. N. Swain, for Respondents.

CASES REFERRED:

(A) ('33) AIR 1933 Cal 295: 60 Cal 54 (SB) (Prs 5, 6)

(B) ('22) AIR 1922 PC 123: 44 Mad 831 (PC) (Pr 6)

MOHAPATRA J.:

It is the unsuccessful plaintiff in both the Courts below who has filed this appeal against the judgment and decree dated 11-8-48, of Sri T. V. Rao, First Addl. Subordinate Judge of Cuttack, confirming the decision of the trial Court after remand. The plaintiff has brought the suit for declaration of his right, title and interest in respect of three mouzas Ahmedpur, Gokulpur and Rangidaspur, as proprietor and for confirmation of his possession. The plaintiff's case is that Raja Raghunath Raj, who owned nine annas six pies interest in all such villages, executed a mortgage transaction (Ext. 5a) on 14-8-1880 in respect of his interest in the said mouzas for a sum of Rs. 1400/- in favour of the plaintiff's ancestor who obtained a final decree on the basis of the said mortgage on 1-3-1887 and in execution of the said mortgage decree the properties were purchased on 17-6-1895 by the mortgagee-decree-holder, that is the plaintiff's ancestor; he had also taken delivery of possession through Court near about the year 1901; the balance six annas six pies, according to the plaintiff, belonged to Raja Suberaj and Sunder Nalia.

They had mortgaged their interest in the said mouzas also in favour of the same ancestor of the plaintiff in the year 1884 for Rs. 1200/- on the basis of which a final decree was obtained on 15-9-1890 and in execution of the said mortgage decree the mortgagee-decree-holder purchased them in two instalments on 15-7-1895 and 15-7-1898; the mortgagee-decree-holder had taken possession through the Court also in the year 1901; the plaintiff's further case is that ever since the delivery of possession in favour of his ancestor he was in possession of the entire mouzas in question ever since the year 1901 and collecting rents in his own rights and on his own behalf; the plaintiff's grandfather, that is, the mortgagee-decree-holder, died near about the year 1901 and he was succeeded by his son Hariharnath Pandit who also died a short time thereafter leaving his widow Rani Luxmi Rani as the legal heir; as she was a young widow, the estate was managed by a committee of executors and subsequently it came under the management of the Court of Wards till the present plaintiff Pandit Shymasundar Suthoo who, in the meantime was adopted by Luxmi Rani, took possession in 1924.

In the year 1936 when the plaintiff started certificate proceedings for the purpose of realisation of rents against the tenants, the tenants raised an objection that the plaintiff had no right to realise rent inasmuch as the properties belonged to deity Raghunath Jiew Thakur represented by Marfatdar Rani Venkataramaniya; these certificate proceedings having been cancelled, the plaintiff filed the suit on 21-9-38 for the relief of declaration of plaintiff's absolute right over the properties and for confirmation of possession on the allegation that the properties in dispute never belonged to deity Sri Raghunath Jiew Thakur but were all along the secular properties of the mortgagors named above; an alternative case also was alleged in the plaint that even though the properties belonged to the deity, the plaintiff had acquired absolute right over the same by virtue of adverse possession against the deity.

(2) The defence, in short, was that the properties were really the debuttar properties belonging to the celebrated deity Shri Raghunath Jiew Thakur situate in the town of Cuttack at Telenga bazar and the mortgagors, namely, Raja Raghunath Raj & Raja Suberj and Sunder Nalia had only marfatdari rights in respect thereof; the mortgage transactions, if any, were only in respect of the said marfatdari rights and the plaintiff's ancestor, Baidyanath Pandit, purchased nothing else than the marfatdari rights of the mortgagors in execution of the mortgage decrees. It is further contended on behalf of the defendants that the plaintiff's ancestor, or, as a matter of that, the plaintiff himself has never asserted any adverse right against the deity and the plaintiff has not acquired any absolute right over the properties even by virtue of adverse possession. We may refer here to S. 30, Cuttack Land-Revenue Regulation, 1805, published in Orissa Code Vol. I, at p. 96, where there is a mention of the deity Sitaram Thakur who is otherwise known as Sri Raghunath Jiew:

> "Provided also that nothing herein contained shall be construed to authorise the resumption of the established donation for the support of the temple of Jagannath, the charitable donation to the officers of certain Hindu temples. called Anuchatri, and the allowance granted for the support of the Hindu temple at Cuttack, called Sitaram Thakur Bari."

(3) Both the Courts below have concurrently found plaintiff's possession for a long time ever since the year 1901 through his ancestor and by himself, but they have categorically found that possession by the ancestor of the plaintiff, or his mother or by the plaintiff himself was only on behalf of the Thakur and as Marfatdar of the

Thakur. The Courts below on a very careful examination of all the documents in question have come to an equally definite finding that the properties in dispute are really the Debottur properties belonging to the Thakur Raghunath Jiew and were never the secular properties of the mortgagors; and what was mortgaged by virtue of the transactions of the year 1880 and 1884 were only the marfatdari rights and not the deity's interest.

(4) We have heard the advocates for the parties at length and have examined carefully all the important documents on record and we find no reason to interfere with the findings arrived at by the Courts below. (After considering the documents the judgment proceeds:)

We, therefore, agree with the view taken by the learned lower Courts that the possession of the plaintiff & his predecessor even though long is only on behalf of the Thakur & that the plaintiff's predecessor purchased only the marfatdari rights of the deity Raghunath Jiew in execution of the mortgage decrees. This finding confirming the concurrent findings of the Courts below is sufficient for the purpose of disposing of this appeal and dismissing the plaintiff's suit for declaring his absolute right in respect of the property in dispute.

(5) The above finding will dispose of the point of adverse possession raised by Mr. Rao; but we should like to add a further note also on the question of adverse possession that once it is found that the plaintiff's predecessor had accepted the position of a shebait of the Thakur, it is not open for him to take the plea of adverse possession against the deity, especially on account of the feature of the present case that it is not clear when he asserted any adverse title against the deity. The position of law that adverse possession in such circumstances is a notion wholly devoid of contents is made clear by reference to the Hindu Law of Religious and Charitable Trust (Tagore Law Lectures delivered by Hon'ble Shri B. K. Mukherjea, M.A.,LL.D., Judge Supreme Court of India) at page 309.

"A shebait who has accepted the office of a shebait or acknowledged himself as such is incapable of asserting any hostile title against the idol or setting up 'jus tertii' in others. This disability is implicit in any person who holds fiduciary position in relation to another. Furthermore, unlike a human beneficiary, an idol cannot act except through a natural person, and normally, the personality of the idol is bound up with that of the shebait. As was pointed out by Rankin C. J. in — 'Surendra Kristo v. Shree Iswari Bhubaneswari', AIR 1933 Cal 295 (SB) (A), if after a shebait has accepted the trust, there is a change in the intention with which he holds the deity's properties, and he applies the rents and profits of the property to his own purposes, the idol's title cannot be affected thereby. Any change of intention on the part of the shebait can be brought home to the idol by means of the shebait only, and the idol can react to it through the shebait. Adverse possession in such circumstances is a notion wholly devoid of contents."

(6) Before the decision of their Lordships of the Privy Council reported in — 'Vidya Varuthi Tirtha v. Baluswami Ayyar', AIR 1922 PC 123 (B), it was generally assumed that S. 10, Limitation Act, would render such a contention impossible, but that decision dispelled all previous conceptions by holding that a shebait is not a person in whom the debuttar property is vested in trust for a specific purpose as contemplated under S. 10, Limitation Act, which led, in consequence, to the amendment of S. 10, Limitation Act, by Act 1 of 1929 so as to bring the shebait within the meaning of that section. But the case before us has got to be examined apart from the provision of S. 10 and merely on the conception underlying Art. 144, Limitation Act. In this connexion we should also quote the passage from the judgment of one of the most eminent Judges of India, that is, Rankin C. J., in the case reported in — 'AIR 1933 Cal 295 (A)', which was very much relied upon by the author of the aforesaid Tagore Law Lectures:

"The fact of their possession is in accordance with the idol's title, and the question is whether the change made by them, in the intention with which they hold, evidenced by an application of the rents and profits to their own purposes and other acts, extinguishes the idol's right. I am quite unable to hold that it does, because such a change of intention can only be brought home to the idol by means of the shebait's knowledge and the idol can only react to it by the shebaits. Adverse possession, in such circumstances, is a notion almost void of content. True, any heir or perhaps any descendant of the founder can bring a suit against the shebaits on the idol's behalf and, in the present case, it may be said that the act of the shebaits must have been notorious in the family, but such persons have no legal duty to protect the endowment and, until the shebait is removed or controlled by the Court, he alone can act for the idol."

In the present case it is crystal clear that the recitals in the mortgage transactions of the year 1880 and 1884 being to the effect that the marfatdari rights were being mortgaged, the mortgagee accepted the position and furthermore Rani Luxmi Rani being recorded in the Provisional and Revisional Settlements records of rights as shebait of Thakur Baghnath Jiew, she accepted the position of a shebait at least till the year 1911 and there is no material when any assertion of absolute right was made adversely to that of the deity. Thus the point of adverse possession is also bound to fail. Under these circumstances, therefore, we find that there is no substance in the appeal and it is bound to fail.

(7) Mr. Rao has taken up a point that even though his prayer for higher relief, that is, for declaration of his absolute right to the property be refused, he ought to be granted the relief of declaration of his (plaintiff's) marfatdari right in the present suit. This contention, as it appears, is taken up only for the first time at this stage of the Second Appeal. We are told by the learned advocate appearing on behalf of the respondents that the Endowments Commissioner of Orissa has in the meantime appointed a Committee of Trustees for the proper management of the properties of the Thakur. It is not, therefore, possible for us to grant the aforesaid relief in favour of Mr. Rao's client without hearing the Endowments Commissioner. This prayer, therefore, is refused.

(8) A point was also taken up by Mr. B. Mohapatra, appearing on behalf of the respondents, that the suit had long abated inasmuch as Rani Venkataramaniya, who was originally sued as marfatdar of the deity, died during the pendency of the suit and her legal representative was brought on record years after her death. As we have decided the appeal on merits and have found against the plaintiff-appellant that the appeal has no substance and particularly confirming the finding of fact arrived at by the Courts below that the plaintiff's possession was only on behalf

of the deity and that the plaintiff purchased only the marfatdari rights, it is unnecessary to decide this question of abatement.

(9) In conclusion, therefore, the appeal fails & is dismissed with costs.

(10) NARASIMHAM J. I agree.

B/G.M.J. Appeal dismissed.

A.I.R. 1954 ORISSA 80 (Vol. 41, C. N. 25)

PANIGRAHI C. J. AND NARASIMHAM J.

Sundar Sahu Gountia and others, Appellants v. Chamra Sahu Gountia and others, Respondents.

Misc. Appeal No. 13 of 1952, D/- 1-9-1953, from order of Sub-J., Sambalpur, D/- 29-11-1951.

(a) Family arrangement — Principles — Civil P. C. (1908), O. 23, R. 3 and S. 151 — (Contract Act (1872), Ss. 2(d), 25) — (Hindu Law — Family arrangement).

To constitute a valid family arrangement (i) the transaction should be one which is for the benefit of the family generally. (ii) The consideration for the arrangement may be preservation of the family property, preservation of the peace and honour of the family, or the avoidance of litigation. (iii) It is not essential that there should be a doubtful claim, or a disputed right to be compromised. If there is one, the settlement may be upheld if it is founded on a reciprocal 'give and take' and there is mutuality between the parties, in the one surrendering his right and in the other forbearing to sue. In such cases the Court will not too nicely scrutinise the adequacy of the consideration moving from one party to the other. (iv) In any case, if such an arrangement has been acted upon the Courts will give effect to it on the ground of estoppel or limitation and the like. (v) A family arrangement may also be upheld if the consideration moves from a third party. (vi) If it appears to the Court that one party has taken undue advantage of the helplessness of the other and there is no sacrifice of any right or interest, the agreement is unilateral and is devoid of consideration. (vii) The consent of the parties should be freely given to the arrangement and gross inadequacy of consideration may be a determining factor in judging whether the consent was freely given. (viii) If the agreement involves or implies an injury to the person or property of one of the parties, the Courts retain an inherent power to prevent injustice being done. English and Indian Case law reviewed. (Para 12)

Anno: Civil P. C., O. 23, R. 3 N. 7, 8, 18, 19; S. 151 N. 1, 2; Contract Act, S. 2 (d) N. 4, 8; S. 25 N. 2.

(b) Family arrangement — Consideration — Preserving the family property — Hindu Law — Partition.

The mere fact that a property is partitioned among several brothers does not destroy the property. The family property is still intact, but only remains separate in the hands of the different brothers. Preserving the family property cannot therefore form the ground or consideration for the arrangement by the party to forego a substantial part of his share so as to make the compromise binding upon him. (Para 13)

(c) Family arrangement — Consideration — Preservation of peace and honour of family — (Contract Act (1872), Ss. 2 (d), 25).

If one of the parties in adjustment seeks to disturb the peace and wants to retain an advantage derived by himself under the contract, the contract is unilateral and it cannot be said that there is any consideration moving from him to support it. Similarly a promise to do a thing or the actual doing of it will not be a good consideration, if it is a thing which the party is already bound to do, either by the general law or by a subsisting contract with the other party.

Thus where the plaintiff was entitled, under the Hindu Law, to call upon the defendants to partition the properties and to give him one-third share, but by the arrangement he got a smaller share than he was entitled to and he had to make a virtual gift of the balance of his share to his brothers.

Held that the agreement could only be based on the ground that the defendants promised to abstain from disturbing the possession of the plaintiff or the peace of the family, on condition of their receiving a larger share than they were entitled to. There was no sacrifice of any interest or right, and undue influence could be inferred on the evidence disclosed that there was marked inequality between the parties, in social position as well as in intelligence. (Para 13)

(d) Civil P. C. (1908), O. 23, R. 3 — Scope.

Rule 3 presupposes that there must be a completed agreement amounting to an adjustment, in whole or in part, of the suit itself. But where an agreement remains executory, or merely prescribes a procedure for the adjustment of the suit, there cannot be said to be a completed agreement. Thus where the agreement contemplated something to be done by the parties through a Patwari and then sought to take the suit completely out of the control of the Court.

Held, that if any of the parties resiled from the agreement or neglected to perform its terms the agreement could only be enforced by a separate suit. In such a situation, the Court was helpless in executing the agreement even if it were to record the compromise and incorporate it in a decree. The agreement was incomplete and indefinite and could not be regarded as an adjustment of the suit as contemplated by the rule. (Para 14)

Anno: Civil P. C., O. 23, R. 3 N. 2, 7, 8, 18, 19.

(e) Contract Act (1872), S. 23 — Unlawful consideration.

Agreements which are calculated to prevent a person from enjoying a fundamental right and which compel him to seek redress in a Court of law are bad and unlawful. (Para 19)

Anno: Contract Act, S. 23 N. 2, 10; Civil P. C., O. 23, R. 3 N. 7, 8, 18, 19.

G. K. Misra, for Appellants; B. Mohapatra, and S. C. Palit, for Respondents.

CASES REFERRED:

(A) (1867) 2 Ch 294: 36 Lj Ch 419 (Prs 6 10)
(B) (1870) 5 QB 449: 39 LJQB 181 (Pr 6)
(C) (1873) 8 Ch A 881: 43 LJ Ch 240 (Pr 6)
(D) ('98) 25 Ind App 161: 26 Cal 81 (PC) (Pr 8)
(E) ('06) 4 Cal LJ 323 (Pr 9)
(F) ('09) 10 Cal LJ 503: 3 Ind Cas 247 (Pr 9)
(G) ('16) AIR 1916 Cal 829: 22 Cal LJ 419 (FB) (Pr 9)
(H) ('21) AIR 1921 PC 107: 47 Ind App 233 (Pr 9)
(I) ('26) AIR 1926 PC 2: 53 Ind App 11 (Pr 9)
(J) ('32) AIR 1932 Cal 600: 59 Cal 859 (Pr 9)
(K) ('48) AIR 1948 PC 7: 1948-1 Mad LJ 47 (PC) (Pr 9)

(L) ('49) AIR 1949 PC 165 (Pr 9)
(M) ('28) AIR 1928 All 65: 50 All 284 (Pr 10)
(N) ('30) AIR 1930 All 687: 52 All 716 (Pr 10)
(O) ('43) AIR 1943 All 101: ILR (1943) All 411 (FB) (Pr 10)
(P) (1856) 5 HLC 627: 25 LJ Ch 482 (Pr 13)
(Q) ('30) AIR 1930 PC 158: 57 Ind App 133 (PC) (Pr 15)
(R) (1902) 1902 AC 465: 71 LJKB 939 (Pr 15)
(S) ('26) AIR 1926 Bom 24: 91 Ind Cas 817 (Pr 15)
(T) ('31) AIR 1931 Cal 205: 131 Ind Cas 257 (Pr 15)
(U) ('50) AIR 1950 Pat 445 (Pr 15)
(V) ('33) AIR 1933 All 861: 56 All 39 (SB) (Pr 15)
(W) ('68-69) 4 Mad HCR 423 (Pr 16)

PANIGRAHI C. J.:

This is an appeal directed against an order passed by the subordinate Judge, Sambalpur under O. 23, R. 3, C. P. C., refusing to record an adjustment of Title Suit No. 28 of 1950, which is pending on his file.

(2) The facts giving rise to this litigation are that the plaintiff Chamra Sahu, defendant No. 1 Sundar Sahu, and defendant No. 9 Bhikarycharan Sahu are uterine brothers. It is said that ever since the year 1949 there has been disputes going on between the brothers for a partition of their family properties. Several attempts appear to have been made for an amicable partition of the properties, all of which however failed on account of the intransigence of one party or another. The plaintiff, therefore, filed a suit for partition on 7-7-1950 in the Court of the Subordinate Judge, Sambalpur, against defendant 1 and the members of his branch, defendant 9 and his branch, and impleaded defendants 12 to 16, who are his remote cousins, as their names have been jointly recorded in some of the revenue papers. While the suit was pending and before the written statement was filed defendants 1 and 9 filed a petition under O. 23, R. 3, Civil P. C. on 3-3-1951 alleging that the suit had been adjusted out of Court and that the compromise arrived at between the parties should be recorded and the suit disposed of accordingly.

(3) The admitted facts are that on 28-2-1949 there was an agreement executed by the brothers Ext. C whereby the properties were roughly divided into five shares of which the plaintiff was given one. This agreement, however, does not purport to be a record of a completed partition of all the properties, but is only a rough memorandum indicating which party will take what share, in some of the properties. It is also admited that, under this agreement Ext. C, the plaintiff was entitled only to one-fifth share in the family properties. However, the agreement was not given effect to, nor were the properties divided in pursuance of the agreement. The plaintiff's complaint is that the defendants wanted to grab a larger share of the income of the joint family properties, and in spite of his protests cultivated more than what should normally fall to their share. This led to the institution of proceedings under S. 145, Cr. P. C.

During the pendency of these proceedings the parties agreed to have their shares divided through the intervention of arbitrators. But this did not bear any fruit and so the plaintiff filed his suit for partition. It is also common ground that on 21-1-51 the parties again entered into an agreement (Ext. A) under which the allotments made under the earlier agreement (Ext. C) were slightly modified so as to give the plaintiff one-fourth share in some of the joint family properties and the proceedings under S. 145, Cr. P. C., were dropped. At the time of this subsequent agreement (Ext. A) there were two proceedings pending under S. 145, Cr. P. C., in Criminal Case No. 138 of 1950 and Criminal Case No. 161 of 1950. It is the validity of this agreement (Ext. A) that forms the subject-matter of the dispute between the parties.

(4) After an exhaustive analysis of the circumstances under which Ext. C was executed, the learned Subordinate Judge held that Ext. C of the year 1949 was incomplete and indefinite and therefore Ext. A which is only a modified version of Ext. C, also suffered from the same infirmity. He further held that both Exts. A and C were inadmissible in evidence for the reason that they were not registered. On the merits, he held that the arrangement by which the plaintiff was given one-fifth share in the Ganghati properties — instead of one-third share to which he was legitimately entitled — was so unfair and unconscionable, that no court would give effect to it. He also held that defendant 1 being the Chairman of the District Board, Sambalpur, was in a position to dominate the will of the plaintiff.

Another fact that emerges from the evidence is that the plaintiff was restrained from moving about and was confined to his village by an order passed by the Sub-divisional Officer, Bargarh. The house allotted to the plaintiff's share had by then been gutted. All these circumstances were sufficient, in the opinion of the learned Subordinate Judge, to show that the plaintiff was in the position of an oppressed party and consequently in considerable mental distress and that, therefore, there was no mutuality between the parties in arriving at an agreement in the proceedings under S. 145, Cr. P. C. In this view of the case the learned Subordinate Judge passed an order refusing to record the alleged settlement between the parties. The defendants have come up in appeal against this order.

(5) Learned counsel for the appellants contends that there was no allegation of any undue influence having been brought to bear on the plaintiff and that the facts proved are not sufficient to invalidate the agreement on the ground of undue influence. Secondly, he contends that the view taken by the learned Subordinate Judge that Exts. A and C were inadmissible in evidence for want of registration, is erroneous. Thirdly he contends that Exts. A and C are no more than family settlements and should be respected as such. There is much force in the first two contentions and we intimated to learned counsel that we were not very much impressed by the reasoning adopted by the Court below on these matters.

The only point, therefore, that has been very strenuously urged before us is the third contention, namely, whether Ext. A is to be regarded as an adjustment of the suit either in whole or in part within the meaning of O. 23, R. 3, Civil P. C., and whether it may be regarded as a family settlement and as an adjustment of the suit. Several cases were cited before us in support of this contention and we were asked to uphold Ext. A as a valid family settlement, as the motive and consideration for such an agreement is said to be the preservation of the family property, the maintenance of the family honour, and the avoidance of future disputes.

(6) The leading English case on the subject of family arrangement which has been followed by Indian Courts is — 'Williams v. Williams', (1867) 2 Ch 294 (A). In that case John Williams died leaving his two sons John and Samuel and his

widow surviving him. After his death a testamentary paper, signed by him, was found, but as it had not been attested probate was refused. The father having died intestate and having left real estates of different tenures, the elder son John Williams became exclusively entitled to the socage property and the younger son, Samuel, became exclusively entitled to the borough English portion. The socage portion, however, was much larger than the borough English portion. The gravelkind tenure was equally divisible between the two sons and the personal estate was divisible between the widow and the two sons in equal shares. The widow was also entitled to the dower and free bench out of the real estates.

Shortly after probate had been refused, the two brothers met and agreed that the invalidity of the will should make no difference between them and the property should be not thine, or mine, but ours. For twenty years the tannery business left by their father was carried on jointly by the two brothers, but upon some disagreement that subsequently arose between them, the appellant John Williams served a notice of dissolution of the partnership and the partnership was brought to an end. It was found that the partnership had continued as a joint business for twenty years. The widow, namely the mother of the parties, had abided by the agreement and never asserted her legal rights, either in the real or personal properties of her deceased husband. On these facts, Lord Chelmsford L. C. held:

"There was, here, no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved. The appellant was merely prompted by respect for his father's intention and by his affection for his brother — both most excellent and praiseworthy motives but scarcely sufficient to constitute such a consideration as to convert an act of kindness into a binding agreement."

It was found, however, that there was quite sufficient consideration to prevent its being a mere voluntary agreement and that the Court will not be disposed to scan with much nicety the amount of consideration. The consideration for the agreement, in that case, was found to be that Samuel brought the Borough English portion of the property to which he was entitled, into a common stock and left his share of the stock-in-trade in the business, and agreed to carry on business jointly instead of breaking up the concern. A further consideration that was found was that the widow was a party to the whole arrangement and the consideration moving from her was taken into account. The Lord Chancellor further observed:

"It seems to me that if valuable consideration is required in this case, to make the family arrangement binding, it is sufficiently provided by the widow agreeing to become a party to it and relinquishing her rights for the purpose of carrying it out."

Turner L. J. rested his judgment on the ground that the arrangement was made between the brothers for the preservation of the common property. It would, therefore, appear that, in order to give validity to a family arrangement, the existence of dispute or of a doubtful right to be compromised, is not a 'sine qua non'. But there must be some consideration to make the family arrangement binding on the parties. That consideration may proceed from a third party as from the widow in the case cited above. The adequacy of the consideration will not be minutely scrutinised by the Court, but the motive which actuated the parties is an important factor to be taken into consideration. There must be mutuality and the agreement must be arrived at in a spirit of 'give and take'. But where an agreement appears to be brought about, not with the free consent of the parties but under compulsion, and there is want of mutuality between them, equity would not favour such an agreement. Forbearance to sue is always regarded as a good consideration for a valid contract.

Thus where a party makes a claim which he believes to be true and forbears to sue, his forbearance will constitute a good consideration. But if a person makes a claim which he knows to be unfounded and seeks, through a compromise, to derive an advantage under it in that case his conduct would be fraudulent — 'Callisher v. Bischoffsheim', (1870) 5 QB 449 (B). The essence of the matter is that to make a compromise of any value the parties must be at an arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection — 'See Moxon v. Payne', (1873) 8 Ch A 881 (C).

(7) This is also the view adopted in the Indian Courts and the cases in the books are legion.

(8) In — 'Muhammad Imam Ali Khan v. Sardar Hussain Khan', 25 Ind App 161 (P C) (D); the plaintiff made an application to the revenue authorities to record his uncle's name in the Lambardari Register, but subsequently repudiated it. The question arose whether that document constituted a valid family arrangement. The mutation operated as a transfer but as no consideration had been given by the defendant the decree in favour of the plaintiff was affirmed by the Judicial Committee. In that case, there was an admission of the title made by the plaintiff, but their Lordships observed:

"A gratuitous admission may be withdrawn, unless there is some obligation not to withdraw it. If then there is no transfer, no estoppel, no bar by time, no trust — why should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle, or for any other cause not injurious to the defendant, have admitted?"

(9) It is also well established that a family arrangement affecting a division of the family properties which has been carried out and acted upon for sometime would be held as binding between the parties. Cases of this type are to be found in — 'Helan Dasi v. Durga Das', 4 Cal LJ 323 (E) and — 'Satyakumar Banerjee v. Satyakirpal Banerjee', 10 Cal LJ 503 (F).

In — 'Hemendranath v. Upendra Narain', AIR 1916 Cal 829 (FB) (G); there was a long standing feud which had harassed the members of the family for more than a generation and had led to litigation between two branches of the family. A permanent lease executed by the limited owner in settlement of the dispute was sought to be challenged. Mookherji J., while upholding the validity of the lease as a family arrangement, observed:

"We are not now concerned with the question how and when the family arrangement may be set aside on the ground of mistake, inequality of position, undue influence, coercion, fraud, or other similar grounds, for no such vitiating fact is alleged or proved in this case."

The settlement was upheld on the ground that a qualified owner can bona fide effect a settlement of the matter in controversy, and that she is not bound, at her peril, to pursue the litigation in respect of the estate in her hands.

In — 'Sureshwar v. Mst. Mahesh Rani', AIR 1921 PC 107 (H); there was an arrangement by which the reversioner, as a consideration for the surrender of the estate by a widow, promised to convey a portion of the property to a nominee of the lady surrendering. This might well fall under the description of a "device to divide the estate" but Lord Dunedin held that it was a bona fide transaction and that there was "a situation of a contest under which, if the decision were one way, the estate was carried to the daughters away from the family, and a litigation in the course of which the estate would probably be much diminished. This situation made it a perfectly good consideration for the lady, in order to avoid these results, to consent to give up her own rights by surrender. On the other hand it was a good consideration for the reversioner to get rid of the will, and in a question with the daughters who would take all by the will, to agree to give them a half of the property". The Board, therefore, held that the arrangements of the compromise would not be stigmatised as a device to divide the estate between the surrendering lady to the nearest reversioner and that the arrangement was bona fide.

On the other side of the line is a case in — 'Mansingh v. Nawalakhbati', AIR 1926 PC 2 (I) where two Hindu widows who were in possession of a joint widow's estate were declared to be 'disqualified proprietors under the Court of Wards Act and the Court of Wards took charge of the property. The widows, without the sanction of the Court of Wards, executed a deed by which they purported to surrender all their rights in the property to the two grandsons of their deceased husband as next heirs, the grandsons agreeing to pay to the widows Rs. 2000/- per month for maintenance. The Board held the surrender to be void as being in contravention of S. 60, Court of Wards Act, but observed at the same time that the deed could have been declared void independently of S. 60, Court of Wards Act, as there was no dispute which could be said to have been settled by the surrender.

It is, therefore, of the essence of the validity of such contracts that there should be a bona fide settlement of a dispute arising out of conflicting claims to property — a situation of contest which is avoided by the policy of 'give & take' otherwise all transfers or surrenders will pass under the cloak of a 'family arrangement' See — 'Sashi Kantha v. Promode Chandra', AIR 1932 Cal 600 (J).

In the latest case reported in —'Balarama Sastri v. Vasudeva Sastri', AIR 1948 PC 7 (K) the appellant was adopted by a widow named Janakiamma who had a widow's interest in considerable properties left by her husband. The dispute between him and Janakiamma had been serious & had been going on for some time. Janakiamma had also saved substantial sums, part of which she had invested in business. Respondent Vasudeva Sastry was Janakiamma's brother's son, and had been brought up by Janakiamma, and had lived on terms of affection with her. There were disputes between the adopted son and the widow, one asserting and the other denying that her savings belonged to the adopted son.

Before her death, the widow made a will in which she expressly asserted her right to certain sums of money deposited in the business and disposed it of in favour of her nephew, the respondent who was made the executor and the beneficiary. After her death, disputes having arisen between the adopted son and the nephew of the widow, the parties entered into an agreement on a compromise arrived at by them, for the settlement of all outstanding disputes in relation to the estate of Janakiamma whereby two-thirds of the cash was to be taken by the nephew of Janakiamma and one-third to be given to the appellant. The question was whether the nephew had a bona fide claim to the property which was the subject-matter of the agreement of compromise. Their Lordships held that he had such a claim and that as this was an honest claim it supported the agreement of compromise.

In — 'Ramakrishana Raju v. Narayana Raju', AIR 1949 PC 165 (L), an exchange of properties already partitioned among the brothers was upheld as a fair compromise brought about in order to make up a family quarrel, and that itself was held to be some consideration for what was done.

It appears to me, on a reading of these cases, that there should be a bona fide dispute and a fair adjustment of the conflicting claims, in order that an agreement may be upheld as a family arrangement.

(10) But what is a 'bona fide dispute'. That expression has been used in many decisions, but has nowhere been defined or explained. The only case brought to our notice is — 'Sidh Gopal v. Beharilal', AIR 1928 All 65 (M), where it was held that a dispute where each party is contending for an advantage for himself in his own right is not a bona fide dispute. If a person makes a claim and intends to press it by litigation or otherwise, it may be a bona fide dispute though the claim itself may be doubtful. In that case the dispute was between a brother and nephew of the deceased person over a question as to whether the deceased was joint or separate at the time of his death. The castemen decided that the property should be divided equally between them in order to avoid litigation. Accordingly, the names of the claimants were put down as the heirs of the deceased persons, in the revenue papers, and this was acted upon for four years. In those circumstances it was held that the dispute was a bona fide one and the settlement was made for the benefit of the family generally.

The case of — 'Pokhar Singh v. Mst. Dulari', AIR 1930 All 687 (N), was also one in which there was a family arrangement between a widow and the next presumptive reversioners and that arrangement had been acted upon for sometime before the dispute arose. It is true that there was some sort of a dispute in these cases. But neither the existence of a family dispute nor the existence of a doubtful claim is essential to validate a family arrangement. The essence of the matter is that there should be some kind of consideration before an agreement in respect of the division of a family property can be held to be a valid family arrangement though, in such cases, the Court will not scrutinise the quantum of consideration with meticulous nicety—See —'Mt. Dasodia v. Gaya Prasad', AIR 1943 All 101 (FB) (O).

Where there is no question as to the devolution of the property, nor any disputed right, a family arrangement can be upheld only if there is some consideration for the arrangement other than love and affection — See 'Halsbury's Laws of England, Hailsham Edition, Vol. XV, page 4 para 4. This statement of the law in Halsbury is based upon the observations of Lord Chelmsford in —'Williams v. Williams (A)', (which I have already quoted) to the effect that there was no doubtful right in that case which required to be compromised, no disputes between the brothers that had to be settled and no honour of the family involved, but

that there was a consideration proceeding from the younger brother, Samuel, and from the mother of the parties that formed the basis of the arrangement. But where there is a bona fide dispute it may itself constitute a good consideration for the parties to the settlement although that is not the only consideration which may form the basis of that settlement.

(11) A 'family arrangement' has been defined in 'Halsbury, Vol. XV, Hailsham Edition, Page 2 paragraph 2 as :

> "a transaction between members of the same family generally which is for the benefit of the family as, for example, one which tends to the preservation of the family property, to the peace or security of the family, or to the saving of the honour of the family."

In all these cases, it will be noticed that the Courts are anxious to see whether there was some consideration for the agreement, quite apart from the motive for the family arrangement. The adequacy or otherwise of the consideration is not a matter for judicial determination, but where the consideration has been grossly or shockingly inadequate the inadequacy will be treated as evidence that the consent was not a real consent or that the party was the victim of some imposition.

(12) The principles deducible from a consideration of these authorities may be summarised as follows :

> "(i) To constitute a valid family arrangement the transaction should be one which is for the benefit of the family generally.
>
> (ii) The consideration for the arrangement may be preservation of the family property, preservation of the peace and honour of the family, or the avoidance of litigation.
>
> (iii) It is not essential that there should be a doubtful claim, or a disputed right to be compromised. If there is one, the settlement may be upheld if it is founded on a reciprocal 'give and take' and there is mutuality between the parties, in the one surrendering his right and in the other forbearing to sue. In such cases the Court will not too nicely scrutinise the adequacy of the consideration moving from one party to the other.
>
> (iv) In any case, if such an arrangement has been acted upon the Courts will give effect to it on the ground of estoppel or limitation and the like.
>
> (v) A family arrangement may also be upheld if the consideration moves from a third party.
>
> (vi) If it appears to the Court that one party has taken undue advantage of the helplessness of the other and there is no sacrifice of any right or interest, the agreement is unilateral and is devoid of consideration.
>
> (vii) The consent of the parties should be freely given to the arrangement and gross inadequacy of consideration may be a determining factor in judging whether the consent was freely given.
>
> (viii) If the agreement involves or implies an injury to the person or property of one of the parties, the Courts retain an inherent power to prevent injustice being done.

(13) I now ask : what is the consideration in this case, for the agreement by the plaintiff to forego a substantial part of his share so as to make the compromise binding upon him? Learned counsel for the appellants seeks to support it on the ground of preserving the family property and maintaining the family honour. The mere fact that a property is partitioned among several brothers does not destroy the property. The family property is still intact, but only remains separate in the hands of the different brothers. There can, therefore, be no question of preserving the family property. Nor am I convinced that any question of family honour is involved in the case so as to justify a surrender by the plaintiff of a portion of his rightful share. It is nobody's case that the legitimacy of any of the parties to the dispute was involved. No question of family honour was ever raised. It was then contended that peace in the family could not have been maintained but for the compromise. If one of the parties in adjustment seeks to disturb the peace and wants to retain an advantage derived by himself under the contract, the contract is unilateral and it cannot be said that there is any consideration moving from him to support it. If, as has been alleged the defendants knew that some lands were more valuable than others and refused to give a share to the plaintiff there is no consideration which can be said to have moved from him, no sacrifice, & no forbearance which would support an arrangement by the plaintiff. It could only be based on the ground that the defendants promised to abstain from disturbing the possession of the plaintiff or the peace of the family, on condition of their receiving a larger share than they were entitled to. There is no sacrifice of any interest or right. I am, therefore, bound to hold that the agreement is not supported by any consideration past or present. It is a settled principle of law that a promise to do a thing or the actual doing of it will not be a good consideration, if it is a thing which the party is already bound to do, either by the general law or by a subsisting contract with the other party. For instance, a promise by A to B to do something which B can already call upon him to do, can, in the contemplation of law, produce no fresh advantage to B or detriment to A. In the instant case, the plaintiff was entitled, under the Hindu law, to call upon the defendants to partition the properties and give him one-third share. But by the arrangement under Ext. C he gets a smaller share than he is entitled to and makes a virtual gift of the balance of his share to his brothers. In such a case the Court must view the transaction with jealousy and anxiously interpose its protection to guard the party from the exercise of unnatural influence by his brothers who are stronger than he. Where a son, without consideration, gives up valuable rights to his father, the doctrine of family arrangement does not apply — 'Savery v. King', (1856) 5 HLC 627 at p. 657 (P). In such cases, undue influence may be inferred when the benefit to the defendant is such as he has no right to claim, no natural or moral claim to it, and the grantor has no rational motive to make the grant. The evidence discloses that there was marked inequality between the parties, in social position as well as in intelligence, and the compromise arose out of the insistence of one of them and was of such a nature as to put the plaintiff, to some extent, in the power of the other. In such a case the Court is bound to give weight to the suspicious circumstances attending the conclusion of the contract, and will be more exacting in demanding a satisfactory explanation as to why the plaintiff gave up a substantial portion of his share. Section 25, explanation (2), Contract Act, lays down the true doctrine in such cases :

> "An agreement to which the consent of the promisor is not freely given is not void merely because the consideration is inadequate; but the

inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given."

If the parties had come to court for specific performance of the contract, the Court has the discretion not to direct specific performance in cases where it would be highly unreasonable to do so. In such cases, therefore, it is well settled that if inadequacy of the consideration is such as to shock the conscience specific performance will be refused. From whatever angle you view it, the promise of the plaintiff to surrender a part of his birth right does not appear to be supported by any consideration of equity or fairness.

(14) The question, then, is whether the Court is bound to record such an agreement under O. 23, R. 3, Civil P. C., as a family settlement, without regard to the adequacy or otherwise of the consideration for the compromise.

Order 23, Rule 3, Civil P. C., runs as follows :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise, or satisfaction, to be recorded, and shall pass a decree in accordance therewith."

The rule contemplates three things : (i) that it is proved that the suit has been adjusted wholly or in part; (ii) that the adjustment should have been brought about by a lawful agreement or compromise and (iii) that the plaintiff should be satisfied that there was a complete agreement amounting to an adjustment either in whole or in part. If these are proved, the Court shall order such an agreement to be recorded and pass a decree in accordance therewith. The rule, therefore, presupposes that there must be a completed agreement amounting to an adjustment, in whole or in part, of the suit itself. But where an agreement remains executory, or merely prescribes a procedure for the adjustment of the suit, there cannot be said to be a completed agreement. The agreement in question, Ext. A has to be examined in this light.

(15) Ext. A runs as follows :

"The parties have compromised as follows. There is no apprehension of a breach of the peace. Possession may be given in accordance with the terms of the compromise. The dispute between us regarding partition of property and the disputes in the village and the disturbance to peace have been settled by us.

TERMS.

(1) It is settled that each of the three brothers shall contribute Rs. 1000/- for the construction of the village temple and the villagers shall contribute the rest and help in its construction.

(2) The partition list which had been prepared on 28-2-49 in the presence of respectable people (and which is marked as Ext. C in this case) is modified as follows :

(a) Item 8 of the list relating to the lands in mouzas Tezgula is altered in respect of the second and third shares, the third share in Choraswall Talaratala is allotted to the second share and Baditala and Aintapalli which had been allotted to the second share, is allotted to the third share.

(b) The lands in mouza Ganghati have been divided into three shares, out of which one share had been given to Chamra Gountia and one share to Sundar and Bhikary Charan Gountia. It is now settled that that property shall be divided into four shares and one share shall be given to Chamra and the other three, will be taken by Sundar and Bhikary Charan Gountia.

(c) The six annas gountiayi right in Tezgula shall be enjoyed equally.

(d) The one anna gountiayayi right in Rai Suba is given to Chamra Gountia and the one-fourth share in the Ganghati gountiyayi right is given to the plaintiff and the balance to the defendants.

(e) The court-fee incurred by Chamra Gountia in the partition suit in the Subordinate Judge's Court shall be borne by the plaintiff and defendants 1 and 9 equally.

(f) The crops attached in the proceedings under S. 145, Cr. P. C., shall be taken by Sundar Gountia and Bhikary Charan Gountia.

(g) The plots indicated in the partition list of 28-2-49 and in cl. (2)(a) of this agreement, will be localised through the Patwari engaged by the parties and their numbers determined and the plans got prepared. The uncultivated lands of mouza Tezgula are not mentioned in the list of 28-2-49. They will be divided equally in three shares between the parties.

(h) In accordance with the settlement of today the parties shall have, each, his share determined in accordance with the plot numbers and the area, shall get the plans prepared, and shall file a compromise in the Court of the Subordinate Judge."

It will be seen on a plain reading of the contents of this document that there has not been any adjustment of the suit as such, except that the plaintiff has been allotted one-fourth instead of one-fifth share in mouza Ganghati. In respect of the suit itself, all that the parties agreed to is that they would get their shares localised with reference to the plot numbers of the area and get plans prepared through a Patwari, and then file a compromise in the Subordinate Judge's court. It is not a case of a suit having been adjusted as contemplated in R. 3 of O. 23, Civil P. C. The agreement contemplates something to be done by the parties through a Patwari and then seeks to take the suit completely out of the control of the Court. If any of the parties resiles from the agreement or neglects to perform its terms the agreement can only be enforced by a separate suit. In such a situation, the Court is helpless in executing the agreement even if it were to record the compromise and incorporate it in a decree. Apart from the question whether the agreement is lawful, the Court is bound to consider whether it has the power to refuse to record an agreement which is bound to result in injustice and lead to multiplicity of proceedings. Undoubtedly, the words of the rule do not, in terms, appear to confer a discretion on the Court, but it would seem from an observation of the Judicial Committee in — 'Sourendra Nath v. Tarubala Dasi', AIR 1930 PC 158 at pp. 162-163 (Q), that the Courts retain an inherent power not to allow their proceedings to be used to work substantial injustice. Reference may also be made to the decision of the House of Lords in — 'Neale v. Gordon Lennox', 1902 AC 465 (R). There have been several Indian decisions also which go to show that in such circumstances the Court is entitled to refuse to record a compromise if it does not work out an adjustment of the suit. In — 'Rupchand v. Janki Bai', AIR 1926 Bom 24 (S), the agreement was that the appeal in the High Court should continue to its normal end and

that whatever decree it may ultimately make, should be replaced by the private arrangement between the parties. The Court was of opinion that the suit had not been adjusted by this agreement. The case in — 'Haridas v. Ramdas', AIR 1931 Cal 205 (T), is very much like the case before us. The parties filed a petition on 20-11-25 asking for an adjournment on the ground that they proposed to settle the suit. By the terms of the agreement, the plaintiff was to execute a kebala in favour of the defendant in respect of his share of the property and the defendant was to execute a kebala in favour of the plaintiff in respect of his share mentioned in para 2 of the petition, and the suit properties were to be thus mutually exchanged by the kebalas. Then, the last clause was that the parties will complete everything by 'Thursday next'. Rankin C. J. posed the question thus :

"The case being adjourned for those reasons until Thursday, the question is: what was the bargain between the parties. Did the parties mean to commit themselves to the bargain, as it was stated on 20th November, or did they mean to wait till Thursday and then have a completed settlement — the kebalas exchanged and everything finished, and nothing to do by execution of compromises, execution of solinamas but a complete, clean and final settlement — each person having a declaration, by a kebala, to show what he had to get? It is abundantly clear to my mind that the intention was the latter. It was not intended that they agreed, by the solinama, to something and that the parties were to be remitted from the process of execution, to compel the performance of each kebala by the other. When Thursday came it is perfectly certain that the parties had not executed their respective kebalas."

It was held that the plaintiff was entitled, if he chose, to resile from the contract as it was not a completed agreement and there had been no adjustment of the suit. The view taken by the Patna High Court is much to the same effect. In — 'Jai Gobind v. Bagal', AIR 1950 Pat 445 (U), the parties had only agreed to abide by the award of arbitrators and it was held that the matter had not proceeded beyond the admission of an agreement contemplated and that the stage of adjustment of the claim had not been reached. In the Full Bench case reported in — 'Mt. Akbari Begum v. Rahmat Husain', AIR 1933 All 361 at p 880 (SB) (V), Sulaiman C. J. reiterated the same principle:

"Strictly speaking, an agreement is not identical with a compromise of the suit and may amount to a mere contract but as no decree can be passed in terms of a mere contract to abide by the statement of a third person, I am prepared to hold that there can be no adjustment of the suit by such a contract until the statement has been made."

(16) The expression 'adjustment of a suit' occurring in O. 23, R. 3, Civil P. C., corresponding to S. 98, old Civil P. C., 1859, came up for interpretation in — 'Komapalem v. Perota', 4 Mad HCR 423 (W), where their Lordships observed that that section provided that if a suit shall be adjusted by mutual agreement or compromise, such agreement or compromise shall be recorded and the suit shall be disposed of in accordance therewith. The question is whether in the instant case, the suit is to be regarded as having been adjusted by mutual agreement or compromise so that it can be disposed of in accordance therewith. In the Madras case the parties filed an agreement in Court that the suit should be dismissed if the second defendant took a special oath. The second defendant refused to take the oath and the commissioner appointed to administer the oath reported accordingly. Thereupon the trial court passed a decree in favour of the plaintiff. Their Lordships held that the agreement did not amount to an adjustment of the suit and said :

"We think that what is meant by this language is that the parties should agree upon some compromise respecting the subject-matter of the suit which is capable of being embodied in a decree whereby the suit would be disposed of."

(17) If I am right so far in interpreting these decisions, I must hold that the learned Subordinate Judge was right in his view that Ext. A was incomplete and indefinite and could not, therefore, be regarded as an adjustment of the suit.

(18) But apart from incompleteness, the agreement Ext. A suffers from several other infirmities which prevent its being treated as an adjustment of the suit. There are several minors arrayed as party-defendants in the suit and Ext. A does not purport to have been executed on their behalf. The plaintiff also impleaded his cosharers, as some of the bhogra and raiyati lands stood recorded jointly in their names. The agreement is not signed by these defendants 12-16, nor is there any prayer that the suit should be disposed of in terms of that agreement. The only prayer in exhibit A appears in the very opening words of the document to the effect that "possession may be ordered in terms of the compromise". There is therefore no escape from the conclusion that Ext. A purported to dispose of only the miscellaneous proceedings pending before the Magistrate and contemplated that the parties would amicably settle their civil suit also. I must accordingly hold that Ext. A is ineffective as a record of an adjustment of the suit either in whole or in part.

(19) It is undoubtedly true, as has been contended by the appellants, that the mere fact that the plaintiff gets a smaller share than he is legally entitled to, will not make the agreement unlawful if it is otherwise lawful. But as I have pointed out above if the settlement is the result of an inequality of position, undue influence or coercion, such as would be sufficient in law to vitiate it, then it cannot be said that there is mutuality between the parties or that consent is freely given. Section 23, Contract Act, says that the consideration or object of an agreement is lawful unless it involves or implies injury to the person or property of another. There is no reason given, nor have we been able to discover any, as to why the plaintiff should have consented to forego a part of his legitimate share. The only reason suggested is that he is issueless, but that is no reason for depriving a party of his rightful share which he acquires at birth. Agreements which are calculated to prevent a person from enjoying a fundamental right and which compel him to seek redress in a court of law must be held to be bad and unlawful. The plaintiff admittedly signed the agreement, but the question is whether he gave his free consent, and that question has to be determined by the Court. There being no consideration at all, as I have already stated, for such consent, I must hold that the agreement should be regarded as void.

(20) I have, therefore, arrived at the conclusion that both on facts and on law, the appellants are bound to fail. The appeal is accordingly dismissed with costs. Hearing fee Rs. 100/- (Rupees one hundred only.)

(21) NARASIMHAM J. : I agree.

B/H.G.P. Appeal dismissed.

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PANIGRAHI C. J. AND NARASIMHAM J.

Polaki Kotesam and others, Petitioners v. S. M. Patnaik, I. A. S. Registration Officer, Berhampur and others, Opposite Party.

O. J. C. No. 52 of 1953, D/- 8-9-1953.

(a) Representation of the People Act (1950), S. 28 — Rules under — Representation of the People (Preparation of Electoral Rolls) Rules, 1950, Rules 22 and 23 — Publication of draft Roll of Orissa Legislative Assembly.

Held that the electoral roll draft of Orissa State Legislative Assembly published on the 7th August, 1952, was not only a list of amendments contemplated in Rule 22(1) of the Representation of the People (Representation of Electoral Rolls) Rules 1950. The Election Commission acted under the proviso to sub-rule (3) of Rule 22 and directed the entire electoral roll of the year 1950 to be brought uptodate by incorporating all changes since the preparation of that roll, and caused it to be printed as a single roll. This was perfectly within the Commission's power to do. The choice was given to the Commission under the Rules either to have the entire old roll, together with the amendments, printed and published as a single roll or to prepare only a list of the amendments and publish it along with the original roll. (Paras 10, 11)

(b) Representation of the People Act (1950), Ss. 23, 28 and 62 — Representation of the People (Preparation of Electoral Rolls) Rules, 1950, Rr. 10 and 20 (2) — Valid draft publications of Roll — Petitioner's name not included — His remedy is either under R. 10 or R. 20(2) — He cannot apply for writ under Art. 226 — (Constitution of India, Art. 226) — (Civil P. C. (1908), S. 9).

Draft publication of Orissa Assembly Electoral Roll — Notice inviting objections issued simultaneously — Petitioner whose name was included in old roll but was not found in draft publication not taking steps under Rule 10 to get his name included by preferring claim— Another remedy available under Rule 20(2) not resorted to by applying to Election Commission for amending roll — Petitioner cannot come to High Court and ask for writ under Art. 226, when the fresh roll for the Constituency was prepared under S. 23 according to rules — In such a case the proper remedy is only either under R. 10 or Rule 20(2).

The right to be registered as a voter should be distinguished from the right to vote at an election. The Representation of the People Act, 1950, was enacted by Parliament in exercise of the powers conferred by Art. 327, and that Act prescribes the manner in which a person entitled to be registered as a voter can get himself so registered. If a person chooses not to avail himself or herself of the procedure prescribed by the Act to get himself registered as a voter, then he loses the right to vote conferred by S. 62, Representation of the People Act, 1951. Where a new right is created by statute and a remedy is provided by statute, the remedy so provided, and no other remedy, shall be available.

(Paras 12, 13, 14)

Anno: Civil P. C., S. 9 N. 62.

(c) Constitution of India, Art. 326 — Scope.

Article does not confer right to exercise franchise, unless a person gets himself registered as voter in electoral rolls in accordance with law — Rejection of nomination papers of a candidate because his name was not in electoral rolls is too remote a consequence of the omission of the names of petitioners from electoral rolls and is not by any stretch of imagination a denial of petitioner's so called right to elect. (Para 15)

Per Narasimham J.: It is true that as citizens of India the petitioners may have their right to exercise their franchise provided their names are found in the electoral roll of their constituency. If they are deprived of this right the Representation of the People (Preparation of Electoral Rolls) Rules prescribe the necessary procedure for rectifying the omission. But the petitioners' right to vote for a particular candidate in the ensuing elections depends on whether that candidate is validly nominated. When that candidate's nomination is rejected by a competent authority and under Art. 329 (b) the decision of the Returning Officer is not liable to challenge before any Court, the petitioners cannot reasonably contend before the High Court that they have been deprived of their right to vote for a particular candidate. This deprivation is brought about by the inaction on the part of that candidate in getting his name registered as a voter in the electoral roll of the constituency. Petition of the petitioners under Art. 226, is nothing else but a colourable device to indirectly challenge the order of rejection of the nomination paper and cannot be entertained. (Para 23)

(d) Constitution of India, Art. 329 — Scope.

Article creates a bar to interference by Court in electoral matters, even under Art. 226 — Validity of law made under Art. 328, namely, Representation of the People Act, 1950, cannot be questioned. (Para 16)

(e) Constitution of India, Art. 329 (a) — Scope.

Quaere: Whether a law relating to delimitation of constituencies would also include the preparation of electoral rolls and whether any challenge to the validity of such a law would be barred from the cognizance of the High Court. (Para 17)

(f) Constitution of India, Art. 226 — Jurisdiction — Writ against Election Commission.

Writ against Election Commission directing him to include petitioner's name in electoral roll or directing him to prepare new roll — Even if High Court of Orissa were to invoke its powers under Art. 226 (in spite of bar under Art. 329) the writ would be ineffective against Commission because Election Commission cannot be regarded as functioning within territorial limits of the High Court. AIR 1953 SC 210, Foll. (Para 18)

(g) Constitution of India, Arts. 329 (b) and 226 — Election.

To attract Art. 329(b), there must be "Election". Word "Election" has been used in the Constitution in a very wide and comprehensive sense to connote the entire process culminating in a candidate being declared elected. No writ can issue to Returning Officer with a view to quash his order rejecting or accepting a nomination paper, and that his decision can be questioned only by means of an election petition after the election is completed. Article 329 (b) thus constitutes a bar to a Court's interference because the process of election has already commenced, and the petitioners are not entitled to any relief under Art. 226. (Para 19)

(h) Constitution of India, Art. 226 — Delay.

Inordinate delay of ten months in seeking the remedy under Art. 226, is a good ground for rejecting the prayer, as the Court will not be inclined in favour of a party who has been admittedly guilty of laches. (Para 20)

P. V. B. Rao and B. Mohapatra, for Petitioners; B. M. Patnaik, V. Pasayat and S. Patnaik, for Opposite Party.

CASES REFERRED:

(A) (1831) 1 B & Ad 847: 109 ER 1001 (Pr 14)
(B) (1859) 6 CBNS 336: 28 LJCP 242 (Pr 14)
(C) (1935) 1935 AC 532: 104 LJPC 82 (Pr 14)
(D) ('40) AIR 1940 PC 105: 44 Cal WN 709 (PC) (Pr 14)
(E) ('52) AIR 1952 SC 64: 1952 SCR 218 (SC) (Prs 14, 19, 23)
(F) ('53) AIR 1953 SC 210: 1953 SCJ 293 (SC) (Pr 18)
(G) ('52) AIR 1952 Trav-C 1: ILR (1951) TC 808 (Pr 19)
(H) ('52) AIR 1952 Bom 277: ILR (1952) Bom 785 (Pr 19)
(I) ('53) AIR 1953 Pat 47: 31 Pat 145 (Pr 19)

PANIGRAHI C. J.:

At the conclusion of the hearing of this petition on 1-9-1953, we intimated our decision to the parties and took time to formulate our reasons for our order. I now proceed to set out the reasons for dismissing the petition.

(2) The petitioners, four in number, are residents of Berhampur Municipality in Ganjam district and were registered as voters in the electoral roll prepared in the year 1950. At the general election held in January 1952, two candidates were returned to the Orissa State Legislative Assembly from the Berhampur Constituency, but their election was set aside on 17-3-1953, by an order of the election tribunal, in Election Case No. 4 of 1952. A by-election was directed to be held under S. 150, Representation of the People Act, 1950 (Act 43 of 1950) and 7-5-1953 was fixed as the last date for receiving nominations and 14-6-1953, for conducting the poll. On the 7th May one Sri Gadi Narayanamurti, an Advocate of Berhampur whose name had been registered in the electoral roll of 1950 filed nomination paper, but the Returning Officer, Berhampur Constituency, who is the opposite party No. 1 in these proceedings, rejected the nomination paper on the ground that his name was not found in the new electoral roll prepared in 1952.

On 20-5-1953, the petitioners filed this petition under Art. 226 of the Constitution impleading the Returning Officer who was also the Electoral Registration Officer for the Berhampur Constituency, as opposite party No. 1 and the other candidates whose nomination has been accepted, as opposite parties 2 to 6. The petitioners have prayed for the issuance of a writ

> "in the nature of mandamus or any other order directing opposite party No. 1 to treat the first-prepared roll of 1950 as the existing electoral roll for the purpose of the by-election, and direct him not to conduct the election on the basis of the illegal electoral roll prepared in 1952."

(3) The contention on behalf of the opposite party No. 1 is that on 7-8-1952, a press note was published informing the public that a new electoral roll for the Orissa State Legislative Assembly was being draft-published, and that objections were invited from electors whose names might have been omitted from the roll. It is further stated that a fresh roll was prepared after a house to house enquiry in the Berhampur Municipality as it was not possible to prepare a mere list of additions and amendments, owing to the fact that there had been a complete re-distribution of the several municipal wards since the preparation of the last electoral roll in 1950; and that a new electoral roll, incorporating the additions and amendments, was draft-published on 7-8-1952 in a single roll superseding the previous electoral roll of the year 1950. The final publication of this new electoral roll was made on 31-1-1953.

(4) It is contended for the petitioners that the preparation of a new electoral roll in 1952, superseding the earlier roll of 1950, is illegal and contrary to the provisions contained in the Rules framed under the Representation of the People Act, 1950 (Act 43 of 1950) and that accordingly the old electoral roll should be deemed to be still in force. It is, therefore, prayed that the elections should be held on the basis of the electoral roll of the year 1950, and the Returning Officer should be directed, by a writ of mandamus to conduct the election on the basis of the roll.

(5) For a clear appreciation of the contentions raised on either side, it is necessary to quote the relevant Articles of the Constitutions, as also the relevant Rules framed under the Representation of the People Act with regard to the preparation of electoral rolls.

(6) Part 15 of the Constitution deals with Elections and the law relating to elections is contained in Arts. 324 to 329 of the Constitution (in that part).

Article 324 runs as follows :

> "'324' (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President held under this constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of, or in connexion with elections to Parliament and to the Legislatures of States, shall be vested in a Commission (referred to in this constitution as the Election Commission.)
>
> (2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and the other Election Commissioners shall, subject to the provision of any law made in that behalf by Parliament, be made by the President.
>
> (3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as Chairman of the Election Commission.
>
> (4) Before each general election to the House of the People and to the Legislative Assembly of each State and before each biennial election to the Legislative Council of each State having such Council, the President may also appoint, after consultation with the Election Commission, such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by cl. (1).
>
> (5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may, by rule, determine;
>
> Provided that the Chief Election Commissioner shall not be removed from his office except in

like manner and on the like grounds, as a Judge of the Supreme Court; and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor or Rajpramukh of a State, shall when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by cl. (1)."

Then comes Art. 326 which reads as follows :

"326 : 'Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage'. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 21 years of age, on such date as may be fixed in that behalf, by or under any law made by the appropriate Legislature, and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

Article 327 says :

"327: 'Power of Parliament to make provision with respect to elections to Legislatures. Subject to the provisions of this Constitution, Parliament may from time to time by law make provisions with respect to all matters relating to, or in connexion with, election to either House of Parliament or to the House or either House of the Legislature of the State including the preparation electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

Next comes Art. 328:

"328: 'Power of Legislature of a State to make provisions with respect to election to such Legislature'. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

Finally comes Art. 329 which is in the following terms :

"329: 'Bar to interference by Courts in electoral matters. Notwithstanding anything in this Constitution :

(a) the validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies, made or purporting to be made under Art. 327 or Art. 328, shall not be called in question in any Court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

(7) It will be seen that the superintendence, direction and control of the preparation of the electoral rolls is vested in the Election Commission under Art. 324. Under Art. 325 every adult person is entitled to be registered as a voter. Under Art. 326 Parliament is vested with the power to make laws with respect to all matters relating to elections including the preparation of electoral rolls, the delimitation of constituencies, all other matters necessary for the due constitution of House of Legislature. Article 328 vests a similar power on the State Legislature to make provisions by law with respect to electoral matters, if the parliament has not done so. Article 329 bars interference by Courts in electoral matters generally and Art. 329(b) specifically bars interference with an election except by an election petition in such manner as is provided by law.

(8) The Representation of the People Act 1950 (Act 43 of 1950) was passed by Parliament, in order to provide for the allocation of seats in and the delimitation of constituencies for the purpose of elections to the House of the People and the Legislatures of States, the qualifications of voters at such elections, and the preparation of electoral rolls and all matters connected therewith. Part III of the Act deals with registration of Parliamentary electors and Part IV with the registration of electors for the State Legislatures. Section 26 deals with the preparation of electoral rolls for the Assembly constituencies and lays down that the provisions of Ss. 15 to 25 shall apply in relation to the Assembly constituencies as they apply in relation to Parliamentary Constituencies.

Section 15 says that for every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election Commission, and S. 23 says that the electoral roll for each constituency shall be prepared every year in the prescribed manner by reference to the qualifying date : Provided that it shall not be necessary to prepare any roll during the year 1951.

Section 24 says that the electoral roll first prepared under this Act shall remain in force until the 30th day of September 1952 and every electoral roll subsequently prepared shall come into force on the 1st day of October next, after the qualifying date by reference to which that roll is prepared, and shall remain in force until the 30th of September next following.

(9) A set of rules, known as the Representation of the People (Preparation of Electoral Rolls) Rules, 1950, was published on the 26th July 1950 prescribing how the rolls are to be prepared. Rule 22 deals with the annual preparation of electoral rolls, and reads as follows:

"22. — 'Annual preparation of Electoral roll' —

(i) After the electoral rolls list prepared under the Act have been published under Rule 19, the Election Commission may, for the purpose of any subsequent annual preparation of the electoral roll for any constituency under S. 23 of the Act, direct the preparation of a list of amendments to the electoral roll for such constituency for the time being in force, for its publication under R. 9, and the provisions of Rules 3 to 8 (both inclusive) shall, so far as they are applicable, apply in the case of such preparation of the list of the electoral rolls.

(ii) When any such list of amendments to an electoral roll for a constituency has been so

prepared, the electoral roll for such constituency for the time being in force, together with the list of amendments thereto so prepared, shall be published under R. 2, & shall be deemed to be the electoral roll prepared for that constituency, and the provisions of rules 10 to 19 (both inclusive) shall, so far as they are applicable apply in the case of every such roll (including the list of amendments) in like manner as they apply in the case of electoral rolls first prepared under the Act.

(iii) When a list of amendments is prepared for any constituency under the foregoing provisions of this Rule, it shall not be necessary to re-print the entire roll, but the list of amendments need only be printed;

Provided that the Election Commission may, if he deems it expedient so to do direct that the entire roll along with the list of amendments shall be printed as a single roll."

(10) The petitioner's contention is that the electoral roll draft-published on 7-8-1952, is only a list of amendments contemplated in R. 22 (1) quoted above and this list of amendments should have been published, along with the first electoral roll prepared in 1950, and that roll, together with this list of amendments, should be deemed to be the electoral roll prepared for the constituency in 1952 as laid down in R. 22(2).

It is further submitted that a list of amendments only need have been printed as contemplated in sub-r. (3) of R. 22 and that the revised roll which was draft-published on 7-8-1952 (as a single roll) has not been prepared in compliance with the rules and as such is illegal.

The contention of opposite party No. 1, on the other hand, is that the Election Commission, acting under the proviso to sub-r. (3) of R. 22 directed that the entire roll, together with the amendments, should be printed as a single roll. The very language of R. 22 gives a discretion to the Commission to adopt either of the two methods in preparing the electoral rolls. He may either direct the preparation of only a list of amendments under R. 22(1) and cause it to be published along with the old prepared roll under R. 22 (2) — in such a case he may only cause a list of the amendments to be printed under Rule 22 (3) or he may direct that the entire roll along with the amendments shall be printed and published as a single roll under the proviso to R. 22(3). The contention of opposite party No. 1 is that it was the latter course that had been adopted by the Election Commission and this contention appears to me to be well founded in fact.

(11) The following press note was issued on 7-8-1952 intimating that the electoral roll was being draft-published and inviting objections and claims to be registered thereunder. It will be useful to quote it here.

"HOME (ELECTIONS) DEPARTMENT
Press Note.
7th August, 1952.

It is notified for general information that the electoral rolls for the State of Orissa are being draft-published throughout the State on the 7th August 1952. The complete electoral roll of a constituency will be published formally at the office of the Electoral Registration Officer of the constituency concerned; and relevant portions of the rolls will be informally published at important rural centres within the constituency. Any person whose name is not included in the electoral roll of constituency and who is entitled to be registered therein may apply, in form VI, to the revising authority of the constituency or to any other office authorised in this behalf, for the inclusion of his name in the roll. A voter of a particular constituency may file objection in Form VIII to the inclusion of any other name not entitled to be an elector in the same constituency, with the officer or officers concerned. Claims & objection will be received by the abovementioned officer on any day within 21 days from the date of publication of the electoral rolls, that is, from the 7th August 1952 to the 28th August 1952. ....."

The position was further made clear by an order of the Election Commission dated 17th January 1953 which also I quote below:

"No. 125/6/52 — Elec. I.
No. 1 Aurangazeb Road,
New Delhi, Jan., 53.

ORDER.

In exercise of the powers conferred by sub-rule (3) of Rule 22 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1950, the Election Commission hereby directs that the 'entire electoral roll along with the lists of amendments' pertaining to each of the areas specified in the table below 'shall be printed as a single roll'.

1. Ganjam District — (i) Berhampur Municipal area.
(ii) Aska and Surada Panchayat Board area.
(iii) Russellkonda Panchayat Board area.

Sd/- P. S. Subramanian.
OFFICER ON SPECIAL DUTY."

There can thus be no controversy that the Election Commission acted under the proviso to sub-rule (3) of Rule 22 and directed the entire electoral roll of the year 1950 to be brought up-to-date by incorporating all changes since the preparation of that roll, and caused it to be printed as a single roll. This was perfectly within the Commission's power to do, as I have already pointed out above. The choice is given to the Commission under the rules either to have the entire old roll, together with the amendments, printed and published as a single roll as has been done in this case, or to prepare only a list of the amendments and publish it along with the original roll. No question of illegality can therefore arise.

(12) The next question that arises is whether the petitioners took steps, subsequent to the draft-publication of the electoral roll on the 7th August, 1952, to have their names included into. Rule 10 of the Representation of the People (Preparation of Electoral Rolls) Rules 1950 lays down that simultaneously with the draft publication of the electoral roll, a notice shall be published calling upon the persons entered in the roll to lodge any objection that they may have to make to the roll as published and calling upon persons claiming to be entered on the roll, to lodge their claim in the prescribed manner.

It is admitted that the petitioners did not comply with the requirements of this rule. If such a claim had been preferred the revising authority appointed under the rules would have included the names of the petitioners in the revised roll and may have then also considered the propriety or otherwise of preparing and publishing fresh roll. In that case the Electoral Registration Officer may have modified the roll, if he was satisfied that the objection or claim made by the petitioners was valid. There was also another remedy open to the petitioners under sub-rule (2) of Rule 20. This enables a person whose name is not included in

the electoral roll of a constituency and who is entitled to be registered thereunder, to apply to the Election Commission for amending the roll, by including his name therein.

The petitioners did not take recourse to either of the remedies provided under the Rules, and by their own obstinacy they have lost a sound case by pursuing a wrong remedy. The only argument laboriously addressed to us is that the Election Commission was not right in directing the preparation of a fresh roll for this constituency and as such the petitioners, on their part, were not bound to adopt the remedies prescribed under the Rules. This contention appears to me to be ill-founded.

(13) Section 23, Representation of the People Act (Act 43 of 1950) says that the electoral roll for each constituency shall be prepared every year in the prescribed manner by reference to the qualifying date. The rules prescribe the manner in which this has to be done. It may be done in two ways: either by merely preparing lists of amendments (additions alterations or omissions) and publishing it along with the original roll; or by preparing an altogether fresh roll, and publishing it as a single roll, after incorporating all the amendments therein.

The necessity for this is obvious. In the rural areas all that can be done is merely to prepare lists of amendments to the roll every year as it is not practicable to find suitable machinery for conducting a house to house search in every village. In urban areas, where there are municipalities, Panchayat Boards, etc., the preparation of a new roll is not only feasible but may also be necessary in some cases. In this particular case it is said that there was a complete re-distribution of wards and complete change in ward numbers and house numbers in the Berhampur municipality, and the revising authority therefore found it difficult to prepare only a list of amendments to the electoral roll of 1950 which had been prepared on the basis of the old ward numbers & houses.

The statement of opposite party No. 1 shows that, after obtaining the previous sanction of the Election Commission, house to house enquiry was conducted within the municipality and a new roll was prepared as directed by the Commission. In these circumstances, it is not open to the petitioners to refuse to adopt the procedure laid down in the Act, and the rules made thereunder, for getting their names included in the roll, and to insist on saying that their rights have been violated and that they are entitled to the protection of this Court.

(14) Article 326 of the Constitution entitles a person over 21 years of age, to be registered as a voter, and S. 62, Representation of the People Act, 1951 says that:

> "No person who is not, and except as expressly provided by this Act, every person who is, for the time being, entered in the roll of any constituency, shall be entitled to vote in that constituency."

The right to be registered as a voter should be distinguished from the right to vote at an election. The Representation of the People Act, 1950, has been enacted by Parliament in exercise of the powers conferred by Art. 327, and that Act prescribes the manner in which a person entitled to be registered as a voter can get himself so registered. If a person chooses not to avail himself or herself of the procedure prescribed by the Act to get himself registered as a voter, then he loses the right to vote conferred by S. 62, Representation of the People Act, 1951. It is well settled that where a new right is created by statute and a remedy is provided, by statute, the remedy so provided, and no other remedy, shall be available.

The principle is stated in the well known passage in the judgment of Lord Tenterdon in — 'Doe d' Bishop of Rochester v. Bridges', (1831) 1 B and Ad. 847 (A):

> "Where an Act creates an obligation and enforces performance in a specific manner we take it to be a general rule that the performance cannot be enforced in any other manner. If an obligation is created but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case."

The rule that where a right or a liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be followed, is also brought out with great force and clearness in — 'Wolverhampton New Water Works Co. v. Hawkesford', (1859) 6 CB NS 336 (B):

> "There are three classes of cases in which liability may be especially founded upon statute. One is, where there was a liability existing at common law and that liability is affirmed by the statute which gives a special and peculiar form of remedy, different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.
>
> The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can proceed by an action at common law.
>
> But there is a third class, namely, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it ..... there, the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class — the form given by the statute must be adopted and adhered to."

The above principle has been adopted by the Judicial Committee in —'Attorney-General of Trinidad & Tobago v. Gordon Grant & Co. Ltd., 1935 AC 532 (C) and in the — 'Secretary of State v. Mask and Co.', AIR 1940 PC 105 (D). Lately, it has also been followed by the Supreme Court in — 'Ponnuswami v. Returning Officer, Namakkal', AIR 1952 SC 64 (E).

I am, therefore, satisfied that the petitioners are not entitled to any relief in the form of a writ in exercise of our power under Art. 226 of the Constitution as they did not pursue the remedy provided, the Representation of the People Act and the Rules made thereunder, for getting their names registered in the electoral roll. They cannot exercise the right 'mode et forma', according to their wishes, and according to their own understanding of the rules. They had the opportunity of exercising it without let or hindrance, in accordance with rule.

(15) But this is not the only hurdle in the way of the petitioner's success in this petition. It is pointed out by opposite party No. 1 that this petition is not a bona fide one, and that the petitioners have been set up by the candidate whose nomination has been rejected; and that the real issue in this petition is whether the nomination paper of Sri Narayanamurty should have been ac-

cepted on the ground that his name was included in the original roll of 1950.

The simple question, therefore, is, whether the action of the Returning Officer in rejecting the nomination paper of Sri Narayanamurty is liable to be questioned at this stage by a writ issued by this Court in exercise of the powers vested under Art. 226 of the Constitution. It is further pointed out that the petitioners were candidates neither at the previous election nor at the subsequent one and that their only right, if any which can be said to have been infringed at all is the right to have their names included in the new electoral roll prepared in 1952, that they may exercise their right of franchise — a right conferred by the Constitution of India.

The claim put forward on behalf of the petitioners is that Art. 326 gives them a right to exercise their franchise and that this right cannot be taken away arbitrarily. The inclination of my mind is that no such right is conferred unless the petitioners first get themselves registered as voters in the electoral rolls in accordance with the procedure prescribed by law. The right to elect a person follows only after getting one's name registered as an elector. The grievance ventilated in this petition is that on account of the omission of their names in the electoral roll the petitioners have been deprived of the right to exercise their franchise, that is, to get the proper person elected to the State Assembly. They say that the rejection of the nomination paper of Sri Narayanamurty itself amounts to a denial of their right of franchise. This complaint is as fanciful as it is curious. The rejection by the Returning Officer of the nomination paper of Sri Narayanamurty appears to me to be too remote a consequence of the omission of the petitioners names from the electoral roll, and does not constitute by any stretch of imagination a denial of the petitioner's so called right.

(16) If the petitioner's contention were to be accepted, then no election can possibly be held, as there are always bound to be some errors or omissions in the electoral rolls prepared for the several constituencies which, in a country like ours, are spread over vast areas. In order that democratic institutions may function properly and to ensure that the Legislatures are not deprived of proper representation from the various constituencies, it is necessary that the process of election should be expeditious. The laws of Western Countries, particularly England, therefore, provide for all such grievances to be ventilated only by means of an election petition, after the elections are over; and give the stamp of finality to the electoral rolls prepared by the administrative machinery before the process of election begins.

Article 329 of the Constitution of India, accordingly, creates a bar to interference by Courts in electoral matters generally. The opening words of that Article expressly override the extraordinary powers conferred upon High Courts under Art. 226. The expression "Notwithstanding anything in this Constitution" indicates that in spite of the power conferred on High Courts under Art. 226 the validity of any law made, or purporting to be made, under Art. 328 shall not be called in question.

(17) The Representation of the People Act, 1950, purports to be an enactment providing for the allocation of seats in, and the delimitation of constituencies for the purpose of elections, the preparation of electoral rolls and matters connected therewith. Elections to Parliament is mentioned in Entry 72 of the Union list (List I of Sch. 7). This comprises not only the delimitation of constituencies and allocation of seats, but also preparation of electoral rolls and all other matters necessary for securing the due constitution of the Legislature. The marginal note to Art. 329 shows that Courts cannot interfere in "electoral Matters" generally.

It is pointed out, however, that Art. 329(a) mentions only "delimitation of constituencies or allotment of seats" and does not make any specific reference to preparation of electoral rolls. The question whether a law relating to delimitation of constituencies would also include the preparation of electoral rolls and whether any challenge to the validity of such a law would be barred from the cognizance of my court does not arise for direct decision in this case, as the matter has gone beyond that stage. That question may have to be decided on a future occasion if and when it arises directly for decision.

(18) The opposite party further contends that the electoral roll is prepared "under the superintendance, direction and control of the Election Commission" and that this petition cannot be enquired into, in the absence of the Election Commission which is not impleaded as a party to these proceedings. Even if this Court were to invoke its special powers under Art. 226, on the ground of any illegality committed by the Commission any writ that we may issue will be ineffective as against the Commission which is beyond our reach. This contention is not without force.

Any writ issued by us can run only through the territories which are within the jurisdiction of this Court. It has recently been held by the Supreme Court in the — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (F), that the Election Commission cannot be regarded as functioning within the territorial limits of all the High Courts. As such it is not amenable to the jurisdiction of this Court under Art. 226. We cannot direct the Commission to include the petitioner's name in the electoral roll or to withdraw the new roll prepared under its direction.

(19) But opposite party No. 1 rests his case on an even more solid foundation and relies on Art. 329(b) which bars the jurisdiction to issue a writ even under Art. 226. That article already quoted, says that no election to the Legislature of a State shall be called in question except by an election petition. The question for consideration is whether there has been an "election" in this case which attracts the provisions of Art. 329 (b). The word 'election' has been used in a very wide and comprehensive sense in the Constitution. Part XV of the Constitution is intituled "Elections" and deals with elections generally, the preparation of electoral rolls, franchise, and laws to be made by Parliament with respect to elections. In one sense an election may be said to commence with canvassing by a candidate after the final publication of the electoral rolls, if it is imminent.

The following passage from Halsbury, Vol. 12, Edn. 2, page 237, is instructive :

"Although the first formal step is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is reasonably immenent. Neither the issue of a writ, nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination afford any criterion. The election will usually begin at least earlier than the issue of a writ."

The proper interpretation of the above Article was considered by the Supreme Court in —'Ponnuswami's case (E)' and it has been ruled by a Full Bench of that Court that the word 'election' has been used in a wide sense to connote the entire process culminating in a candidate being declared elected. In that case the appellant was a candidate for election to the Legislative Assembly of the State of Madras, and his nomination was rejected by the Returning Officer. The High Court of Madras declined to issue a writ of certiorari to quash the order of the Returning Officer and direct him to include the appellant's name in the list of valid nominations to be published. The Supreme Court, agreeing with the view of the Madras Judges, held that the High Court had no jurisdiction to interfere with the order of the Returning Officer. The facts of the instant case are identical with those that were considered by the Supreme Court.

The same view has been adopted by several other High Courts. See: —In re Dr. John Matthai', AIR 1952 Trav C 1 (G); — 'Shankar v. Returning Officer, Kolaba', AIR 1952 Bom 277 (H); — 'Sukar Gope v. State of Bihar', AIR 1953 Pat 47 (I). The consensus of opinion among the High Courts thus is that no writ can issue to a Returning Officer with a view to quash his order rejecting or accepting a nomination paper, and that his decision can be questioned only by means of an election petition after the election is completed. Article 329(b) thus constitutes a bar to a Court's interference because the process of election has already commenced, and the petitioners are not entitled to any relief under Art. 226.

(20) It has been further urged, on behalf of the opposite party that no writ should issue as the petitioners have come up to this Court nearly ten months after the draft-publication of the electoral rolls in August 1952. This inordinate delay in seeking remedy is itself a good ground for rejecting their prayer as the Court will not be inclined in favour of a party who has been admittedly guilty of laches.

(21) All the points raised on behalf of opposite party No. 1 are well founded. The petition is accordingly dismissed with costs of opposite party No. 1 which we assess at Rs. 150/- (Rupees one hundred fifty only). None of the other opposite parties, except Opposite Party No. 3 appeared in this Court, but Opposite Party No. 3 did not take part in the hearing. We would not, therefore, allow costs to him.

NARASIMHAM J.:

(22) On 7-3-1952, the revised electoral roll of Berhampur constituency was draft-published in the prescribed manner and notice was given to all concerned to file their claims or objections, if any, within twenty one days from the date of draft-publication. Persons whose names were not included in the draft electoral roll and who were entitled to be registered therein were also informed that they may apply in the prescribed form to the revising authority. Though the petitioners' names were not found in the draft electoral roll they did not care to file any claim or objection against the preparation of the roll on the ground that the provisions of Rule 22 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1950 were contravened nor did they care to apply for the registration of their names on the said roll.

The draft electoral roll was finally published in the prescribed manner on 31-1-53. Under Rule 20 of the said Rules even after final publication persons whose names were not included in the roll could apply to the prescribed authority for registering their names. Admittedly the petitioners did not care to avail of the provisions of this rule either. It is true that at that time they could not anticipate that the Election Tribunal who was then sitting to hear the petition filed against the election of Sri Ramachandra Misra and Sri Dandapani Das from the said constituency would set aside their election. But it was well-known that the election of the aforesaid two gentlemen was under challenge before the competent Tribunal and if the petitioners felt really aggrieved by the deprivation of their right of franchise on account of the non-inclusion of their names in the revised electoral roll they could have approached the competent authority in time. They, however, kept quiet even after 17-3-53 when the said Tribunal set aside the election of the aforesaid two gentlemen.

A fresh election was then ordered to be held in the constituency and the 7th of May was fixed as the date for receiving nominations. Even after the notification of the aforesaid date for the purpose of fresh election the petitioners did not care to move the authorities concerned for the inclusion of their names in the electoral roll. It was only when the nomination of Sri Gadi Narayanamurty was rejected by the Returning Officer on the 7th May that the petitioners suddenly became alive to the fact that the electoral roll was not published in the prescribed manner. The petition under Art. 226 of the Constitution was filed before this Court on the 20-5-1953.

(23) I am not satisfied about the bona fides of this petition. Sri Gadi Narayanamurty's nomination was rejected by the Returning Officer on the 7th May on the ground that his name was not included in the revised electoral roll of the constituency. The recent decision of the Supreme Court in — 'AIR 1952 SC 64 (E)', has concluded the question whether an application under Art. 226 would lie against an order of the Returning Officer rejecting the nomination of a candidate. Their Lordships of the Supreme Court held that such an application would not lie in view of the provisions of Art. 329(b) of the Constitution. Sri Gadi Narayanamurty could not, therefore, directly challenge before this Court the correctness of the order of the Returning Officer rejecting his nomination. The present petition appears to be nothing else but a colourable device to indirectly challenge that order.

The petitioners admitted that according to their belief Sri Gadi Narayanamurty was a fit candidate to represent them in the State Assembly, that he had been selected by the Utkal Provincial Congress Committee and that by the rejection of his nomination paper on illegal grounds the petitioners have been deprived of their right to send their representative to the State Assembly and from exercising their franchise. These admissions coupled with the complete silence of the petitioners to take any steps to challenge the validity of the revised electoral roll till the rejection of the nomination of Sri Gadi Narayanamurty leave no room for doubt that the primary purpose of the present petition is to get the order of the Returning Officer set aside indirectly on the ground that the revised electoral roll itself was not validly prepared.

It is true that as citizen of India the petitioners may have their right to exercise their franchise provided their names are found in the electoral roll of their constituency. If they are deprived of this right the Representation of the People (Preparation of Electoral Rolls) Rules prescribe the neces-

sary procedure for rectifying the omission. But the petitioner's right to vote for a particular candidate in the ensuing elections depends on whether that candidate is validly nominated. When that candidate's nomination is rejected by a competent authority and Art. 329(b) as construed by their Lordships of the Supreme Court in the decisions referred to above says clearly that the decision of the Returning Officer is not liable to challenge before any Court, the petitioners cannot reasonably contend before us that they have been deprived of their right to vote for a particular candidate. This deprivation is brought about by the inaction on the part of that candidate (Sri Gadi Narayanamurty) in getting his name registered as a voter in the electoral roll of the constituency.

(24) An ingenious attempt was made to get round the aforesaid decision of the Supreme Court by urging that the petitioners were not in any way challenging the decision of the Returning Officer rejecting the nomination of Sri Gadi Narayanamurty but that they were challenging the revised electoral roll in contravention of the provisions of R. 22 of the Representation of the People (Preparation of Electoral Rolls) Rules.

This argument cannot, however, bear scrutiny. The time for challenging the validity of the revised electoral roll had expired long ago. The prayer of the petitioners in the present petition was for the issue of a writ of Mandamus directing the Returning Officer to treat the old electoral roll of 1950 as the valid electoral roll for the purpose of holding the by-election and directing him not to conduct the by-election on the basis of the revised electoral roll of 1952. However cleverly the petition might have been worded there can be no doubt that in essence, the prayer of the petitioners, if allowed, would amount to setting aside the order of the Returning Officer rejecting the nomination of Sri Gadi Narayanamurty. The process for holding the by-election in the said constituency had already commenced some months ago and any direction that may be issued to the Returning Officer now as to whether the old electoral roll or the revised electoral roll should be considered to be the valid electoral roll for the constituency would amount to interfering with the conduct of the elections and would thus amount to a contravention by this Court of Art. 329(b) of the Constitution as construed by the Supreme Court.

The petitioners are not without any remedy. If elections are held under the revised electoral roll such elections could perhaps be called into question later on before the Election Tribunal on the ground that the entire election became invalid due to the invalidity of the revised electoral roll on the basis of which it was held.

(25) I would, therefore, agree with my Lord that the petition should be dismissed with costs.

A/R.G.D. Petition dismissed.

A.I.R. 1954 ORISSA 94 (Vol. 41, C.N. 27)

JAGANNADHADAS C. J. AND NARASIMHAM J.

Gourhari Rice Mill, Petitioner v. Commr. of Income-tax, Opposite Party.

S. J. C. No. 95 of 1950, D/- 6-11-1952.

(a) Income-tax Act (1922), S. 14(2)(c) — Deemed to have received in British India.

Where the assessee, a resident of the former Nilgiri State, operated a rice mill in the State and dispatched the milled rice to the various purchasers through railway stations located in British India and the delivery of the goods to the purchasers consequently took place in British India, the sale proceeds also were received in British India, in the form of hundis which were also cashed in those territories:

Held that mere fact that the hundis were delivered to the assessee's agent in British India and they were cashed in British India did not suffice for holding that the entire profits were received as income in British India. Mere transmission of funds through British India would not suffice and it should be further shown that the monies were received or deemed to have been received as income. AIR 1939 PC 1 and AIR 1952 Bom 306, Rel. on. (Para 4)

(b) Income-tax Act (1922), S. 64(2) — Objection to jurisdiction of Income-tax Officer.

Where an assessee who is not a resident of British India, submits to the jurisdiction of the Income-tax Officer by filing a return through his agent in British India, the second proviso to sub-s. (3) of S. 64, Income-tax Act is a complete bar to his raising any objection regarding the jurisdiction of the Income-tax Officer, to make the assessment. (Para 5)

Anno: Income-tax Act, S. 64 N. 3.

B. K. Pal and M. S. Mohanty, for Petitioner; G. C. Das, for Opposite Party.

CASES REFERRED:

(A) ('50) AIR 1950 SC 134: 1950 SCJ 374 (SC) (Pr 3)

(B) ('39) AIR 1939 PC 1: ILR (1939) Mad 178 (PC) (Pr 4)

(C) ('52) AIR 1952 Bom 306: 1952-21 ITR 82 (Pr 4)

NARASIMHAM J.:

This is a petition under S. 66(2), Indian Income-tax Act requesting the Court to direct the Income-tax Appellate Tribunal, Madras Bench, to state a case under the following circumstances.

(2) The petitioner is an unregistered firm carrying on the business of milling rice in its factory situated in Nilgiri State (now merged in the district of Balasore) and exporting the same for sale to various places in the territories which were formerly known as British India. For the assessment year 1943-44 the firm was assessed to income-tax as a non-resident through its admitted agent Jashbant Bhol who was a resident of village Angula, P. S. Soro, in Balasore district. Even before the Income-tax Officer the petitioner objected to the assessment on the ground that the entire profits of the business accrued or arose in Nilgiri State which then did not form part of British India and was consequently exempt from assessment. As a matter of fact, the petitioner was assessed to income-tax by the Income-tax Officer, Nilgiri State, also for the year in question. The Income-tax Officer of Balasore, however, rejected the petitioner's objection observing that the sales took place either at Howrah or at Balasore in British India and that the evidence of the petitioner's partner Brundaban Ransingh was itself sufficient to show that the sale prices were received in the form of hundis from Calcutta which were mostly cashed in some places in Balasore district. He, therefore, held that the profits of the firm "accrued or arose and were received in British India". On appeal, the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer observing

"It is now settled law that the profit arises where the sales are made and a sale is not com-

plete until delivery is given of the goods concerned; in view of the matter, the entire income of the appellant accrued in British India."

Before the Income-tax Appellate Tribunal the same point was urged. But the Tribunal held on the facts that the sale proceeds of the rice supplied by the Mill were received in British India, that the goods were delivered to the purchasers in British India and not in Nilgiri State and that consequently no part of the profits accrued or arose in Nilgiri State. The petitioner thereupon requested the Tribunal to state a case. But the Tribunal rejected its prayer.

(3) Mr. Mohanti rightly contended that in view of the recent decision of the Supreme Court reported in — 'Commissioner of Income-Tax, Bombay v. Ahmedbhai Umarbhai and Co. Bombay', A I R 1950 S C 134 (A), the income-tax authorities were not right in holding that no part of the income accrued or arose in Nilgiri State. Admittedly the rice mill is located in Nilgiri State and the milling operation is entirely performed there. The facts found are that the rice is then despatched to various purchasers through railway stations located in British India and that the delivery of the goods to the purchasers consequently took place in British India. The sale proceeds also were received in British India in the form of Hundis which were also cashed in those territories. But the income-tax authorities were not justified in relying solely on the place of delivery of goods and the place of receipt of sale proceeds as decisive on the question as to where the profits of the business accrued or arose. In the aforesaid Supreme Court decision it was pointed out that where goods were manufactured in Hyderabad State and the sale of the goods was effected in British India and the sale prices were also realised there a portion of the profits of the business accrued or arose in Hyderabad State also. Applying the principles of that decision to the present case, it would appear prima facie that a portion of the profits of the petitioner's business accrued or arose in Nilgiri State. The authorities concerned will doubtless bear in mind the provisions of S. 42, especially sub-s. (3), in apportioning the total profits of the business between the profits that accrued or arose in Nilgiri State and the profits that accrued or arose in British India.

(4) The next question would be whether the petitioner is entitled to claim any relief in respect of that portion of the income which accrued or arose in Nilgiri State. Clause (c) of sub-s. (2) of S. 14, Income-tax Act is material in this connection. It runs as follows :

"S. 14(2): The tax shall not be payable by an assessee —

(a) xx xx xx

(b) xx xx xx

(c) in respect of any income, profits or gains accruing or arising to him within an Indian State unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee, or are assessable under S. 42."

The income-tax authorities have not examined the materials furnished by the petitioner with a view to ascertain what portion of the profits which accrued in Nilgiri State was received or deemed to be received in British India. Investigation into this aspect was presumably not considered necessary in view of their decision that no part of the income accrued or arose in Nilgiri State. But prima facie, that view has been shown to be incorrect and consequently further investigation with a view to see whether cl. (c) of sub-s. (2) of S. 14, Income-tax Act is applicable cannot be avoided.

It will perhaps be premature to discuss this point at great length in this order. It is, however, sufficient to note that the mere fact that the hundis were delivered to the petitioner's agent in British India and they were cashed in British India may not suffice for holding that the entire profits were received as income in British India. Mere transmission of funds through British India would not suffice and it should be further shown that the monies were received or deemed to have been received as income (see pp. 239 to 241 of Sampathiyengar's Indian Income Tax Act, Edn. 4, and also the decision of the Privy Council reported in — 'Commr. of Income-tax, Madras v. S. L. Mathias', AIR 1939 PC 1 (B) and the decision of the Bombay High Court in — 'Kirloskar Bros. Ltd. v. Commr. of Income Tax, Bombay', AIR 1952 Bom 306 (C). I am refraining from discussing this point at length because it may have to be fully considered by this Court when the Tribunal states a case as directed in this order.

(5) Another minor point taken by Mr. Mohanti on behalf of the petitioner may also be referred to. He objected to the jurisdiction of the Income-tax Officer of Balasore to make an assessment on the petitioner who was a non-resident. This objection was rightly rejected by the Income-tax authorities. The petitioner submitted to the jurisdiction of the Income-tax Officer by filing a return through its agent Jashbant Bhol and consequently the second proviso to sub-s. (3) of S. 64 Income-tax Act is a complete bar to the petitioner raising any objection regarding the jurisdiction of the Income-tax Officer, Balasore, to make the assessment.

(6) I would, therefore, direct the Tribunal concerned to state the following case for the decision of this Court

(i) Whether on the facts and circumstances of this case it can be held that the whole or a portion of the profits of the petitioner's business accrued or arose in Nilgiri State for the year in question.

(ii) Whether on the facts and circumstances of this case any portion of the income, profits or gains which accrued or arose to the petitioner in Nilgiri State was received or deemed to be received in or brought into British India by or on behalf of the petitioner or is assessable under S. 42, Indian Income-tax Act.

(7) JAGANNADHADAS C. J. : I agree.

B/D.R.R. Order accordingly.

A.I.R. 1954 ORISSA 95 (Vol. 41, C.N. 28)

PANIGRAHI AND NARASIMHAM JJ.

Balabhadra Raja Guru Mohapatra, Petitioner v. The State.

Criminal Revn. No. 43 of 1951, D/- 15-1-1953, from Order of Addl. S. J., Koraput-Jeypore, D/- 8-12-1950.

Orissa Food Grains Control Order (1947), Cl. III (1) — "Storage" — "Undertaking".

The find of grain in a truck is a storage within the meaning of the Control Order and even if it is a solitary transaction, the act of storage would come within the meaning of an undertaking. AIR 1948 Pat. 8, Distinguished. (Para 1)

P. C. Chatterjee, for Petitioner; Govt. Advocate, for the State.

CASE REFERRED: Para

(A) (V35) AIR 1948 Pat. 8 (Prs 3, 4, 5): 48 Cri LJ 558 1

PANIGRAHI, J.:

This is a revision petition directed against the judgment of the Additional Sessions Judge confirming a judgment of the Subdivisional Magistrate, Rayagada convicting the petitioner for contravention of Cl. III(1), Orissa Food Grains Control Order, 1947. The case against him is that he was found carrying 50 bags or 100 maunds of ragi in a truck on 4-8-1950 to Jemidipeta beyond the border of Orissa. The plea of the petitioner was that he had purchased it for himself and 9 others at Kakirigumma and that he was taking the goods to Pitamahal. The Orissa Food Grains Control Order of 1947 is an order passed by the State Government with the concurrence of the Central Government under S. 3(1), Essential Supplies (Temporary Powers) Act, 1946 (24 of 1946). Clause III(1) of the Orissa Order is as follows:

"III. (1) No person shall engage in any undertaking which involves the purchase, sale or storage for sale in wholesale quantities of any food-grains except under and in accordance with a licence issued in that behalf by the Director of Food Supplies:

x x x x

Explanation (2)— For the purpose of this clause any person who stores Mung and Biri or their products in quantities exceeding 20 standard maunds and other food-grains in quantities exceeding 50 standard maunds, shall unless the contrary is proved be deemed to store the food-grains for purposes of sale."

Both the courts below have found that the goods found loaded in the truck belonged to the accused as indeed they were claimed by him to be his and the plea put forward by the accused that they had been purchased for others was disbelieved. It must, therefore, be found as a fact that 100 maunds of ragi found in the truck belonged to the petitioner. The next question is whether his possession of the goods while in transit in a truck can be described as "storage" within the meaning of the Control Order. The learned Additional Sessions Judge has said:

"storage does not necessarily mean stocking in a house or at a particular place. Its ordinary dictionary meaning is "the placing in a store".

There may be a case in which a seller may be carrying goods for purpose of sale in a vessel and may be selling all along the route. It cannot be said that the goods kept by him are not stored by him. I would, therefore, agree with the Sessions Judge that the find of the goods in the truck was a storage within the meaning of the Control Order. What the order prohibits is storage in wholesale quantities which means storage in quantities exceeding 20 maunds for purpose of sale. But cl. III(2) prescribes that where any person is found storing in quantities exceeding 50 maunds, he shall, unless the contrary is proved, be deemed to store the food-grains for the purpose of sale. We cannot therefore escape from the conclusion that the storage by the petitioner was for purpose of sale apart from the evidence in the case. Both the Courts have held as a fact that the petitioner was transporting goods for sale within the Madras area.

If, therefore, it be held that the petitioner was found storing food-grains exceeding 50 maunds, it must also be found that it was for the purpose of sale. Mr. Chatterjee has, however, raised an interesting point of law which led this case being referred to a Bench. His contention is that the expression 'undertaking' used in cl. III(1) should be understood in the sense of a general course of business carried on by the storer and would exclude the case of a solitary transaction such as has been proved against the petitioner in this case. Our attention is drawn to a case reported in — 'Kamla Prasad v. Emperor', AIR 1948 Pat 8 (A). That was a case in which the Food-grains Control Order, 1942 was one promulgated under R. 81(4), Defence of India Rules. The language employed in cl. III(1) is identical with that in the Orissa Food Grains Control Order. Das J. held that the expression 'undertaking' used in the Control Order should have the same meaning as it has in R. 81, Defence of India Rules.

The expression 'undertaking' is defined in the Defence of India Rules by R. 81(1) as meaning any undertaking "by way of any trade or business". It was, therefore, held in that case that the expression 'undertaking' used in the Control Order should have the same meaning as defined in the parent R. 81, Defence of India Rules under which the order purports to have been made. This case, however, is easily distinguishable from the present one as the Orissa Control Order does not purport to have been made under the Defence of India Rules. The Central Act 24 of 1946 under which the Orissa Control Order of 1941 has been made does not define the word 'undertaking' as it had been defined in the Defence of India Rules. It may well be that the omission of the definition in the present Act was intended to expand the meaning of the expression and make it applicable to transactions other than those carried on in the course of business or as a part of it. Even if the contention of Mr. Chatterjee were to be accepted, viz., that it was a solitary transaction, I would hold that the act of storage alleged against him was for business and would come within the meaning of an 'undertaking' used in cl. III(1) of the Orissa Control Order.

I would, therefore, hold that the Courts below were right in holding that the petitioner was engaged in an undertaking which involved the storage for sale of more than 50 maunds and accordingly had contravened the provision of Cl. III(1). It was, however, pointed out that Sch. III which prescribes the form of licence intended to be used by those who are engaged in the business of purchase or sale, use the word 'business' and that the meaning of the word 'undertaking' should therefore be restricted only to business. It is well known that a Schedule to an Act does not control the meaning of the expressions used in the Act and is subordinate to the Act itself. It may be that the word 'business' used in the Schedule may also include a singular act of business provided it involves buying and selling. But that question does not arise in the present case. I am satisfied that the act proved against the petitioner amounts to contravention of the provisions of Cl. III(1). He has, therefore, been rightly convicted and I see no reason to interfere with the sentence of fine imposed on him. This revision is accordingly dismissed.

(2) NARASIMHAM J.: I agree.

B/V.R.B. Revision dismissed.

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PANIGRAHI C. J. AND MOHAPATRA J.

Mohan Prasad Singh Deo, Petitioner v. The State of Orissa and another, Opposite Party.

O. J. C. No. 64 of 1952, D/- 6-10-1953.

(a) Madras Survey and Boundaries Act (8 of 1923), Ss. 6, 26(e) — Notification under S. 6.

Notification under S. 6 must be published in Form 1, prescribed by rules made under S. 26 (e). (Para 6)

(b) Madras Estates Land Act (1 of 1908 as amended by Act 8 of 1934), Ss. 164 (3) and 25 — Survey by Collector.

All that R. 1(3) under Chap. XI of the Statutory Rules framed under S. 215, Madras Estates Land Act says is that the Collector functioning under the Madras Estates Land Act will also have the powers of a Survey Officer and may exercise such powers in preparing the record of rights. But the conferment of this general power would not be sufficient to constitute him the Survey Officer who is specifically required to be appointed under S. 4, Survey and Boundaries Act, 1923. If therefore the Collector makes a survey it cannot be said to be a survey made by a Survey Officer appointed under the Survey and Boundaries Act, which is contemplated in S. 164(3), Madras Estates Land Act. (Para 7)

Held that the survey of the estate in question purporting to have been made by the Collector appointed under the provisions of the Madras Estates Land Act was not a survey in accordance with the provisions of S. 164(3) of that Act and was wholly unauthorised. (Para 7)

(c) Madras Revenue Recovery Act (2 of 1864), S. 8 — Distraint order for recovery of cost of survey.

Survey charges not incurred in accordance with law — Survey itself unauthorized—Settlement charges not included in demand — Demand not representing survey charges exclusively — Distraint warrant held unauthorized and issued in contravention of law — Warrant held could not be executed — Attachment held illegal. (Para 8)

(d) Madras Estates Land Act (1 of 1908 as amended by Act 8 of 1934), S. 180 — Recovery of cost of survey from proprietor.

The use of the word 'determine' in S. 180, Madras Estates Land Act would seem to indicate that Government must exercise the statutory power and act with discretion. Where this is not done and in a bona fide manner, the Court can interfere. The statutory power vested in Government does not enable it to act as it pleases. This is clear from the use of the expression "having regard to all the circumstances". The expression means that Government shall take into consideration all the circumstances before deciding who should bear, what proportion of such charges. The facts that the survey as well as the record of rights were forced upon the proprietor, that the estate has now vested in the Government by virtue of the provisions of the Orissa Estates Abolition Act and that the benefits of the survey as well as of the record of rights are lost to the proprietor as such, are some of the circumstances which Government have to take into consideration. (The failure of the Government to take these facts into consideration and demanding half the cost of survey from the proprietor, simply on the recommendation of the Settlement Officer held amounted to failure on the part of the Government to exercise the statutory power in accordance with S. 180 of the Estates Land Act). (Para 9)

(e) Madras Estates Land Act (1 of 1908, as amended by Act 8 of 1934), S. 180 — Apportionment of survey costs — Power of Court to question.

The power vested in Government to apportion the expenses implies that it has to prove in the first place that the money spent was expended in accordance with law—for in that case alone the State will be entitled to recover it from the party for whose benefit the money was spent, and in the second place that the expenses have actually been incurred. If the Government can satisfy the Court that the expenses were lawfully incurred in carrying out the provisions of Chapter XI of the Madras Estates Land Act, the Court would not embark upon an idle enquiry into the propriety or extravagance of the expenses so incurred, otherwise, Government would be able to wield an absolutely despotic power which the Legislature never intended that it should exercise. (Para 10)

The exclusion of Government land, including resumed inam lands, pre-settlement Inam lands & communal 'porombokes' from the total expenditure incurred and the distribution of costs over the rest of the lands can hardly be justified as proper or equitable. Similarly, in case of the private lands of the land-holder the cost of the proceedings under S. 183, Madras Estates Land Act are to be "apportioned among the parties to the proceedings in proportion to the area which, after the finding may be found to have been wrongfully claimed by each party" according to the statutory Rule 5 framed under S. 183 of that Act. There must be some indication in the records that this principle was kept in view in recommending that the entire cost of the survey of the private lands of the proprietor should be borne by the land-holder. But it is not the function of the Court to indicate what should be done in any particular case. The task of apportionment must be left to the Government to decide, according to their discretion after taking every factor into consideration:

Held that the Local Government did not apply its mind and take into consideration all the circumstances in apportioning the charges in strict compliance with S. 180, Madras Estates Land Act. (Para 11)

P. C. Chatterji and D. V. N. Rao, for Petitioner; The Advocate-General, for Opposite Party.

PANIGRAHI C. J.:

This is an application by the proprietor of Bodogodo Estate in Ganjam district, under Art. 226 of the Constitution, praying for the issue of a direction in the nature of mandamus against the State of Orissa and the Taluk Officer, Surada, restraining them from executing a distraint order issued by the Collector of Ganjam for the recovery of the costs of survey and preparation of the record-of-rights of the petitioner's estate. The said distraint order was issued for the recovery of a sum of Rs. 48.044/- and odd and was served on the petitioner on 16-3-1951.

The distraint order purports to have been issued under S. 8, Madras Revenue Recovery Act 1864 (Act 2 of 1864) against the proprietor who became a defaulter on failure to pay up the amount. A number of cars belonging to the petitioner, one silver Tamjan, one silver Hauda and some other

movables were attached and notified for sale at a public auction.

(2) The petitioner contends, in the first place, that he is not liable to pay the charges incurred either for the survey or for the preparation of the record-of-rights, as both these operations were undertaken 'suo motu' by Government.

Secondly, he contends that the said survey was not conducted in accordance with the provisions of the Madras Survey and Boundaries Act, 1923 (Act 8 of 1923) and, as such, it was not a survey authorised by law.

Thirdly, he contends that the apportionment of the expenses between the petitioner and his raiyats in the ratio of half and half was done without notice to the petitioner and is unjust and inequitable as the petitioner has been divested of his estate under the Orissa Estates Abolition Act.

(3) The survey of the petitioner's estate was directed by Government in Notification No. 3729-S. 52/38-R. dated 10-9-1938 of the Revenue Department. The notification reads as follows:

"GOVERNMENT OF ORISSA,
REVENUE DEPARTMENT.
Dated Cuttack, the 10th Sept., 1938.

No. 3729-S. 52/38-R: Whereas in the opinion of the Government of Orissa, a survey and preparation of the record-of-rights are required to secure the raiyats generally and the land-holders of the estates named in the schedule annexed hereto in the district of Ganjam in the enjoyment as such of their legal rights, the Governor of Orissa, in exercise of the powers conferred by S. 17 (b) (ii), Madras Survey and Boundaries Act, 1923 (Act 8 of 1923) and by Ss. 164(1)(b) and 182, Madras Estates Land Act, 1908 (Act 1 of 1908) as amended by Madras Act 8 of 1934. hereby directs that the survey of unsurveyed estates & raiyati villages & the resurvey of such unsurveyed estates and of which no record-of-rights has been prepared be made under the provisions of the said Act 8 of 1923 and a record-of-rights be prepared for these villages situate in the estates named in the schedule under the provisions of the said Act 1 of 1908 by the Settlement Officer Ganjam-Koraput who has been appointed Collector under the said Act 1 of 1908 for this purpose.

The record-of-rights shall contain the following particulars:

(a) the name of each raiyat's land-holder and of each land-holder in the estate or a portion thereof;

(b) the name of the raiyat and. where there is no raiyat, the name of the occupant;

(c) the situation and extent of the land held by the raiyat as shown in the survey map of the village;

(d) the description of the land whether it is irrigated, rainfed or dry; and, if irrigated, whether double or single crop;

(e) the rent lawfully payable at the time the record is being prepared and whether the raiyat is entitled to the benefit of proviso (a) to Clause (i) of S. 30;

(f) how the rent has been fixed; whether by decree or under the provisions of the Madras Estates Land Act or otherwise;

(g) any rights lawfully incident to the holding;

(h) if the rent is a gradually increasing rent, the times at which and the steps by which it increases;

(i) if the land is claimed to be held rent-free whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled under what authority and if the land were liable for rent, the rent payable;

(j) (i) the use by raiyats of water for agricultural purposes, whether obtained from a tank well or any other source of supply; and (ii) the repair and maintenance of works for securing a supply of water for the cultivation of the land held by each raiyat whether or not such works be situated within the boundaries of such lands;

(k) a record of any special rights which, by law or by custom, the raiyats may have in the waste lands of the estate; and

(l) any right of way or other easement attaching to the land for which a record-of-right is being prepared.

SCHEDULE.

Names of Estates.

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....
7. .....
8. .....
9. .....
10. .....
11. .....
12. .....
13. .....
14. .....
15. .....
16. .....

BY ORDER OF GOVERNOR,
Sd/- E. R. Wood,
Chief Secretary to Government."

(4) It will be noticed that the survey was directed by Government suo motu, in exercise of the powers conferred by S. 17 (b) (ii), Madras Survey and Boundaries Act, 1923. Section 17 of the Act empowers Government to direct, by notification, the survey of any estate (a) on the application in writing of the proprietor of such estate, or (b) without such application whenever in the opinion of the Local Government such survey is necessary (i) for the better and more convenient assessment or levy of irrigation cess; (ii) for any other reason to be recorded prior to the issue of such notification.

The proviso to the Section says:

"Provided (1) that any person making an application under Cl. (a) shall forward with his application a statement in writing signed by him to the effect that he will pay the whole cost of the survey and, if required, will deposit the amount in a Government treasury before the survey is commenced and (2) that any survey commenced under that clause may be stopped on the withdrawal of his application by the applicant unless the Local Government sees reason to direct the continuance of the survey in virtue of the power conferred on it by clause (b)."

The Government notification quoted above clearly says that the powers conferred on Government under S. 17 (b) (ii), Madras Survey and Boundaries Act, 1923 were exercised by Government

"to secure the raiyats generally and the land-holders of the estates.....in the enjoyment as such of their legal rights."

This was the reason given by Government for directing a survey of the petitioner's estate under S. 17 (b) (ii) of the Act. The notification also directed the preparation of the record-of-rights under S. 164 (1) (b) and S. 182, Madras Estates Land Act.

It would thus appear that while the survey was directed to be made under the provisions of the Madras Survey and Boundaries Act, 1923, the record-of-rights was directed to be prepared under the provisions of the Madras Estates Land Act. The officer appointed to prepare the record-of-rights was designated as the Settlement Officer, Ganjam-Koraput who was also appointed as 'Collector' under the Madras Estates Land Act for that purpose.

(5) Section 164 (3), Madras Estates Land Act, 1908 as amended by Act 8 of 1934 says that

"the survey shall be made under the Madras Survey and Boundaries Act, 1923 and the record-of-rights shall be prepared in accordance with the rules prescribed by the Local Government."

Under S. 215, Madras Estates Land Act statutory rules have been made by Government. Rules 5 and 6 made under Chapter XI provide how applications under S. 164 (1) of the Act are to be made for the preparation of survey and record-of-rights. They also prescribe certain forms which are to be used during the operations.

Form No. I is a notice calling upon the land-holder's raiyats, occupants, village officers and other persons to clear obstructions to existing survey marks, to present to the Collector written applications for any changes that they desire to be made in the existing registration, and to attend when called upon to supply information for the preparation of the record-of-rights.

It should also be noticed that the prescribed form is to be used in respect of a designated village and the Collector is empowered to take the assistance of persons interested as registered holders in preparing the record of rights after the survey has been completed. This Form No. I is to be used if the preparation of the record-of-rights is undertaken by Government on the application of the proprietor or of the raiyats.

The rules do not indicate the procedure to be followed and the forms to be used by the Collector when the record-of-rights register is prepared by Government without any application for the purpose whether by the land-holder or the raiyats. Turning to the forms prescribed for use during survey operations, we find that Form No. 1 printed at page 425 of the Madras Survey Manual, Volume III, empowers the Officer in Charge of the survey party to issue a notification under S. 6, Madras Survey and Boundaries Act, 1923 notifying that the survey operations of lands in a particular village will commence in a particular month, and calling upon persons claiming to be interested in such lands to point out the boundaries and supply information in connexion with the survey. The name of the Survey Officer is to be given in the notification so that all petitions connected with the survey may be addressed to him. Form No. 1 also contains columns for the name of the village and the names of persons interested in the survey on whom the notice is to be served.

It is thus clear that if the survey is to be undertaken as prescribed under S. 164 (3), Madras Estates Land Act all persons interested should be called upon by the Officer in charge of the survey, in Form 1, to point out the boundaries and file petitions if any before the Survey Officer whose name should appear in the notice.

The Survey Officer referred to in Form 1 is defined in the Madras Survey and Boundaries Act, 1923 as "any person appointed to be a Survey Officer under S. 4" of the Act. It was frankly conceded at the Bar by the learned Advocate-General that no notification was made under S. 4 of the Survey and Boundaries Act appointing any person to be a Survey Officer for any of the purpose of the Act. It is also clear from sub-s. (2) of S. 4 that the powers and duties of a Survey Officer as laid down in the Act can be exercised only by a person so appointed by the Local Government by notification.

(6) Soon after Notification No. 3729 of 10-9-1938 was published by Government the Settlement Officer, Ganjam-Koraput, appointed as Collector by the said notification under the Madras Estates Land Act, issued Notification No. 318, dated 22-9-1938. This notification (published at page 119 of the Supplement to the Orissa Gazette, dated 1-10-1938) reads as follows:—

"BY THE SETTLEMENT OFFICER.
Notification.

No. 318: Notice under Section 6(1), Madras Survey and Boundaries Act 8 of 1923 and R. 6 of the statutory Rules under Chapter XI and R. 5 of the statutory Rules under Chapter XII of the Madras Estates Land Act 1 of 1908 (VIII of 1934) to the land-holders, raiyats, occupants, village officer and other persons claiming to be interested as registered holders or otherwise in the lands of the raiyati villages which have not been surveyed, or in respect of which no record-of-rights has been prepared in the following estates:

1. Khallikota.
2. Atagada.
3. Biridi.
4. Humma.
5. Paluru.
6. Dharakota.
7. Shergoda.
8. Bodogodo.
9. Bodokhimedi.
10. Sannokhimedi.
11. Chikati.
12. Aska.
13. Kurla.
14. Devabhumi.
15. Surangi.
16. Jarada.

Whereas the Government of Orissa have been pleased to order the survey of the unsurveyed raiyati villages and the resurvey of such of the surveyed raiyati villages for which no record-of-rights has been prepared and the preparation of record-of-rights in respect of all such villages in the above estates under the provisions of the Survey and Boundaries Act 8 of 1923 and of the Madras Estates Land Act 1 of 1908 (8 of 1934).

You are hereby requested—

(1) to clear within 15 days all obstructions to existing survey marks, to whitewash the said marks, drive into the ground whitewashed pegs to indicate your individual rights and occupation and the changes to be made in the existing registration;

(2) to present to the Collector within 15-10-38 a written application in the form approved by the Revenue Commissioner for changes, if any to be made in the existing registration; and

(3) to attend whether in person or by agent at the time and place specified and from time to time thereafter when called upon for the purpose of pointing out boundaries and supplying information for the preparation of Survey and Record-of-Rights, to produce evidence in support of your rights, and to provide labour and survey marks.

Chatrapur, 22-9-1938. S. C. Banerjee.
Collector."

This notification appears to be a combined notice under S. 6(1), Madras Survey and Boundaries Act

1923 and under R. 6 of the Statutory Rules framed under Chapter XI of the Madras Estates Land Act, and is not in accordance with either. It is not at all clear whether such a form was ever prescribed under S. 215, Madras Estates Land Act. No such claim has been made on behalf of the State Government. It is plain, however, that the Form prescribed under the Survey and Boundaries Act was not used. Section 6 of the Act says that the Survey Officer "shall publish a notification in the prescribed manner." Section 26 (e) of the Survey and Boundaries Act empowers the Local Government to make rules to carry out the purposes of the Act and to

> "provide for the publication of all notifications issued under this Act and for the form, issue and service of all orders, communications and notices to be issued, communicated, given or served under this Act."

In exercise of the general power vested in them under S. 26 (1) Government have issued a number of departmental rules, wherein Form No. 1 has been prescribed for use in issuing a notification under S. 6 of the Act, and it is in that form alone that the notification should be published.

(7) It may also be noticed that the combined notification issued by the Settlement Officer on the 22-9-1938 was issued by him as "Collector" appointed under the Madras Estates Land Act and not as "Survey Officer" appointed under the Madras Survey and Boundaries Act. The learned Advocate-General relied on R. 1(3), under Chapter XI, of the Statutory Rules framed under S. 215 of the Estates Land Act, which says that the Collector appointed under the Act is invested with "all the powers exercised by a Survey Officer under the Madras Survey and Boundaries Act 1923" and accordingly contended that the Collector could himself act as the Survey Officer and conduct surveys under the Survey and Boundaries Act.

I am unable to accept this contention. All that the rule says is that the Collector functioning under the Madras Estates Land Act will also have the powers of a Survey Officer and may exercise such powers in preparing the record-of-rights. It may well be that while preparing a record-of-rights, the Collector has to go upon the land and if necessary make a re-survey for the purpose of deciding disputes between the parties. But the conferment of this general power would not be sufficient to constitute him the Survey Officer who is specifically required to be appointed under S. 4, Survey and Boundaries Act, 1923. If therefore the Collector makes a survey it cannot be said to be a survey made by a Survey Officer appointed under the Survey and Boundaries Act, which is contemplated in S. 164 (3), Madras Estates Land Act.

Curiously enough the procedure adopted by the Collector was not uniform throughout operations. The notice under S. 9(2), Survey and Boundaries Act purports to have been issued by an officer described as "Survey Officer". Who this Survey Officer was and what legal right he had to issue the notice, has not been satisfactorily explained. Even if the learned Advocate-General's contention that the Collector had the power to conduct surveys were to be accepted, the survey in this case does not purport to have been made by him as such, but by some officer describing himself as the "Survey Officer", and that officer was never invested with the statutory powers of a Survey Officer or Collector. I have therefore no hesitation in holding that the survey of Bodogodo Estate purporting to have been made by the Collector appointed under the provisions of the Madras Estates Land Act is not a survey in accordance with the provisions of S. 164 (3) of that Act and was wholly unauthorised.

(8) The next point for consideration is whether the petitioner can be made liable for meeting the survey charges if they are not incurred in accordance with law and if the survey itself is unauthorised. It was made clear to us during argument that the survey charges, as such, have not been separately calculated and that the demand of Rs. 48,044/- and odd made upon the petitioner included the charges for preparation of the record-of-rights also. The distraint warrant dated 16-3-1951 which was served on the petitioner shows that the amount was due towards "Survey Charges". The copy retained by Government and signed by the proprietor, however, shows that the amount represented "Settlement Charges". As a matter of fact, the Settlement Charges have not been included in the demand, nor does the demand represent Survey Charges exclusively. In such circumstances the distraint warrant must be held to be unauthorised and to have been issued in contravention of the provisions of the law.

The sale notice issued by the Taluk Officer, Surada, and served on the petitioner on 12-11-1952, shows that the sale was to be held for realization of a single case where such serious discrepancies are present in a solemn document like a distraint warrant or a sale notice affecting the rights of the proprietor of an estate. It only reveals an utter disregard of the forms and procedure to be observed in such proceedings where the law enables Government to realise such demands as arrears of revenue, with the risk of the estate itself being put to sale in case of default of payment. On the face of it the distraint warrant is wrong and cannot be executed. The attachment of the movables of the petitioner must, in the circumstance, be held to be illegal as it is made for realization of a demand which the petitioner is not bound to satisfy.

(9) The question whether a proprietor can be made to meet the expenses incurred for the survey of his estate undertaken suo motu by Government under S. 17 (b) (ii), Madras Survey and Boundaries Act 1923 was argued at some length. It was contended by the learned Advocate-General that even when a survey is undertaken by Government under S. 17 (b) (ii) of the Act, the costs of the survey may be recovered from the proprietor under S. 19 of the Act, read with S. 180, Madras Estates Land Act. Section 19 of the Survey and Boundaries Act says that

> "the cost of a survey directed under Cl. (b) (i) and (ii) of S. 17 shall be borne by the Local Government unless otherwise provided by any law for the time being in force."

It was argued that the provision in S. 180, Madras Estates Land Act is a special provision and should prevail over the general provision in S. 19, Madras Survey and Boundaries Act. This contention is not without force, but it is not necessary to test its validity in this case.

Counsel for the petitioner, on the other hand, points out that even if that contention were to be accepted the apportionment of the charges in the proportion of half and half between the petitioner and his raiyats is inequitable as it was not 'determined' as enjoined in S. 180 'having regard to all the circumstances'. The use of the word 'determine' in S. 180 would seem to indicate that Government must exercise the statutory power and act with discretion. Where this is not done and in a bona fide manner the Court can interfere. The statutory power vested in Government

does not enable it to act as it pleases. This is clear from the use of the expression "having regard to all the circumstances". As I understand it, the expression means that Government shall take into consideration all the circumstances before deciding who should bear, what proportion of such charges.

It must be remembered that the survey as well as the record-of-rights were forced upon the proprietor. The estate has now vested in the Government by virtue of the provisions of the Orissa Estates Abolition Act; and the benefits of the survey as well as of the record of rights are lost to the proprietor as such. These are some of the circumstances which Government have failed to take into consideration. They appear to have simply adopted the recommendation of the Settlement Officer and failed to exercise the statutory power in accordance with S. 180 of the Estates Land Act.

(10) It was next contended, on behalf of the petitioner, that the power vested in Government to apportion the expenses implies that it has to prove in the first place that the money spent was expended in accordance with law—for in that case alone the State will be entitled to recover it from the party for whose benefit the money was spent, and in the second place that the expenses have actually been incurred. If the Government could satisfy us that the expenses were lawfully incurred in carrying out the provisions of Chapter XI of the Madras Estates Land Act, the Court would not embark upon an idle enquiry into the propriety or extravagance of the expenses so incurred. Otherwise, Government would be able to wield an absolutely despotic power which the Legislature never intended that it should exercise.

It was conceded by the learned Advocate-General that the manner in which the Settlement Officer proposed to apportion the expenses is open to objection and cannot be wholly justified. The exclusion of Government land, including resumed 'inam lands', presettlement inam lands and communal 'porombokes' from the total expenditure incurred and the distribution of costs over the rest of the lands can hardly be justified as proper or equitable. Similarly, in the case of the private lands of the land-holder the cost of the proceedings under S. 183, Madras Estates Land Act are to be "apportioned among the parties to the proceedings in proportion to the area which, after the finding may be found to have been wrongfully claimed by each party according to the statutory R. 5 framed under S. 183 of that Act. There is no indication in the records that this principle was kept in view in recommending that the entire cost of the survey of the private lands of the proprietor should be borne by the land-holder.

'Apportionment' does not denote division but frequently connotes distribution. Government do not give any reason why the cost should have been directed to be divided equally and not proportionately distributed according to the interests of the parties concerned. The petitioner complains that since the passing of the Orissa Tenants Protection Act the share of rent that he was entitled to collect had been considerably reduced and that the apportionment of the expenses if justifiable at all, should be made according to the quantum of interest he has in the land. This argument appears to me to be perfectly reasonable and equitable. I should observe, however, that it is not the function of this Court to indicate what should have been done in this case. The task of apportionment must be left to the Government to decide, according to their discretion after taking every factor into consideration.

(11) On the facts of this case we are satisfied that the survey of the petitioner's estate was not justified by law and was done without jurisdiction. The distraint was also levied for an amount which admittedly does not represent 'survey charges' alone. Further, the Local Government did not apply its mind and take into consideration all the circumstances in apportioning the charges in strict compliance with S. 180, Madras Estates Land Act. We would therefore hold that the State is not entitled to recover the demand made on the petitioner. We would accordingly direct the State Government to withdraw the demand and release the properties of the petitioners from attachment. The petitioner shall have the costs of this application which we assess at Rs. 250/- (Rupees two hundred and fifty only).

(12) MOHAPATRA J.: I agree.

B/R.G.D. Application allowed.

A.I.R. 1954 ORISSA 101 (Vol. 41, C.N. 30)

PANIGRAHI C. J. AND MOHAPATRA J.

Hari Hara Singh; Petitioner v. Harihar Patnaik and others; Opposite Party.

O. J. C. No. 37 of 1952; D/- 7-10-1953.

(a) Tenancy Laws — Orissa Tenants Protection Act (3 of 1948), S. 3 — Applicability to private lands of Ruler of Khandapara State.

The Orissa Tenants Protection Act applies to the merged State areas only with effect from 1-8-1949 and so far as the State of Khandapara is concerned any special law or custom prevailing therein has to be taken into consideration before the Act is applied. On a strict interpretation of the words 'landlord' and 'tenant' as defined in the Orissa Tenants Protection Act the Ruler of Khandapara cannot be regarded as a 'Landlord' so far as his private lands guaranteed under the Agreement are concerned; nor is the cultivator thereof to be regarded as a 'tenant'. The application of the Orissa Tenants Protection Act is limited to the State lands as distinct from the private lands of the Ruler. The provisions of the Orissa Tenants Protection Act are inapplicable to the private lands of the Ruler of Khandapara. The adjudication of any dispute concerning such land should be left to the special machinery set up under Orissa Act 4 of 1950.

(Paras 9, 10, 12)

(b) Interpretation of Statutes — State enactment in conflict with covenants — (Civil P. C. (1908), Pre.)

Where a State enactment appears to be in conflict with the agreement entered into between a Ruler and Government of India the canon of construction applicable to such legislation is that it must not be deemed to take away or extinguish the existing right of the Ruler unless it appeared, by express words, that it was the intention of the State Legislature to do so. In order to have the effect of extinguishing the right of the Ruler of Khandapara it is not enough to show that the protection given to tenants under the Tenants Protection Act, and extended to the merged State areas, will automatically put an end to such right. It must further be shown that the Legislature has authorised such a thing to be done at all events, and irres-

pective of its possible interference with existing rights. (Para 10)

Anno: C. P. C., Pre. N. 7.

(c) Interpretation of Statutes — General and special enactments — (Civil P. C. (1908), Pre) — (Orissa Merged States (Laws) Act, 4 of 1950) — (Tenancy laws — Orissa Tenants Protection Act (3 of 1948), S. 3).

Where there are provisions in a special Act which are inconsistent with a prior general Act, the provisions of the general Act must yield place to those of later special enactment. The Orissa Merged States (Laws) Act of 1950 is admittedly a special enactment which expressly makes provision in respect of the private lands of the Ruler and creates a machinery for the decision of disputes between him and his tenants in respect of Khamar lands. Any tenant in respect of such lands can only acquire a right of occupancy after fair and equitable rent has been fixed by a competent authority appointed by the Revenue Commissioner. The definations of "Landlord" and "Tenant" given in the Orissa Tenants Protection Act should, therefore, be extended only to those classes of persons who answer the description of landlord and tenant in those areas, and not to a Ruler who was not a landlord at any time. (Paras 10, 11)

Anno: C. P. C., Pre. N. 7.

K. Patnaik and G. G. Das, for Petitioner; Advocate General and R. Das, for Opposite Party.

PANIGRAHI C. J.:

This is a writ application filed by the Ruler of Khandapara praying for the issue of a writ to quash the proceedings taken by the Sub-Deputy Collector, Khandapara, under the Orissa Tenants Protection Act, 1948 (Orissa Act 3 of 1948) in Orissa Tenants Protection Act Cases Nos. 23 to 30, 32 to 34 and 36 to 41. In all these cases the Sub-Deputy Collector held that the petitioner had violated the provisions of S. 3, Orissa Tenants Protection Act and directed him to restore possession of the disputed lands to the opposite parties within a week of the receipt of his order. He further directed the petitioner to show cause why the penalty of fine under S. 10 of the said Act should not be imposed on him. The petitioner did not take part in the proceedings before the Sub-Deputy Collector as, according to him, they were without jurisdiction.

(2) A contention was raised on behalf of the petitioner that the Orissa Tenants Protection Act constituted a violation of Art. 19 of the Constitution. This extreme position was, however, not pressed at the Bar. Learned counsel for the petitioner ultimately rested his case on Arts. 362 and 363 of the Constitution and urged that the Sub-Deputy Collector had no jurisdiction to decide the dispute as it related to the rights of the petitioner arising under the agreement entered into between him, as the ruler of the ex-State of Khandapara, and the Governor-General of India on 14-12-47. On behalf of the opposite parties it is urged that the Orissa State Legislature has the power to regulate the relations between 'landlord' and 'tenant' and that they being 'tenants' under the petitioner, were entitled to claim protection under the provisions of the Orissa Tenants Protection Act.

(3) The State of Khandapara was one of the States which acceded to the Indian Dominion after India became independent in August 1947. On 14-12-1947 there was an agreement executed between the Governor-General of India and the petitioner as the Ruler of that State, whereby the latter ceded to the Dominion of India full and exclusive authority, jurisdiction and powers in relation to the governance of the State, and agreed to transfer the administration of the State to the Dominion Government on 1-1-1948.

Article 2 of the agreement provides for the payment of an annual privy purse to the Ruler. Article 3, which is relied on by the petitioner is as follows:

"The Raja shall be entitled to full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of this Agreement."

Article 4 guarantees to the Raja and the members of his family the enjoyment of all personal privileges. Article 5 guarantees the succession, according to law and custom, to the gadi of the State and to the Raja's personal rights, privileges, dignities and titles.

(4) On 24-12-1947 the Extra-Provincial Jurisdiction Act, 1947 (Act 47 of 1947) was passed by the Central Legislature empowering the Central Government to exercise extra-provincial jurisdiction over the State areas which remained outside the jurisdiction of the Provinces created by the Government of India Act, 1935. Subsection (2) of S. 3 empowered the Central Government to delegate its jurisdiction to any officer or authority in such manner and to such extent as it thought fit.

Section 4 empowered the Central Government to make such orders as may seem to it expedient for the effective exercise of any extra-provincial jurisdiction of the Central Government. The power thus conferred upon the Central Government under the Act was delegated to the Provinces and in exercise of this delegated power the Provinces enacted laws for the administration of such States. The Administration of Orissa States Order, 1948 was passed on 1-1-1948, in exercise of this delegated power.

(5) On 12-1-1949 the Constituent Assembly of India amended the Government of India Act, 1935, and inserted two new sections, namely, 290-A and 290-B. Section 290-A provided that the Governor-General may by order direct that a State shall be administered in all respects as if it formed part of a Governor's Province specified in the Order. Section 290-B empowered the Governor-General to direct, by an order, that any area included within a Governor's Province shall be administered in all respects by a neighbouring acceding State as if such area formed part of such a State. In exercise of the power vested in him under S. 290-A the Governor-General issued an Order, on 27-7-1949, styled as the States' Merger (Governor's Provinces) Order 1949.

Article 3 of that Order says:

"As from the appointed day the States specified in each of the schedules shall be administered in all respects as if they formed part of the Provinces specified in the heading of that schedule."

Schedule 6 to the Order gives a list of the States that were merged in the Province of

Orissa and Khandapara is one of them. Article 4 of the Order provides for the continuance of all laws in force in a merged State until repealed, modified or amended, by a competent Legislature.

Article 8 which is important runs thus: "Without prejudice to the special provisions contained in Art. 7 any contract, made or deemed to be made, before the appointed day by, or on behalf of, the Dominion for purposes connected with the governance of a merged State shall, as from that day, have effect as if it has been made by, or on behalf of, the absorbing Province, unless it is wholly or in part for central purposes."

The 'appointed day' referred to in the Order is 1-8-1949. So far it is clear. That the States were administered by orders issued by the Central Government under the Extra-Provincial Jurisdiction Act, or by the Provincial Government as the delegated authority of the Central Government. After the appointed day, however, namely 1-8-1949, the States became a part of the Provinces and came under the regular administration of the Provincial Governments.

(6) Article 3 of the agreement entered into between the Governor-General of India and the Raja of Khandapara on 14-12-1947, guarantees "full ownership, use and enjoyment of all the private properties belonging to the Raja". The Raja claimed a number of items as his private properties and the matter was referred to the Adviser for Orissa States for determining whether all the items claimed by him could be regarded as his private properties. On 10-6-1949 the Adviser communicated his decision that the Raja was entitled to 1643 acres as his Khamar lands and 29 and odd acres as lands settled with his tenants. It is the admitted case of both parties that the lands comprised in the present proceedings taken under the Orissa Tenants Protection Act have been declared to be the private properties of the Raja.

(7) On 26-1-1950 the Constitution of India came into force and the relevant Articles on which reliance is placed by the petitioner's counsel, are Arts. 362 and 363.

Article 362 is as follows:

"In the exercise of the power of Parliament or the Legislature of a State to make laws, or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in cl. (1) of Art. 291, with respect to the personal rights, privileges and dignities of the Ruler of an Indian State."

'Indian State' is defined in Art. 363(2)(a) as meaning "any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State", and "Ruler" is defined in Art. 363(2)(b) as including "the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

Article 291 makes provision for the payment of the sum guaranteed as privy purse under the agreement entered into by the Ruler before the commencement of the Constitution. Article 363 bars the jurisdiction of the Courts to decide any dispute in respect of any right accruing under or any liability or obligation arising out of, any of the provisions of the Constitution relating to a treaty, agreement, covenant, engagement, or other similar instrument which was entered into or executed by any Ruler of an Indian State and the Government of the Dominion of India.

(8) On 3-3-1950 the Orissa Merged States' (Laws) Act (Orissa Act 4 of 1950) was passed by the State Legislature, replacing the Merged States' (Laws) Ordinance (No. 4 of 1949). This Act extended the operation of several Provincial Acts to the merged areas and repealed and amended the laws then in force in the merged States. Section 7 of the Act modifies the tenancy laws in force in the merged States.

It provides:

(a) That all suits and proceedings between landlord and tenant as such shall be instituted and tried in revenue courts;

(b) confers the right of transfer of a holding belonging to an occupancy tenant and the full right to trees standing on his holding;

(c) prohibits the enhancement of cash rents except in accordance with the tenancy laws continued in force in the merged State concerned;

(d) provides against eviction of an occupancy tenant except in execution of a decree for ejectment on stated grounds;

(e) declares the interest of an occupancy tenant in his holding to be heritable;

(f) declares the tenant of a homestead as entitled to the rights of an occupancy tenant;

(g) deals with service tenures created by the Ruler and the rights accruing to the tenants under such tenures; and

(h) lays down the law to be applied to the Khamar lands of the Ruler.

The last item is in the following terms:

"When a person holds Khammar, nijjote and any other private lands of a Ruler which has been recognised as such by the Provincial Government he shall not be liable to ejectment but shall be liable to pay such fair and equitable rent as may be fixed by any competent authority appointed in this behalf by the Revenue Commissioner, or the Commissioner Northern Division as the case may be, and thereupon he shall acquire the right of occupancy in respect of such land."

There was a proviso to this clause but it has been omitted by Orissa Act 31 of 1951. The schedule to Act 4 of 1949 shows that the Orissa Tenants Protection Act, 1948, is one of the Acts extended to the State of Khandapara.

(9) It will now be convenient to refer to the provisions of the Orissa Tenants Protection Act and see how far they are applicable to the merged State of Khadapara. The Act purports "to provide temporary protection to certain classes of tenants in the Province of Orissa". This object has to be borne in mind in interpreting S. 2 which defines the term "tenant" to whom the Act would be applicable. Section 3 of the Act declares that a person who was cultivating any land as tenant on 1-9-1947 shall not be liable to eviction and shall be entitled to continue to have the right to cultivate such land.

I have already pointed out earlier that the State of Khandapara became merged in the Province on 1-8-1949 under the States Merger (Governor's Provinces Order 1949). It would be anomalous to hold that the Orissa State Legislature purported to legislate extra-terri-

torially in respect of an area which did not form part of the Orissa Province till 1-8-1949 and gave protection to tenants in such areas with effect from 1-9-1947. The argument adduced by the opposite parties that the State Legislature being competent to enact laws with retrospective effect, S. 3, Orissa Tenants Protection Act should be held to have come into force in the merged State of Khandapara from 1-9-1947, the date from which the Act is deemed to have operated, appears to me to be fantastic and deserves no consideration whatsoever.

On the other hand, the circumstances that led to the passing of the subsequent amending Act, namely, the Orissa Tenants Protection (Amendment) Act 1951 (Orissa Act 17 of 1951) would indicate that the Legislature realised its mistake and made the necessary amendments in order to make the Tenants Protection Act applicable only from the date of merger, namely, 1-8-1949. This is evident from the fact that by S. 2 of the Amendment Act of 1951 a new sub-section was added after sub-s. (4) of S. 1 of Act 3 of 1948.

This new sub-section numbered as "(5)" reads as follows:

"(5) (1) for the purpose of the merged States areas to which this Act has been extended by the Orissa Merged States (Laws) Act, 1950:

(i) for the words, letters and figures "1st day of September, 1947" wherever they occur the words, letters and figures "1st day of August, 1949" shall be substituted;

(ii) for the words, letters and figures "30th November, 1947" as they occur in item (3) of clause (g) of section 2, the words, letters and figures "1st day of August, 1949" shall be substituted.

(2) In such areas where neither the Madras Estates Land Act 1908 nor the Orissa Tenancy Act 1913 is in force special laws or customs prevailing therein shall be taken into consideration for the application of the said Act."

These provisions make it absolutely clear that the Orissa Tenants Protection Act applies to the merged State areas only with effect from 1-8-1949 & that so far as the State of Khandapara is concerned any special law or custom prevailing therein has to be taken into consideration before the Act is applied. Section 8, Orissa Merged States' (Laws) Act (Act 4 of 1950) also makes a similar provision and gives the power to a Court to adapt & apply any Provincial Act, shown in the schedule thereto, with such alterations as may be necessary.

(10) It is in the context of the antecedent history of this legislation that we are to consider whether the guarantee given to the petitioner, under Art. 3 of the Agreement entered into by him on 14-12-1947 with the Governor-General of India, that he shall be entitled to full ownership, use and enjoyment of his private properties was intended to be extinguished by the State Legislature by a side wind, by extending the applicability of the Orissa Tenants Protection Act to the State areas from a date anterior to the 'appointed day' mentioned in the States Merger (Governor's Provinces) Order of 1949, namely, 1-8-1949.

The Constitution expressly respects the sanctity of the agreement and says that in making laws due regard shall be had to the assurances and guarantees given under such agreements. It is true that the State of Khandapara as such has ceased to exist. But the existence of the Ruler of that State has been expressly recognised by the Constitution. It is not inconceivable that there can be a Ruler without a State, even as there can be a State without a Ruler. The agreement thus entered into between the Ruler and the Government of India must continue to receive effect unless and until it is expressly terminated by the mutual consent of parties, or possibly by an Act of State.

Where a State enactment appears to be in conflict with the agreement, the canon of construction applicable to such legislation is that it must not be deemed to take away or extinguish the existing right of the Ruler (the petitioner in this case) unless it appeared, by express words that it was the intention of the State Legislature to do so. In order to have the effect of extinguishing the right of the petitioner, it is not enough to show that the protection given to tenants under the Act, and extended to the merged State areas, will automatically put an end to such right. It must further be shown that the Legislature has authorised such a thing to be done at all events, and irrespective of its possible interference with existing rights.

The Orissa Merged States' (Laws) Act, 1950 (Act 4 of 1950) expressly makes provision in respect of the private lands of the Ruler and creates a machinery for the decision of disputes between him and his tenants in respect of Khamar lands. Any tenant in respect of such lands can only acquire a right of occupancy after a fair and equitable rent has been fixed by a competent authority appointed by the Revenue Commissioner. This provision cannot be deemed to have been abrogated by the Schedule to the Act which extends the operation of certain Acts already in force in the Province. The function of the interpreter should be to see whether the two provisions can exist side by side. The existence of the petitioner's right in his private lands and the protection of the tenant's interests in the State lands are not inconsistent and both the Orissa Merged States' (Laws) Act 1950 (Act 4 of 1950) and Orissa Tenants Protection (Amendment) Act 1951 (Orissa Act 17 of 1951) justify this interpretation.

Section 8 of the former Act expressly empowers a Court to so construe the Acts cited in the Schedule annexed thereto, as not to affect the substance of the parent Act itself. On a strict interpretation of the words 'landlord' and 'tenant' as defined in the Orissa Tenants Protection Act I am disposed to think that the petitioner cannot be regarded as a 'landlord' so far as his private lands guaranteed under the agreement are concerned; nor is the cultivator thereof to be regarded as a 'tenant'. We have therefore to refer to the new sub-s. (5)(2) introduced by the Amendment Act of 1951 (Orissa Act 17 of 1951) for guidance. As already pointed out this sub-section specifically says that the special laws or customs prevailing in an area where the Madras Estates Land Act or the Orissa Tenancy Act does not apply (like the State of Khandapara) shall be taken into consideration in applying the Act.

It may be noted that even in the State of Orissa the Act does not apply to some areas notably the district of Sambalpur. There can therefore be no warrant for assuming that the Act should necessarily apply to the Rulers and their private lands. In the circumstances, I am

inclined to hold that the application of the Orissa Tenants Protection Act is limited to the State lands as distinct from the private lands of the Ruler.

(11) Another canon of construction that may be called in aid is that where there are provisions in a special Act which are inconsistent with a prior general Act, the provisions of the general Act must yield place to those of later special enactment. The Orissa Merged States' (Laws) Act of 1950 is admittedly a special enactment which declares the laws that are to be in force in the merged areas, and introduces modifications and amendments to the existing law. The provisions of the Acts extended to the State areas must be read as subject to those made in the special Act. The Legislature could not have intended at the time the Orissa Tenants Protection Act was passed that it should apply to the tenants of State areas.

The definitions of "landlord" and "tenant" given in the Act should, therefore, be extended only to those classes of persons who answer the description of landlord and tenant in those areas, and not to a Ruler who was not a landlord at any time. This construction would give protection to tenants of "landlord" as defined in the Tenants Protection Act, and also respect the guarantees given under Art. 3 of the agreement executed between the petitioner and Governor-General on 14-12-1947.

Any other interpretation would have the effect of permitting the tenants to treat the agreement as a nullity. In order to have that effect, the words of the enactment should be clear and explicit, so as to leave no doubt about the intention of the legislature. As I have already pointed out that could never have been the intendment of the legislature.

(12) If I am right so far in my interpretation of the two Acts, the conclusion must follow that the provisions of the Orissa Tenants Protection Act are inapplicable to the private lands of the petitioner. The adjudication of any dispute concerning such land should be left to the special machinery set up under Orissa Act 4 of 1950. The Sub-Deputy Collector was therefore in error in calling upon the petitioner to restore possession of the lands to the opposite parties and to show cause why he should not be fined.

(13) In the view that I have taken that the provisions of the two Acts are not inconsistent with each other, it is not necessary to discuss whether Art. 363 applies to the facts of this case.

(14) We should accordingly allow this petition and issue of a writ declaring that the proceedings under the Orissa Tenants Protection Act taken by the Sub-Deputy Collector, Khandapara are void as being without jurisdiction and that they should be quashed. The petitioner shall be entitled to the costs of this application which we assess at Rs. 100/- (One Hundred Rupees only).

(15) MOHAPATRA J.: I agree.

B/D.H.Z. Petition allowed.

A.I.R. 1954 ORISSA 105 (Vol. 41, C.N. 31)

MOHANTY, J.

Kama Sahu and another, Defendants, Appellants v. Krishna Sahu, Plaintiff, Respondent.

Second Appeal No. 563 of 1948 D/- 25-8-1953 from decision of Addl. Sub. J., Berhampur, D/- 30-10-1948.

T. P. Act (1882), Ss. 54 and 118 — Sale and exchange — Distinction.

A 'sale' should always be for a price, but in the case of 'exchange' the transfer of the ownership of one thing is not for any price paid or promised, but for transfer of another thing in return. If in a case a transfer of ownership of an immovable property is exchanged for money, then the transaction cannot be an exchange, but a sale. It being so, unless the property of both parties are simultaneously transferred in favour of each other, the title to the property cannot pass in favour of the one when the other party does not execute any such document in favour of the other. Exchange can be effected either by one document or by different documents. The consideration for the one document executed in pursuance of an agreement for exchange is the execution of a document by the other party. Unless it is so done, the party who has taken the deed from the other party without himself executing any document in favour of that other party, cannot claim to have got a valid title to the property until and unless he executes a similar document transferring his interest in favour of that other party. AIR 1929 All 63 (2), Distinguished. (Para 4)

When one of the parties has failed to execute the deed in pursuance of the agreement, the mere fact of exchange of possession cannot be sufficient to complete the passing of title in favour of each other, especially when properties to be exchanged are each worth more than Rs. 100/-. S. A. No 309 of 1948 (Orissa) Rel. on. (Para 5)

Anno: T. P. Act S. 118 N 2, 4 and 6.

P. Misra and H. Mohapatra, for Appellants; M. S. Rao for Respondent.

CASES REFERRED:

(A) ('29) AIR 1929 All 63 (2): 113 Ind Cas 753 (Pr 5)

(B) ('48) S. A. No. 309 of 1948 (Orissa) (Pr 6)

JUDGMENT: Defendants are the appellants. It appears that D-1, (the husband of D-2) Satyabadi Sahu, Krishna Sahu and Laxman Sahu are four brothers. The family had some lands at different places including lands in village Chandipadaro. Appellant 2 (D-2) had purchased some homestead lands with a house thereon at Chatrapur. Satyabadi and his other brothers wanted to take an interest in that homestead land of D-2, treating it to be a portion of the joint family property, but failed.

It also appears that it was so arranged between the present plaintiff, Krishna Sahu and Satyabadi on the one hand, and the defendants-appellants on the other, that Krishna and Satyabadi would separately take the homestead land and the house of D-2 at Chatrapur in exchange for their lands that would fall to their share in the village Chandipadaro. Accordingly on 27-7-43, D-2 executed sale-deeds one in favour of the present plaintiff and another in favour of Satya-

badi with respect to her homestead land and the house thereon situate at Chatrapur. But they, in return, could not execute any such deed in favour of D-2 in respect of their lands at Chandipadaro; but promised to do so after partition of their lands had been finalised. Admittedly the partition deed was effected between the brothers with respect to their joint family property on 18-2-44. Notwithstanding it, they did not execute any sale-deed in favour of D-2 as previously agreed upon. It is why D-2 cancelled the two sale-deeds executed by her on 27-7-43.

It should be noted here that the dispute between the parties went so far as to culminate in the initiation of 145 proceedings with respect to the disputed land. The Magistrate could not come to any finding as to which party is in possession of the disputed land, and he therefore kept the property under attachment and directed the parties to establish their right in the Civil Court. It is why the respondent filed a suit out of which this appeal has arisen for a declaration of his title to the property on the strength of the sale-deed executed in his favour by D-2 on 27-7-43. A similar suit was also filed by the present appellant against Satyabadi Sahu for a declaration of her title to the other portion of the homestead and for recovery of possession thereof.

(2) The case of the plaintiff is that he has purchased the property for a cash consideration of Rs. 500/- and has acquired a good title to it on the execution of the sale-deed by D-2 and has been in possession thereof since his purchase. The claim was contested by both the defendants (appellants) mainly on the ground that in pursuance of an oral agreement for exchange of lands, D-2 executed a deed with respect to her Chatrapur land on the promise of the plaintiff (respondent) to execute similar deed in her favour with respect to her Chandipadaro land after the partition of that land had been finalised. Though the said partition was finalised in February 1944, the plaintiff did not execute any sale-deed in her favour, although asked for many a time. It is why she has cancelled the sale-deed executed in favour of the plaintiff; and the plaintiff has acquired no title to the property on account of his failure to execute a similar deed in her favour with respect to his own land.

(3) Both the Courts below have concurrently held that in pursuance of an oral agreement for exchange of land as between the parties, D-2 has executed a sale-deed, Exhibit I in favour of the plaintiff on the promise of the plaintiff to execute a similar deed in favour of D-2 with respect to his Chandipadaro land after the partition among the brothers had been finalised, that the partition was effected in February, 1944, but the plaintiff did not execute any Kabala in favour of D-2; and that notwithstanding it, the plaintiff has acquired a good title to the property on the execution of the sale-deed, Ext. I by D-2. They have further held that it is open to the defendants to legally enforce the specific performance of the contract for the execution of the sale-deed with respect to the Chandipadaro land. They have, therefore, decreed the plaintiff's suit. Against that decree and judgment of the appellate Court the defendants have preferred this second appeal.

(4) As has been stated above, there is a concurrent finding of both the Courts below that in pursuance of an agreement for exchange of land between the parties, D-2 has executed a sale-deed now in question in favour of the plaintiff. This finding was not challenged before me by the respondent. The only question that was canvassed at the bar is as to whether the plaintiff has acquired any title to the property by virtue of the deed, Ext. I. Exhibit C is a deed of cancellation which D-2 executed on 21-6-44 cancelling thereby the deed, Ext. I. She appears to have done it when she found herself helpless in persuading the plaintiff to execute a similar document in pursuance of the agreement of exchange.

It is contended on behalf of the respondent that the mere execution of the sale-deed without any specific agreement for the postponement of the passing of the title till after the execution of another document by the plaintiff is itself sufficient to pass valid title in the disputed property to the plaintiff under Ext. I. But on the other hand, it is contended on the side of the appellant that as the transaction is an exchange, but not a sale, the title would not pass to the plaintiff under Ext. I until and unless a similar document is executed by the plaintiff in favour of D-2 with respect to his land at Chandipadaro. In my view, the contention advanced on the side of the appellant is tenable.

The word 'sale' has been defined in the T. P. Act in S. 54 as

> "A transfer of ownership in exchange of price paid or promised, or part paid, or part promised."

It appears from this definition that a 'sale' should always be for a price, but in the case of 'exchange' the transfer of the ownership of one thing is not for any price paid or promised, but for transfer of another thing in return. The word "exchange" has been defined in S. 118 of the T. P. Act, as:

> "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange'."

If in case a transfer of ownership of an immovable property is exchanged for money, then the transaction cannot be an exchange, but a sale. It being so, unless the properties of both parties are simultaneously transferred in favour of each other, the title to the property cannot pass in favour of the one when the other party does not execute any such document in favour of the other. Exchange can be effected either by one document or by different documents. The consideration for the one document executed in pursuance of an agreement for exchange is the execution of a document by the other party. Unless it is so done, the party who has taken the deed from the other party without himself executing any document in favour of that other party, cannot claim to have got a valid title to the property until and unless he executes a similar document transferring his interest in favour of that other party. It being so, the title cannot pass, nor could have passed to the present plaintiff on the mere execution of the sale-deed Ext. I. In the case of an exchange, the intention of parties cannot but be that there should be a reciprocal transfer of two things at the same time and that until such a thing is done, the passing of title under the one document executed in pursuance of the contract

should always be postponed till after the execution of the another document by the other party. In this view of the position of law, I hold that the plaintiff in this case has acquired no title to the property, because, he has failed to act according to the promise even though the partition was finally effected in February, 1944.

(5) Learned advocate appearing for the respondent relies upon a decision of the Allahabad High Court reported in — 'Gopi Ram v. Durjan', AIR 1929 All 63 (A), in support of his contention that under Ext. I the plaintiff has got good title to the property, but the only remedy available to the present appellant is to sue the plaintiff for specific performance of the contract with respect to the Chandipadaro land. But the facts of that case are not similar to the facts of the present case, in that case land was exchanged between the parties under one deed of exchange. But in spite of that deed of exchange, the defendant was withholding possession of his land. It is why, the plaintiff in that case brought a suit for recovery of possession of the land in dispute on the basis of that exchange.

Their Lordships of the Allahabad High Court while discussing this point has made a distinction between an executed contract and an executory contract and held that specific performance of a contract is available only in the case of an executory agreement, but not in the case of an executed contract. He has further observed in that case to the effect that when the exchange-deed was finally executed, the contract is not available to the parties in that suit. It being so, that authority is not of any avail to the respondent. It is further urged on the side of the respondent that when there was a mutual exchange of possession the defendants cannot avail the plea that passing of the title in favour of the plaintiff to the disputed property has been postponed till after the execution of a similar Kabala by the plaintiff. But the transaction of exchange cannot be completed till after the execution in the present case of deeds by both parties in favour of each other. When one of the parties has failed to execute the deed in pursuance of the agreement, the mere fact of exchange of possession cannot be sufficient to complete the passing of title in favour of each other, especially when properties to be exchanged are each worth more than Rs. 100/-. It being so, this contention is not sustainable.

(6) But the case filed by the present defendants against Satyabadi Sahu ultimately came up before this Court in — 'Second Appeal No. 309 of 1948 (Orissa) (B)'. In that case a similar question arose as to whether Satyabadi has acquired any title by the deed executed by the present appellant in his favour without Satyabadi executing a similar document in favour of D-2 with respect to the Chandipadaro land. A Division Bench of this Court in the unreported case have held that when it was an exchange, the title to the two items of the property on each side would pass to the other simultaneously on execution of the necessary document or documents, and that "it is impossible to say that the title passes until the entire transaction is fully completed." Both these cases are of same nature. The view taken by the Division Bench of this Court is in consonance with the view which I have taken in this case on a consideration of the distinction between 'exchange' and sale.

(7) In the result, I would differ from the courts below in this that the plaintiff-respondent has not acquired any title to the property merely on the execution of the sale-deed Ext. I in his favour by D-2. As the plaintiff has not carried out his part of the contract and as there has been no reciprocal transfer of the property as contemplated within the definition of 'exchange', I would hold that the plaintiff-respondent has acquired no title to the property under Ext. I.

(8) I would, therefore, set aside the judgment and decree of the Courts below and dismiss the plaintiff's suit with costs. The appeal is allowed with costs.

B/K.S.B. Appeal allowed.

A.I.R. 1954 ORISSA 107 (Vol. 41, C.N. 32)

MOHAPATRA AND MOHANTY JJ.

Ananto Mohini, Defendant-Appellant v. Khalli Sahu and others, Plaintiffs-Respondents.

Second Appeal No. 105 of 1950, D/- 8-9-1953, from judgment of Addl. Sub.-J., Berhampur, D/- 17-11-49.

(a) Hindu Law — Alienation — Legal necessity — Litigation.

Mother of the minor who was, a young woman was in a very embarrassing position. Her relations had an eye over the minor's property and with that intention, slandered her in such vile terms with the help of the village Karji that her position in the village became intolerable. The family of the minor was then practically ostracized by her people so much so that not only the widow but also the minor had practically no standing in the village, nor in their community. In such adverse embarrassing circumstances, the mother thought it fit to file the criminal case against her slanderers for defamation in order to remove the disgrace and stigma that had been cast on her fair name and also on the name of the family:

Held that such a litigation constituted a legal necessity binding the minor and his estate. It is the bounden duty of the son to remove the disgrace and stigma from his mother cast on her falsely and maliciously by some of the villagers and his relations. (Para 5)

(b) Hindu Law — Alienation — Legal necessity — Bona fide enquiry.

When a creditor had personal knowledge of the condition of the borrower's family and also all about the unexpected expenses of the family, he is not ordinarily required to make any inquiry as to them. His personal knowledge itself is sufficient to justify the loan advanced by him. Further though the recital in the deed of mortgage cannot be taken to be an evidence as to the existence of any legal necessity if the mortgagor makes a representation to the original creditor as to the existence of necessity for borrowing the money, and believing that representation to be true supplemented by his personal knowledge of the family, the creditor advances money to her, such a belief is a bona fide one. (Para 6)

P. Misra and C. S. Misra, for Appellant; B. K. Pal, for Respondents.

CASES REFERRED: Paras

(A) (V2) AIR 1915 PC 57 (59): 43 Cal 417 (PC) 4
(B) (V4) AIR 1917 PC 6 (7): 40 Mad 402 (PC) 6

MOHANTY J.:

This was a suit by the plaintiff-respondent 1 to enforce a mortgage bond executed by respondent 2 Suvarno Mohini as the mother-guardian of the appellant during his minority in favour of Ananda Mohanty, the deceased father of defendants-respondents 9 and 10 on 3-2-1933. The principal sum advanced on the mortgage-bond was Rs. 500/-. The claim was laid at for Rs. 1,000/-. In 1947, defendant-respondents 9 and 10 after the death of their father transferred that mortgage-bond to the respondent 1 for consideration. Respondent 1 as a transferee of the mortgage has brought the suit for recovery of the mortgage-amount by sale of the mortgaged property.

Defendants 3 to 8 who are respondents 3 to 8 have purchased a portion of the mortgaged property, subsequent to the mortgage in question. Defendants 3, 4, and 6 have filed a written statement claiming that their purchased property should be sold last of all, if the mortgage amount cannot be entirely recovered by the sale of the remaining mortgaged property. But at the time of trial they did not appear. The suit was contested by D-2 only on the ground that Ananda Mohanty fraudulently took a mortgage bond from his mother without any consideration, and that there was no legal necessity justifying the loan avdanced under the mortgage bond.

(2) The trial Court has held that the mortgage-bond in suit is genuine and for consideration; but has dismissed the plaintiff's suit on the ground that though there was a necessity for the loan, such a loan is entirely personal to D-1 and cannot be said to have been incurred to avert any danger to the estate of D-2, the appellant. He has further held that there was no pressure on the estate of D-2, nor was there any benefit conferred upon it and that as the defendant is rich man, he could never have any necessity for borrowing at least Rs. 50/- for the family expenses.

(3) On appeal by D-2 the subordinate Judge has reversed the judgment of the trial Court on the finding that the mortgage bond in suit is genuine and for consideration and that the debt contracted under that bond by the mother-guardian of D-2 during his minority is for such legal necessity as would bind the minor and his estate.

(4) There is a concurrent finding of the Courts below to the effect that the bond in suit, Ext. I, is genuine and for consideration. It appears from the recitals in the bond that out of Rs. 500/- Rs. 450/- was taken to meet the litigation expenses and Rs. 50/- was for the family expenses. In the recitals the details as regards litigation have been given. It appears that in 1922 the father of D-2 died leaving his young widow (D-1) who was then pregnant. D-2 is a posthumous child of his father. The troubles of D-1 arose sometime after the death of her husband. Her relatives went against her and started scandalising her as an unchaste woman and as having caused the abortion of her illicit pregnancy. They anyhow prevailed upon the village Karji, and through him sent reports to the Tahsildar-Magistrate and the Police about her character and about her causing the miscarriage of her illicit pregnancy.

It is to vindicate her position and to remove the stigma and disgrace, that D-1 brought a criminal case against the village Karji and some of her close relations under section 500, I. P. C. That case was a long-drawn affair. It appears from the judgment Ext. A that the case was twice tried de novo by reason of the transfer of the Magistrate. One of the accused who was a village Karji took up the position before the Magistrate that he cannot be prosecuted without the previous sanction of the Government. His plea having been negatived by the Magistrate, he went in appeal to the Sessions Judge, who also confirmed the order of the Magistrate. Then he moved the Madras High Court, but it was ultimately disallowed. The widow had to oppose all those petitions and had to meet the expenses in connection therewith.

The case was started against them on 27-4-32 but ended in conviction of all the accused on 24-10-33. During this period, the debt in question was incurred by D-1 as the guardian of D-2. The case number has also been referred to in that bond in great detail, and the reason for which that case had to be started has also been given therein. Thus two factors that emerge from the above circumstances and the facts of the present case are: (1) there was a long-drawn litigation started by D-1 against her slanderers; and (2) that much expense must have been incurred by her in connexion with that litigation. The widow was so much harassed in that litigation that she must have incurred expenses much more than the sum of Rs. 450/- mentioned in Ext. 1.

But these two factors are not sufficient to show that there was at that time pressure upon the estate of the minor to borrow money from others to meet those expenses. It must, therefore, be shown by the creditor that at that time, the expenses could not have been met from the income of the estate. There is no evidence as to any bona fide enquiry having been made by the creditor before advancing the loan to her. It is, therefore, contended by the learned Advocate-General on behalf of the appellant that in absence of any such bona fide inquiry by the creditor in order to satisfy himself about the existence of legal necessity alleged in the bond itself before advancing the loan to D-1, the plaintiff cannot get any decree. In support of this contention, he relies upon the decision of the Privy Council reported in — 'Ravaneshwar Prasad Singh v. Chandi Pd. Singh', AIR 1915 PC 57 (A).

It appears from that decision that the Privy Council have accepted as a good principle of law the observations of the High Court in this connection. It was a case in which there was a vast impartible property to which one Tikaithi Durga Kumari succeeded as the mother-heir of her son in 1863. Durga Kumari borrowed between the years 1870 to 1871 a sum exceeding one lakh and sixty thousand rupees and alienated most substantial portion of the estate, the remaining property being comparatively of insignificant value. She died on 15-5-1907. In the year 1908, the person brought a suit for setting aside those alienations, on the ground that the alienations not being for legal necessity, cannot bind the reversion. It was found in that case that no doubt there was litigation and money must have been spent over it; but at the same time the annual income of the estate was of a considerable amount.

As the debt was for a considerable amount incurred in the course of one year, and as the major portion of the property yielding large income was sold away by the widow for repayment of the debt, it was, therefore, observed by their Lordships of the High Court that unless incurred for litigation purposes, it could not have been met from the income of the estate, and unless the transferee proves that he had made bona fide inquiry about it before purchasing the property, he cannot get a decree binding the reversion. As

there was no evidence of bona fide inquiry, the alienations were set aside.

(5) But the present case stands on a different footing. The appellant's father died leaving only 14 or 15 acres of land. The appellant has given in the written statement how much property he was possessed of at the time of the loan and how much savings he used to make out of its usufruct annually. According to his written statement, he has got 70 Varanams of land that is, some 15 and odd acres, and saves to the extent of Rs. 500/- annually after meeting all the family expenses. He would have us believe in his evidence before the Court that he has got money-lending transaction to the extent of one lakh of rupees. A suggestion was made to P. W. 1 in cross-examination that he got Rs. 20,000/- from the Court (sic); but his reply is that he might have got it.

That reply was taken advantage of by the trial Court in holding that the appellant is a very rich man getting a very substantial income from the property. P. W. 1 has admitted that sometime the appellant lends out money, but he does not say whether in the year 1932-33, the mother-guardian used to lend out money. It being so, we do not think that in the year 1932-33, the appellant was so substantial a man as to get more than sufficient income from his property.

His mother who was then a young woman was in a very embarrassing position. Her relations had an eye over the minor's property and with that intention, slandered her in such vile terms with the help of the village Karji that her position in the village became intolerable. The family of the appellant was then practically ostracized by her people so much so that not only the widow but also the minor had practically no standing in the village, nor in their community. It is in such adverse embarrassing circumstances, that D-1 thought it fit and we think rightly, to file the criminal case against her slanderers for defamation in order to remove the disgrace and stigma that had been cast on her fair name and also on the name of the family. In our view, such a litigation constitutes a legal necessity binding the minor and his estate.

There are good many authorities for the proposition that the debt incurred by the manager of the family to defend any member of a Hindu joint family in a criminal case is a legal necessity of the family binding all the members. When the family is threatened with disgrace and the intention is to ward it off, any debts incurred by the head of the family or the Karta of the minor in connection therewith should be taken as for legal necessity of the family. As has been rightly observed by the learned Subordinate Judge, it is the bounden duty of the son to remove the disgrace and stigma from his mother cast on her falsely and maliciously by some of the villagers and his relations.

We are, therefore, of the opinion that there cannot be any more pressing necessity from the point of view of a member of a joint Hindu family, than raising money for removing such disgrace. Learned Advocate-General appearing for the appellant does not contest this position. He has practically admitted that if it is proved that there was any bona fide inquiry to the effect that the money could not be met at that time out of the income of the family, certainly the debt now in question should be taken as such a legal necessity as binding the minor and his estate.

(6) The only question is whether at that time the minor had any such fund as to meet such expenses. Undoubtedly, the death of the original creditor has put the plaintiff under serious disadvantage. Nevertheless, D-2 appears to have remained satisfied by merely relying upon the abstract principle that the onus is on the creditor. He has made no attempt to give any assistance to the Court for arriving at the truth in this case. In evidence, as we have stated above, he has made strenuous attempts to show himself to be a very rich man having a considerable money lending transaction. If it is so, he must have accounts; but he has withheld them for the year 1932-33. Had those accounts been filed, they would have afforded sufficient opportunity to the Courts for being satisfied as to whether the family had sufficient funds in those years to meet all those unexpected expenses. Nor has he examined his mother.

She was a party to the transaction and was managing the minor's property in 1932-33. She is in a better position to speak to the fact what was the condition of the family. The principle on which we rely for taking this view of the case has been well enunciated by their Lordships of the Privy Council in the case reported in — 'T. S. Murugesam Pillai v. M. D. Gnana Sambandha', AIR 1917 PC 6 at p. 7 (B). In our view the circumstances of the case are such and the position of the family at that time was such an embarrassing one, that it can easily be inferable that the family had no sufficient fund at that time to meet the litigation expenses.

Moreover there is no evidence to show that D-1 was such an imprudent woman as to borrow money recklessly even though the minor had enough cash with him. But on the other hand, it appears to us that faced with such adverse and embarrassing circumstances, she could not have managed the property of the minor efficiently so as to get any surplus after meeting all the expenses of the family. She instead of selling the property of the minor, appears to have done well, as an act of prudent woman, to borrow money for meeting unexpected expenses. Moreover, the original creditor was a neighbour of defendants 1 and 2. He must have known, as a neighbour, the financial condition of the appellant's family at that time.

When a creditor had personal knowledge of the condition of the family and also all about the unexpected expenses of the family, he is not ordinarily required to make any inquiry as to them. His personal knowledge itself is sufficient to justify the loan advanced by him. Apart from this, Ext. 1 at best shows that, though the recital in it cannot be taken to be an evidence as to the existence of any legal necessity, she made a representation to the original creditor as to the existence of necessity for borrowing the money, and that, believing that representation to be true supplemented by his personal knowledge of the family, the creditor advanced money to her. Such a belief, we think, is a bona fide one. The creditor appears to have acted bona fide and in good faith in this matter, especially in view of the existence of the pending litigation in Court requiring large amounts of money to be spent over it. In this view of the case, we hold, in agreement with the learned Additional Sub-Judge that there was such justifying legal necessity for the loan under the bond in suit.

(7) Having regard to all the circumstances of the case, and having regard to the unhelpful attitude of the appellant in not examining his mother who was in the know of everything, and having regard to the state of affairs of the family pro-

perty in the year 1932-33, we feel satisfied that the loan incurred under Ext. 1 is for such legal necessity as binding the minor. The contentions advanced by the learned Advocate-General for the appellant cannot therefore be accepted.

(8) In the result, we would confirm the judgment and decree of the lower appellate Court and dismiss this appeal with costs.

(9) MOHAPATRA J. : I agree.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 ORISSA 110 (Vol. 41, C.N. 33)

PANIGRAHI C. J. AND MOHAPATRA J.

Radha Kamal, Plaintiff-Appellant v. Puri Municipality and others, Defendants-Respondents.

Second Appeal No. 407 of 1948, D/- 23-9-1953, from judgment of Addl. Dist. J., Berhampur, D/- 7-5-1948.

(a) Transfer of Property Act (1882), Ss. 40, 105, 108 — Covenants between landlord and tenant.

A covenant entered into between a lessor and a lessee is primarily binding as between the two personally. But upon an assignment either of the reversion or of the terms, it may also be binding on the grantee of the reversion or the assignee of the terms, and similarly, the benefit of a covenant may pass to these parties respectively. If the covenant is one by the lessor for the benefit of the lessee and directly touches or concerns the land it runs with the land in favour of the assignee. An option to renew the lease runs with the land and the lease-hold interest, and so both the lessors' and the lessees' successors-in-title are bound.

Having regard to the nature of the lease in the instant case both the covenant requiring the lessee to put up a building on the leased premises and the covenant relating to the renewal of the lease, held were covenants running with the land and the assignees of the lease consequently incurred the liability to perform and acquire the right to take advantage of the covenants. The liability to put up a building having been discharged by the original lessee the right to exercise the option of renewing the lease passed to the assignee. The contention that every assignee of a part of the tenement is bound to put up buildings on the parcel of land assigned to him, is unreasonable and by the very nature of the thing, is impossible of performance. The lease-hold interest having been severed by agreement of the parties each of the assignees was entitled to enforce the term providing for the renewal, so far as his separated part was concerned irrespective of the others. (1838) 8 LJCP 59, Rel. on. (Paras 5, 7)

Anno: T. P. Act, S. 40 N. 25; S. 105 N. 36; S. 108(j) N. 2, 3, 4.

(b) Specific Relief Act (1877), S. 16 — "Stands on a separate and independent footing."

Section 16 contemplates a contract parts of which are separate and independent. If the contract is actually divisible and the Court enforces what is apparently a part, it really enforces the entire and complete contract. The expression 'stands on a separate and independent footing' points to a limitation which would exclude any new bargain, and cannot be said performance of a part of a contract. Where the other parts have already been performed, the Court is not introducing a new bargain, and S. 16 is a statutory warrant for enforcing a part which can and ought to be performed. Where the suit contract has been divided up into four contracts not by unilateral action but by consensual authority and what was at one time a single contract to renew the lease of the whole of the land, has been split up into four leases piecemeal each of them "stands on a separate and independent footing" from the rest. Case law discussed. (Paras 9, 10, 11)

Anno: Specific Relief Act, S. 16 N. 1.

(c) Specific Relief Act (1877), S. 27 — Notice and burden of proof—(Evidence Act (1872), Ss. 101 to 103).

Section 27 throws the onus upon the transferee to establish that he had no notice of the original contract. In the circumstances held that the transferee failed to discharge the onus that was cast upon her under S. 27. (Para 12)

Anno: S. R. Act, S. 27 N. 4; Evidence Act, Ss. 101 to 103 N. 1, 8.

R. N. Sinha, for Appellant; B. N. Das and P. C. Chatterjee, for Respondents.

CASES REFERRED: Paras

(A) (1838) 8 LJCP 59 (70): 132 ER 981 7
(B) (V15) AIR 1928 PC 258 (260): 55 Ind App 423 (PC) 9
(C) (V12) AIR 1925 PC 45 (46): 52 Ind App 90 (PC) 9
(D) (V14) AIR 1927 Mad 513 (519): 50 Mad 595 9
(E) (1856) 52 ER 1143 (1148): 22 Beav 351 10
(F) (1856) 22 Beav 625 (627): 52 ER 1249 10
(G) (V6) AIR 1919 Mad 374 (378): 53 Ind Cas 283 10
(H) (V5) AIR 1918 Cal 889 (890): 27 Cal LJ 611 10

PANIGRAHI C. J.:

This is a second appeal by the unsuccessful plaintiff who has lost his suit for specific performance in both the Courts below.

(2) The facts leading up to this litigation are briefly these. On 10-7-23 defendant No. 1, namely, the Municipality of Puri, granted a lease of 500 acres of land on the Beach Road to one Chandramoni Devi, the period for which the lease was to run being stipulated as twenty years. The lessee assigned her lease-hold interest by four different sale-deeds, to four different persons including the plaintiff, and his brother, Dr. Radha Kumud Mukherjee. Under these assignments the plaintiff and his brother, each acquired 120 acres of the entire lease-hold by virtue of two sale-deeds dated 26-5-1925. The other vendees from Chandramoni Devi were one Promode Sundari and one Amiya Nath Mukherjee.

By an identure made on the 10th January 1944, defendant No. 1 granted a lease of the plot purchased by the plaintiff from Chandramoni Devi, to defendant No. 2, and by a subsequent sale-deed dated 9-6-1944 the second defendant conveyed the very same property to defendant No. 3. The case for the plaintiff is that he is entitled to a renewal of the lease granted to Chandramoni Devi his vendor in respect of the plot purchased by him from her and on the same terms and conditions as were contained in the original lease.

The main contest put forward on behalf of the municipality is that there was a breach of one of the terms of the lease by the plaintiff and that, accordingly, he was not entitled to exercise the option of having the lease renewed as provided for therein. The municipality therefore contends

that it was entitled to regard the original lease as having been cancelled and grant the plot in question to defendant No. 2. The plea of defendant No. 3 is that she was a bona fide purchaser of the plot for value without notice of the prior contract in favour of the plaintiff by the Municipality, and that therefore the plaintiff should not be allowed specific performance of the lease as against her.

(3) Some of the terms of the lease granted to Chandramoni Devi which have a bearing on the decision of the dispute between the parties are given below:

" Clause (3): That you shall not by any means or in any way whatsoever transfer your holding or any portion thereof to any other person, without previously obtaining the written permission of the Chairman to do so and paying a transfer fee equal to 12½ per cent. of the consideration money, provided that no such fee shall be less than one rupee.

Clause (4): That you shall enjoy the fruits of all the trees on your holding but shall not cut down or in any way injure such trees without the permission of the Chairman.

Clause (8): That the house that you shall erect shall be at least 10 feet away from the edge of the road and shall be constructed on a plan to be previously approved by the Chairman.

Clause (13): That the lease may be cancelled by the Chairman if the building is not completed within 12 months of the date on which it was executed or within such further time as the Chairman may allow. On such cancellation the Chairman may, by notice in writing, require the lessee to remove within a reasonable time any plot (sic) which may have been commenced and not completed, or the materials which may have been collected on the land, and if he fails to comply with such notice the Chairman may, after giving further notice in writing specifying the time, cause such removal to be effected and recover the costs from him.

Clause (17): That on the expiry of the term of this lease you shall, if you have duly observed all the conditions thereof, be entitled to its renewal, on such terms as may be agreed upon, the rent being liable to enhancement on such renewal.

Clause (20): That in the event of the infringement of any of the above conditions the lease shall, ipso facto, terminate at once and you shall quit the holding as soon as you are required in writing by the Chairman to do so."

(4) The defendant municipality's contention is that Clause (13) of the Covenant has not been complied with as a building was not put up within 12 months of the date of the lease and that, therefore, under Clause (20) the lease ipso facto terminated. It is not the case of the municipality that the original lessee, namely Chandramoni Devi, did not put up a building within one year of the lease, but that the plaintiff did not do so, within a year after his purchase of the lease-hold interest from his vendor, namely the original lessee. The plaintiff meets this contention by saying that the covenant regarding the putting up of a building contained in Clause (13) had been duly complied with by the lessee Chandramoni Devi and that it is not necessary for each of the assignees from the original lessee to put up buildings on the plots purchased by them.

The point is which of these rival contentions is correct. The second contention on behalf of the defendants, generally, is that the plaintiff is not entitled to specific performance of a part of the contract and that the contract should be enforced either as a whole or not at all. It is accordingly argued that the plaintiff in so far as he asks for renewal of the lease in respect of the portion that he has purchased is not entitled to specific performance. The third contention which is raised only on behalf of defendant No. 3 is that she is a bona fide transferee for value and that specific performance cannot be decreed against her as she had no prior notice of the pre-existing contract between the plaintiff and the municipality. I shall examine the validity of these three contentions seriatim.

(5) I shall take up the first contention first. The proved facts are that the original lease-hold property has been, by mutual agreement between the parties, subdivided into four parcels and each of the assignees except the plaintiff, has been granted a renewed lease by the Municipality at an enhanced rent. It is not claimed for the Municipality that the lease in favour of Chandramoni Devi was ever cancelled for non-compliance with any of the terms of the lease. The trial Court found that Chandramoni Devi had not, and the appellate Court found that she had, completed the construction of the house within the stipulated time. We see no reason to disbelieve the evidence of P. W. 1, the husband of the original lessee or to differ from the finding of the lower appellate Court that there was a complete compliance by the original lessee with the condition of the lease.

It has also been admitted that the assignees from Chandramoni Devi of the different parts of the house-hold were recognised by the defendant municipality and that they have been paying their shares of the apportioned rents since the mutation of their names in the municipal registers. It is further admitted that the renewal clause of the covenant has been availed of by the other assignees and separate leases for the severed plots of the lease-hold have been granted by the municipality. These circumstances clearly indicate that the lease-hold interest has been severed by agreement of the parties and each of the assignees is entitled to enforce the term providing for the renewal, so far as his separated part is concerned irrespective of the others.

(6) There is no evidence that the plaintiff was ever called upon to put up a building within one year of his purchase, or that any notice was taken of his negligence by the municipality. It must, therefore, be held that the terms and conditions of his holding the land are to be determined with reference to the original lease in favour of his vendor. If, as has been found by the lower appellate Court Clause (13) of the covenant has been complied with, the lease must be held to be still in force, and the plaintiff as the assignee of a portion thereof is entitled to take advantage of, the renewal clause in respect of the portion purchased by him.

(7) In the judgments of both the Courts below, there was some discussion as to whether the covenant stipulating for the renewal of the lease is one running with the land or is independent of it. A covenant entered into between a lessor and a lessee is primarily binding as between the two personally. But upon an assignment either of the reversion or of the terms, it may also be binding on the grantee of the reversion or the assignee of the terms; and similarly, the benefit of a covenant may pass to these parties respectively. There may be covenants for the benefit of the lessor, or there may be a burden on the

lessee. Whether a covenant runs with the land would depend partly on the nature and partly on the form of the covenant.

It is said to run with the land if it directly concerns the land as, for example, covenant to pay rent, to repair houses already built, to insure against fire, to use premises as dwelling houses only, or to manure the land if it is an agricultural land: and such covenants will bind the assigns. If the covenant is one by the lessor for the benefit of the lessee and directly touches or concerns the land it runs with the land in favour of the assign. See — 'Simpson v. Clayton', (1838) 8 LJCP 59 (A). An option to renew the lease runs with the land and the lease-hold interest, and so both the lessors' and the lessees' successors-in-title are bound.

"Unlike an option to purchase an option to renew the lease is not affected by the rule against perpetuities..... It is an interest in land capable of assignment and upon bankruptcy of the lessee the option vests in his trustee in bankruptcy";—see Redman's Law of Landlord and Tenant, p. 125.

Having regard to the nature of the lease in the instant case both the covenant requiring the lessee to put up a building on the leased premises and the covenant relating to the renewal of the lease, are covenants running with the land and the assignees of the lease consequently incurred the liability to perform and acquire the right to take advantage of the covenants. The liability to put up a building having been discharged by Chandramoni Devi the original lessee the right to exercise the option of renewing the lease passed to the assignee, namely, the plaintiff.

The extreme contention put forward on behalf of the municipality, that every assignee of a part of the tenement is bound to put up buildings on the parcel of land assigned to him, is unreasonable and by the very nature of the thing, is impossible of performance. The lessee could have used the lands, other than those required for putting up buildings, in any manner she liked; she could have raised a garden or put up a gymnasium. The only liability that she undertook under the lease had been discharged by her and when the lease was assigned to the plaintiff the assignee was at liberty to take advantage of the covenant in the same way as the lessee could have done.

Clause (3) of the lease permitted transfer of the holding or a portion thereof, with the previous permission of the Chairman of the Municipality. It was open to the Chairman of the Municipality to withhold permission to recognise the assignment in favour of the plaintiff, or to insist upon a new lease being executed by the plaintiff, making it obligatory on him to put up a building on the portion assigned to him. None of these things was done. It is clear therefore that neither the terms of the lease nor the subsequent conduct of the parties would warrant a finding in favour of the municipality. I would accordingly hold, in agreement with the view of the lower appellate Court that the covenant imposing a burden on the lessee has been complied with and that the advantage of the renewal clause is available to the plaintiff, the assignee of the lessee.

(8) Even if the recognition of the plaintiff by the Municipality as an assignee of a part of the demise is to be regarded as a fresh lease on the terms of the original lease, the fact remains that the period of twenty years stipulated in the lease did not expire on 10-7-1943 and certainly not on the date when the Municipality granted the lease in respect of the same land to defendant No. 2 for the plaintiff would be entitled to a period of twenty years from the date of mutation of his name and recognition of his assignment by the Municipality. This fact, by itself, would show that there could be no question of the old lease being replaced by a fresh contract with the plaintiff. The original lease still holds the field and would govern the rights of the parties. The first contention, raised on behalf of the Municipality, must therefore be overruled.

(9) The second contention raised on behalf of the defendants, generally, is however not so easy to dispose of. The proposition advanced is that even if the plaintiff be held entitled to specific performance of the covenant for renewal of the lease he cannot sue in respect of only a part of the lease. As I have already indicated earlier, the lease-hold interest had been severed by agreement between the parties. Both the Courts below appear to have accepted the above contention raised on behalf of the defendants relying on the case of — 'Secy. of State v. Volkart Brothers', AIR 1928 PC 258 (B).

In that case the lessees had sold their right, title and interest in the greater part of the demised lands and claimed a renewal in respect of the remaining lands in their possession. The Judicial Committee held that on a true construction of the covenant, the respondents were not entitled to claim renewal. Before considering the facts of that case, I think it necessary to refer to another decision of the Judicial Committee reported in — 'William Graham v. Krushna Chandra', AIR 1925 PC 45 (C). There the Judicial Committee has laid down that Sections 14 to 17 of the Specific Relief Act constitute, with regard to the specific performance of a part of the contract, a complete Code within the terms of which relief of that character must be brought if it is to be granted.

Section 14 of the Act enables the Court to direct specific performance of so much of a contract as can be performed if the part which must be left unperformed bears only a small proportion to the whole or does not admit of compensation in money. Section 15 deals with a case where the part which must be left unperformed bears only a small proportion to the whole in value and does not admit of compensation in money. In that case the party in default is not entitled to obtain a decree for specific performance. But the party not in default may claim specific performance, provided he relinquishes his claim to further performance and all rights to compensation.

Section 16 deals with divisible contracts and is as follows:

"When a part of a contract which, taken by itself, can and ought to be specifically performed, 'stands on a separate and independent footing' from another part of the same contract which cannot, and ought not, to be specifically performed, the Court may direct specific performance of the former part."

This section contemplates a contract parts of which are separate and independent. If the contract is actually divisible and the Court enforces what is apparently a part, it really enforces the entire and complete contract. The expression 'stands on a separate and independent footing' points to a limitation which would exclude any new bargain, and cannot be said performance of a part of a contract where the other parts have already been performed the Court is not introducing a new bargain, and Section 16 is a statutory warrant for enforcing a part which can and ought to be performed.

The decision of the Privy Council in — 'Secy. of State v. Volkart Brothers (B)' did not turn on the construction of any of the provisions of the Specific Relief Act and their Lordships (had?) no contract to renew the lease for a part of the premises. The judgment of the High Court of Madras in that case is reported in — 'Secy. of State v. Volkart Bros.', AIR 1927 Mad 513 (D) and it gives the facts and reasonings of Krishnan J. showing why Section 16 of the Specific Relief Act was not applicable to the facts of the case. His Lordship observed:

"Section 16 also does not apply as we have not got here, in my opinion, part of a contract which stands on a separate and independent footing from the rest. If the suit contract could be divided up into two contracts, one with the respondents for their plot and the other with the Cochin Club for theirs, the section may apply. But I am unable to see what justification there is for holding that the lessees can by any means by their own unilateral act, without any reference to or consent of the lessor, split up into two his contract for a single lease to renew the whole plot as one plot. The United Company entered into a single contract to renew with reference to the whole of the land. I am unable to see how they can be compelled to perform that contract piecemeal."

In the instant case before us, the suit contract has been divided up into four contracts not by unilateral action but by consensual authority. What was at one time a single contract to renew the lease of the whole of the land, has been split up into four leases piecemeal and, in the language of Section 16, each of them "stands on a separate and independent footing" from the rest. It is well established that where a tenement is subdivided, each tenant holds his share in severality. Where there are tenants-in-common with undivided moieties there is only one tenement in the whole of which each tenant shares. Each tenant-in-common has an estate in the whole of the single tenement and there is privity of estate between him and the landlord; and each is liable for the whole rent.

But where the land has been divided, as well as the rents due on the separate parcels, as indeed is the case here, the covenant is divisible and the tenants are not in the same position as tenants in common. His estate does not extend over the whole of the land leased, and I see no reason why either on principle or on authority he should not be protected in his possession. The case of — 'Volkart Brothers (D)' is easily distinguishable on the facts as that was a case of tenants-in-common.

(10) The ordinary rule is that a part of a contract shall not be specifically performed except in cases coming under one or other of Sections 14, 15 and 16. Where the part which it is impossible to enforce has already been performed Court will decree specific performance of a contract: — 'Hope v. Hope', (1856) 52 ER 1143 (E). Where a contract to grant a lease also contained a covenant giving the option to purchase, the Court decreed performance of the contract of sale although the covenantee had forfeited the right to obtain a lease as the contract was separable: — 'Green v. Low', (1856) 22 Beav 625 (F). In — 'Subramania Iyer v. Kalyanasundaram Iyer', AIR 1919 Mad 374 (G), Oldfield J. observed that if the plaintiff could show that the portion of the property which he claimed can reasonably be enjoyed independently of the remainder specific performance would be decreed.

In — 'Shama Charan v. Kumed Dasi', AIR 1918 Cal 889 (H), the first defendant professed to enter into a contract on his own behalf as well as of the other members of his joint family. It turned out that his co-sharers were not willing to abide by the contract but the share of the first defendant was large enough for the purpose of compliance of the contract made by him with the plaintiffs. The Court ruled that specific performance could be granted to the plaintiff in respect of the first defendant's share of the property.

(11) But apart from authority the inclination of my mind is to uphold the plaintiff's claim as no injustice will be done to the Municipality by decreeing specific performance. It is obvious that the original lease was granted to a lady who did not have money enough to complete the whole of the building which she had undertaken to erect. To enable her to raise funds for the purpose the contract was made divisible and she was permitted to assign her lease-hold interest to different persons. As soon as she put up the building she could enter into the market for raising money to enable her to complete the rest of the contract. If that was her right, is the plaintiff in any worse position? The plaintiff did not take upon himself to put up a building on the plot purchased by him from Chandramoni Devi. No injury has resulted to the Municipality by treating the contract as separable.

They have got a portion of the property leased out covered with a building. With regard to the remaining ground, in the occupation of the plaintiff, they still retain exactly the same right as they had under the original agreement, and that right is the right to enhance the rent. It is, therefore, idle to contend that the plaintiff must seek performance of the whole contract or none at all. Having given our best consideration to the facts and circumstances of this case, we have no hesitation in holding that the contract in favour of the plaintiff stands "on a separate and independent footing" and is severable from the rest of the contract. The contention of the Municipality based on this ground, must accordingly be held to be untenable.

(12) The third contention was raised by learned counsel appearing for defendant No. 3. That defendant claims to be a bona fide purchaser for value, without notice of the earlier contract, and seeks to resist the plaintiff's suit. Some cases under S. 41 of the Transfer of Property Act were cited before us, but in our judgment they have no application to the facts of the instant case and need not be noticed. For the purpose of deciding this appeal, it will be sufficient to refer to Section 27 of the Specific Relief Act. That section says that specific performance of a contract may be enforced against either party thereto, and against any other person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The Section throws the onus upon the transferee to establish that he had no notice of the original contract. The third defendant did not examine herself, but examined one Bhajanananda Mohanty as D. W. 3 whose evidence, however, is too artificial to be accepted. He says that he was looking after the purchases on behalf of defendant No. 3, but that he was not aware of the prior lease of this property. He, however, admits that he did not make any enquiry in the matter. Although he claims to have been looking after

the purchases the sale-deed in favour of defendant No. 3 shows that he took no part at all in the transaction. The stamps were all purchased by defendant No. 3 herself; and the document was registered at the residence of the vendor, defendant No. 2, where she was identified by one B. C. Mohanty. D. W. 3 does not even figure as an attestor to the deed and the document appears to have been attested by one Kali pada Ghatak, the Manager of the Darjeeling Bank.

We are not therefore inclined to place any reliance on the testimony of this witness. In the circumstances, we must hold that defendant No. 3 has failed to discharge the onus that was cast upon her under Section 27 of the Specific Relief Act. Exhibit 5, the resolution of the Municipality would also clearly indicate that defendant No. 2 the vendor of the third defendant had clear notice of the petition of the plaintiff praying for renewal of the lease and its rejection by the Municipality. The sale deed in favour of defendant No. 3 also specifically refers to the lease granted by the Chairman of the Municipality on 27-3-1944 in favour of the vendor, defendant No. 2. In spite of these facts having been brought to the notice of defendant No. 3 it is idle for her to contend now that she is a bona fide purchaser for value without notice of the prior contract in favour of the plaintiff.

(13) We would, therefore, allow this appeal, set aside the judgments of the Courts below and grant a decree to the plaintiff in terms of the plaint. The plaintiff is entitled to a renewal of the lease on the enhanced rent fixed by the defendant-municipality, subject to the terms and conditions of the original lease except the covenant relating to the obligation of putting up a house within twelve months. The trial Court will call upon the plaintiff to file a draft lease on these lines for being executed by defendant No. 1. The plaintiff shall be entitled to take possession of the suit plot by evicting defendants 2 and 3 therefrom. The plaintiff will also be entitled to the costs of this litigation throughout. Hearing fee in this Court is assessed at Rs. 100/-.

(14) MOHAPATRA J.: I agree.

B/D.H.Z. Appeal allowed.

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PANIGRAHI C. J. AND MOHAPATRA J.

Purna Chand Sahu. Defendant-Appellant v. Chamra Bariha and others, Respondents.

Supreme Court Appeal No. 24 of 1953, D/- 10-11-1953 for leave to appeal to Supreme Court against the judgment of Panigrahi C. J. and Mohapatra J., D/- 21-4-1953.

(a) Civil P. C. (1908), Ss. 110 and 109 (c) — Certificate of fitness for leave to appeal.

Where the trial Court granted a decree for possession of sir lands attached to the Thikadari tenure in favour of the plaintiffs mainly on the ground that the previous decree for rent and ejectment obtained by zamindar (defendant No. 2) was merely a personal decree against the ex-Thikadar and that it did not bind the interest of the present plaintiffs because the Thikadari interest along with the disputed sir lands were the ancestral properties of the plaintiffs and in appeal, the High Court confirmed the finding of the trial Court:

Held that the interest of the joint family members could not be extinguished by execution of a mere personal decree against the ex-Thikadar and therefore, it was not a fit case where leave could be granted; nor was it a case where any substantial question of law was involved. AIR 1952 Orissa 99, Ref. (Paras 2, 3)

Anno: Civil P. C., S. 109 N. 10.

1953 Mulla: S. 109, P. 390 N. "Clause (c)..... fitness" (14 Pts. extra in N. 10 to S. 109 of A.I.R. Com.—N. 10 to S. 109 in A.I.R. Com. exhaustively illustrative — 2 Pts. extra in Mulla — A.I.R. 1947 Lah. 304 (305) (F.B.), not noticed in Mulla).

(Note: The text of Clause (c) to S. 109 as given in Mulla is wrong. In view of the adaptation directed by Adaptation of Laws Order, 1950. which is only of the expression "decree or final order", there is no warrant for adding the word "judgment" in Clause (c): see 58 C.W.N. 31).

Civil P. C., S. 110 N. 17 (see also N. 16).

1953 Mulla: S. 110 P. 404 N. "The appeal.... law" (Lahore view on Pt. (q) and contra Calcutta view on Pt. (r), not noticed in Mulla — 2 Pts. extra in Mulla — 25 Pts. extra in Ns. 16 and 17 to S. 110 in A.I.R. Com.).

(b) Civil P. C. (1908), S. 110 — Valuation.

Even if the valuation of the properties be more than ten thousand rupees, leave to appeal to the Supreme Court cannot be granted unless there is any substantial question of law involved, when the judgment of the High Court is one confirming the judgment and decree of the trial Court. That apart appellant will not be allowed to take up the position that the suit properties are valued at more than ten thousand rupees in the face of the fact that he, being the appellant before the High Court, had valued the properties in suit at Rs. 3000/-. AIR 1931 Cal 417; AIR 1918 Bom 224, Ref. (Para 4)

Anno: Civil P. C., S. 110 N. 12.

1953 Mulla: S. 110 P. 400 N. "Where..... decree".

Civil P. C., S. 110 N. 8.

1953 Mulla: S. 110 P. 396 N. "The amount.... Supreme Court" (8 Pts. extra in N. 8 to S. 110 in A.I.R. Com. — Patna, Madras and P. C. views on Pt. (u) not noted in Mulla).

(c) Civil P. C. (1908), O. 45, R. 13 — Stay of execution after rejecting leave to appeal.

Under R. 13 special provision is made for granting stay of execution of the decree only after the grant of certificate. The High Court therefore cannot grant stay when the leave to appeal is rejected, for allowing the appellant to apply for special leave to the Supreme Court and obtain stay. (Para 6)

Anno: Civil P. C., O. 45, R. 13 N. 6.

1953 Mulla: O. 45, R. 13 P. 1246 N. "Stay.... appeal."

(d) Civil P. C. (1908), S. 151, O. 45, R. 13; O. 41, Rr. 5 and 6 — Court cannot override express provision of law.

The decree-holder manifestly has got the right to execute the decree unless he is prohibited by law to execute or unless the Courts are empowered by express provision of law to restrain the decree-holder from executing the decree in certain events. The very language of O. 45, R. 13 is emphatic on the point that such a decree having been passed by the High Court is to be executed 'unconditionally', unless the Court directs otherwise even after the granting of the certificate. In such a case, to prevent the decree-holder from exe-

cuting the decree by using the inherent power of the Court would ordinarily be an abuse of the process of Court.

Therefore the Court cannot order stay of execution of decrees while leave application is pending before granting certificate or when the Court has refused to grant certificate. The Court has no inherent power of staying execution of the decree by provisions like O. 41, Rr. 5 and 6 also; because O. 45, R. 13 would be deemed as redundant and unnecessary. 40 Cal 955; AIR 1934 Cal 823; AIR 1939 Cal 308; AIR 1934 All 585, Distinguished and explained. (Paras 6, 10)

Anno: Civil P. C., S. 151 N. 2(7).

1953 Mulla: S. 151 P. 476 N. "Inherent..... Court" and O. 45, R. 13 P. 1246 N. "Stay..... appeal" and "Stay.....suit" (Contrary view of Allahabad noted in Pt. 41 in N. 2 to S. 151 in A.I.R. Com., not noticed in Mulla).

Civil P. C., O. 45, R. 13 N. 6.

1953 Mulla: O. 45, R. 13 P. 1246 N. "Stay.... appeal".

Civil P. C., O. 41, R. 5 N. 2.

1953 Mulla: O. 41, R. 5 (Topic discussed in N. 2 to O. 41, R. 5 in A.I.R. Com. extra).

Civil P. C., O. 41, R. 6 N. 2. ..

1953 Mulla: O. 41, R. 6 P. 1192, N. "Application .....rule" (3 Pts. extra in N. 2 to O. 41, R. 6 in A.I.R. Com.).

B. N. Das and P. C. Chatterjee, for Appellant; G. K. Misra, for Respondents.

CASES REFERRED: Paras

(A) (V39) AIR 1952 Orissa 99 (Pr 17): ILR (1949) 1 Cut 139 3
(B) (V18) AIR 1931 Cal 417 (419): 58 Cal 66 4
(C) (V5) AIR 1918 Bom 224 (225): 42 Bom 609 4
(D) ('13) 40 Cal 955 (962, 963): 18 Ind Cas 207 6, 8
(E) (V21) AIR 1934 Cal 823 (824): 153 Ind Cas 272 7
(F) (V26) AIR 1939 Cal 308 (309): 183 Ind Cas 565 8
(G) (V21) AIR 1934 All 585 (586): 56 All 907 9

MOHAPATRA J.:

This application for leave to appeal to Supreme Court has been filed by defendant No. 1 against the confirming judgment and decree dated 7-11-1949 of Sri P. C. Dey, Subordinate Judge of Sambalpur. The suit is for recovery of possession of sir lands attached to the Thikadari tenure of which defendant No. 3 was the ex-Thikadar and defendant No. 2 Lal Sadananda Singh is the Zamindar. Plaintiff No. 1 is the son of ex-Thikadar Raghu Bariha (defendant No. 3) and plaintiff No. 2 is the uncle of plaintiff No. 1 belonging to the junior branch of the family which had a common ancestor.

The Zamindar (defendant No. 2) filed O. S. No. 16/33 in the Munsif's Court against defendant No. 3 alone for realisation of arrears of rent of Rs. 375/- and odd and for ejectment of defendant No. 3. The suit was decreed on 5-6-33. Defendant No. 3 was directed to pay up the decretal dues within three months, failing which he was to be evicted. The present defendant No. 2 having taken delivery of possession of the suit lands in execution of that decree, and defendant No. 1, the appellant, having taken lease of these lands from defendant No. 2 and having entered upon the disputed lands, the present suit was brought mainly on the allegation that the previous decree was a personal decree against defendant No. 3 and the plaintiffs not having been represented in the previous decree, their interest in the suit lands, which are ancestral properties, is not affected. The plaintiffs, therefore, prayed for recovery of possession of the suit lands. The plaintiffs' further contention was that the Thikadar was not liable to be ejected solely on the ground of non-payment of rent.

(2) The trial Court granted relief in favour of the plaintiffs mainly on the ground that the previous decree was merely a personal decree against the ex-Thikadar (defendant No. 3) and it did not bind the interest of the present plaintiffs. It was found that the Thikadari interest along with the disputed sir lands were the ancestral properties of the parties. In appeal, the High Court confirmed the finding of the trial Court that the previous decree against defendant No. 3 was a mere personal decree and further that the properties in dispute are the ancestral properties and, as such, the interests of the plaintiffs were not affected by the previous decree.

(3) It is not disputed before us that the previous decree was a personal decree wherein the present plaintiffs were not represented at all. Furthermore, it is not disputed that the properties along with the Thikadari interest are the ancestral properties of the parties. This being the position, the case is fully covered by the decision of this Court in the case of — 'Tirtha Naik v. Sadananda', AIR 1952 Orissa 99 (A).

Some of the principles laid down in that case, after a review of the entire case law on the subject are that the Thikadari leases, either permanent or temporary but renewed or renewable from time to time, are, like any other property, capable of being possessed by a coparcenary; and that the joint family estate in such (Thikadary) leases can grow either if they are acquired with the joint family funds, or with joint family labour or is allowed to be treated as joint family property by the acquiror. When the manifest position in the case is that the disputed properties are ancestral and the other members of the family had interest, the same cannot be extinguished by execution of a mere personal decree against the ex-Thikadar. We are, therefore, of the opinion that it is not a fit case where leave can be granted nor is it a case where any substantial question of law is involved.

(4) Mr. B. N. Das, appearing for the appellant, contends, relying upon the affidavit filed on behalf of the appellant, that the suit properties will be valued at more than ten thousand rupees. Even if the valuation of the properties be more than ten thousand rupees, leave cannot be granted unless there is any substantial question of law involved, as the judgment of the High Court is one confirming the judgment and decree of the trial Court. We have found that the case does not involve any substantial question of law.

But that apart, it is clear that the appellant will not be allowed to take up the position that the suit properties are valued at more than ten thousand rupees in the face of the fact that he, being the appellant before the High Court, had valued the properties in suit at Rs. 3000/-. The principle is well established that a party cannot approbate and reprobate for the purpose of filing an appeal to the Supreme Court when he had taken advantage of the position by putting a much lower value of the properties in dispute in the lower appellate Court. It is to be noted here that the court-fees payable in the lower Court were on the marked value of the subject matter of the suit. We may here refer to a decision of Rankin C. J. in Division Bench of the Calcutta

High Court reported in — 'Mahendra Narayan v. Jankinath', AIR 1931 Cal 417 (B). The same view was also taken in the Bombay High Court reported in — 'Anant Narayan v. Ramchandra Gangadhar', AIR 1918 Bom 224 (C).

(5) On a consideration of these points, therefore, we refuse to grant leave and the application is, therefore, dismissed with costs, which are assessed at Rs. 50/- (rupees fifty).

(6) But a further point of importance arises to be decided in connection with the prayer of the appellant for staying execution of the decree in the meantime and allowing the appellant to move the Supreme Court for special leave and obtain a stay order. The question is, after rejecting the prayer for leave, whether we have any jurisdiction to grant such a prayer for stay of execution of the decree and further if the present case is a fit one wherein we should exercise our jurisdiction. The provision of stay of execution of decree, appealed from, in such cases, is contained in Order XLV, Rule 13, Civil Procedure Code, which runs as follows :

> "Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs."

The language is manifestly clear to indicate that special provision is made for granting stay of execution of the decree only after the grant of certificate. Mr. Das, realising that the present case is not covered by the provisions of Order XLV, Rule 13, falls back upon Section 151, Civil Procedure Code, to invoke our jurisdiction to prevent abuse of the process of Court and stay execution in the interest of justice.

He particularly relies upon a decision of Mukherjea J. reported in — 'Nund Kishore v. Ramgolam', 40 Cal 955 (D) wherein in similar circumstances stay of execution was allowed in exercise of the inherent power of the High Court. In that case the petitioners were defendants in a mortgage suit which was dismissed by the trial Court; but the decree was reversed and the mortgage decree was passed by the High Court. The defendants applied to the High Court for leave to apply to His Majesty in Council; the application was refused; thereafter the defendants made an application for stay of execution of the decree which was made final by the Court in India during the pendency of the application. After the rejection of the leave by the High Court the petitioners filed an affidavit that they had taken steps to apply to the Judicial Committee for special leave and invoked the inherent powers of the Court to stay execution. The High Court stayed the execution proceedings relying upon the principle 'ex debito justitiae', to do that real and substantial justice for the administration of which alone the Court exists. Mukherjea J. was mainly impressed with the circumstances appearing that

> "an application to the Judicial Committee for special leave to appeal to His Majesty in Council, must necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of utmost expedition, in the preparation and transmission of papers. Besides their Lordships of the Judicial Committee do not hold their sittings continuously throughout the year, and weeks may elapse before the most diligent of suitors is able to obtain special leave to appeal to His Majesty in Council."

It is significant to note that these circumstances have now disappeared. We will note here that Holmood J. was a party to the judgment. Even though he did not differ from his learned brother in allowing stay, he did not agree with the reasons contained in the judgment of Mukherjea J. He strongly expressed himself in the words :

> "To my mind, the use of the inherent power in this case would be an abuse of the process of the Court ..... I am strongly averse to staying execution, where the law does not expressly authorise it, except on very good grounds shown to the satisfaction of the Court."

It is clear that in such a case there is no question to right a wrong or to prevent the abuse of process of Court; the decree has been passed by the High Court and we have got to take the decree as a valid and good decree until it is set aside. The decree-holder manifestly has got the right to execute the decree unless he is prohibited by law to execute or unless the Courts are empowered by express provision of law to restrain the decree-holder from executing the decree in certain events. The very language of Order XLV, Rule 13 is emphatic on the point that such a decree having been passed by the High Court is to be executed 'unconditionally', unless the Court directs otherwise even after the granting of the certificate. We are inclined to agree with the view expressed by Holmood J. that in such a case where the law does not expressly authcrise to restrain the decree-holder from executing the decree, to prevent the decree-holder from executing the decree by using the inherent power of the Court would ordinarily be an abuse of the process of Court.

(7) We shall next refer to the case reported in — 'Sailendra Nath v. Saroj Kumar', AIR 1934 Cal 823 (E). In that case, a petition for stay of further proceedings was distinguished from that of stay of execution of the decree. Their Lordships opined that even though such a case did not come within the language of Order XLV, Rule 13, the High Court might exercise its inherent powers in staying further proceedings. Their Lordships merely observed, without any discussion of the matter, that it was now well settled that apart from the aforesaid provision. that is, Order XLV, Rule 13, there was abundant inherent power in the Court to stay such proceedings in a suitable case. On the merits, however, their Lordships refused to allow stay. It does not appear from the case whether the petition for stay of further proceedings was presented after the refusal of the prayer for leave to appeal or after granting the same. That is an important point of distinction.

(8) The next decision that has been brought to our notice is also of the same High Court reported in — 'Jewan Ram Gangaram & Co. v. Commrs. for Port of Calcutta', AIR 1939 Cal 308 (F). The applicants before their Lordships were defendants in the suit which was decreed, one of the terms of the decree being that the applicants were ordered to remove certain buildings and structures on the land in suit within three months from the date of the decree. Against that decree, the applicants preferred an appeal to the High Court and the appeal was pending. The applicant's petition for stay of execution of the decree appealed against to the High Court having been refused, the applicants applied for a certificate for leave to appeal to His Majesty in Council against the order refusing to stay execution.

It is to be noted that the appeal itself was pending. It was stated before their Lordships in the petition for stay that the applicants had

taken steps to file an application for leave to appeal and for stay of execution of the said decree to His Majesty in Council. As it was physically impossible for the applicants to file an application for special leave before a considerable length of time, they moved for stay to enable them to approach their Lordships of the Privy Council for obtaining such an order for stay. Their Lordships observed, relying upon the decision that we have already referred to above, that is 40 Cal 955 (D), that it was open to the High Court to exercise its power under Section 151 and stay execution of the decree although the matter may not strictly come within the terms of Order XLV, Rule 13.

Here the point of distinction, of course, is that the appeal was still pending and the decree was not finalised by the High Court. In the meantime the applicants having failed to obtain stay order from the High Court they wanted to move the Privy Council only against the order refusing to stay. When the High Court had full seisin over the case, the appeal being pending, they passed an interlocutory order during the course of the appeal granting stay of execution of the decree for a short time for enabling them to approach the Privy Council aggrieved by the previous interlocutory order refusing stay.

(9) We may next refer to a Division Bench case of the Allahabad High Court reported in — 'Atma Ram v. Beniprasad', AIR 1934 All 585 (G) where the judgment was delivered by Sulaiman C. J. There, leave to appeal to His Majesty in Council from an order passed in revision by the High Court was granted under Section 109 (c) and the appeal before the Privy Council was pending. The defendant-appellant applied to the High Court that further proceedings in the Court below be stayed till the disposal of the Privy Council Appeal. The question arose whether the Court could exercise inherent power to stay further proceedings in the Court below which are not covered by the strict language of the provisions of Order XLV. Rule 13. Without finally deciding the point, Sulaiman C. J. expressed an opinion that

> "We are not prepared to hold that there is an inherent jurisdiction in the High Court to direct Courts subordinate to it to proceed in a particular manner. Section 151. C. P. C. does not confer any jurisdiction on the Court which did not already exist. It merely preserves the inherent power of the Court which it may possess. Varieties of inherent jurisdiction are well recognised, and new categories cannot be invented."

(10) On a review of these decisions, therefore, we are of the opinion that we may safely lay down as a proposition that in such cases of execution of decree, ordinarily the Court has no inherent power to stay unless the case is covered by the provisions of Order XLV, Rule 13, that is to say, the Court cannot order stay of execution of decrees while leave application is pending before granting certificate or when the Court has refused to grant certificate. We are strengthened in our view on another consideration also by looking to the provisions of Order XLI, Rr. 5 and 6 — Rule 5 empowers the appellate Court to stay execution of decree during the pendency of the appeal on sufficient cause; Rule 6 empowers the Court which passed the decree to stay execution of the decree on sufficient security having been furnished during the pendency of the appeal. If the Court has inherent power of staying execution of the decree by such provisions like Order XLI, Rr. 5 and 6, Order XLV Rule 13 will be deemed as redundant and unnecessary. Indeed in some cases the judgment and decree passed by the High Court are set aside, but in this case the appellant has the remedy by restriction if the decree has been executed before stay order is obtained from the Supreme Court. The stay petition is, therefore, rejected.

(11) PANIGRAHI C. J. : I agree.

B/H.G.P. Petition rejected.

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PANIGRAHI C. J. AND MOHAPATRA J.

Anjani Dei, Plaintiff-Appellant v. Krushna Chandra and another, Defendants-Respondents.

First Appeal No. 62 of 1950, D/- 26-10-1953, from decision of Addl. Sub. J., Cuttack, D/- 14-5-1949.

(a) Hindu Law — Wife — Maintenance.

Per Mohapatra J.: Apart from the question of physical cruelty, torture or assault by any member of the family, if the circumstances are such that it is not possible for the wife to live as a wife with self-respect and dignity in the house of the husband, indeed she is entitled to separate maintenance and residence.

Almost from the beginning of their married life the husband had an abnormal sort of aversion for the wife. The aversion was to such an extent that for this marriage, which he considered to be unhappy from the very beginning, he had to live away from his parents as the parents were responsible for this marriage. He called the wife as illiterate and ill-bred. The wife had to leave the husband's place and thereafter the husband within a year of such separation contracted second marriage without her consent and by flouting her sentiment:

Held that this unhappy situation was mainly, if not solely, due to the fault of the husband and not of the wife and that there was justifiable cause for the wife's separate residence and, therefore, she was entitled to separate maintenance. (Paras 3, 4, 5, 6)

Per Panigrahi C. J.: The husband had been guilty of abandonment for unjustifiable cause, and his conduct even otherwise would amount to cruelty in law which would entitle the wife to separate residence and maintenance. (Para 19)

(b) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2 (4) — Retrospective effect — AIR 1950 Nag 33, Dissented from.

Per Mohapatra J.: (Quaere) — Whether S. 2 (4) applies also to cases where the husband had married for the second time before the Act came into operation when he was not saddled with the obligation of giving separate allowance and maintenance to his first wife merely on the ground of the second marriage? (Para 8)

Per Panigrahi C. J.: The clause is general and applies to all husbands who take a second wife. The Act is prospective in its direct operation as suits based on a statutory right for separate residence and maintenance can be laid only after the Act came into operation. The Act was intended to cure an existing evil and to afford to married women a remedy for separate residence and maintenance against a twice married man, whether such marriage

took place before or after the Act, provided it continued on the date of the suit. (Para 21)

(c) **Hindu Law — Wife — Maintenance — Arrears of maintenance.**

Held that the wife was entitled to the arrears of maintenance from the time of the second marriage of the husband as with the anterior circumstances the second marriage completed the situation to make impossible for the wife to live with her husband. (Para 10)

(d) **Hindu Law — Wife — Maintenance — Cruelty.**

Per Mohapatra J.: Conception of legal cruelty undergoes changes according to the changes and advancement in social concepts and standards of living. With the advancement of our social conceptions, this feature has obtained the legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. (Para 5)

(e) **Hindu Law — Wife — Maintenance — Cruelty.**

Per Panigrahi C. J.: To establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect and indifference on the part of the husband are all factors which may undermine the health of a wife. In such cases it would not be unreasonable to hold that the wife may legitimately apprehend that if she goes to her husband there will be repetition of such conduct which may result in a complete breakdown of her health. Where a husband habitually insults his wife and behaves towards her with neglect and studied unkindness so as to impair her health he is held guilty of cruelty. Where evidence of physical violence is not 'per se' sufficient to warrant a finding of cruelty the court is bound to take into consideration the general conduct of the husband towards the wife and if this is of a character tending to degrade the wife and subjecting her to a course of intense indignity injurious to her health the Court is at liberty to pronounce the cruelty proved. (Para 13)

(f) **Hindu Law — Wife — Maintenance.**

Per Panigrahi C. J.: A wife is entitled to live separate and claim maintenance if the husband is found guilty of abandonment. It is not essential, therefore, that physical violence on the part of the husband should be proved in order to entitle her to a decree for separate maintenance. Even if the conduct of the husband does not amount to cruelty but constitutes a gross moral offence such as habitual ill-treatment the wife would be entitled to separate residence and maintenance. What amounts to desertion, in a particular case, depends upon the circumstances and the mode of life of the parties. But there can be no doubt that an active withdrawal from cohabitation and breaking off of marital relations is an indication of an intention of the husband to forsake his wife. Case law rel. on. (Paras 17, 18)

B. N. Das and S. C. Das, for Appellant; A. Das, for Respondents.

CASES REFERRED: Paras

(A) (V37) AIR 1950 Mad 321 (Pr 5): 1950-1 Mad LJ 63 7, 21
(B) (V33) AIR 1946 PC 173 (176): ILR (1946) Kar PC 145 7
(C) (V40) AIR 1953 Mad 712 (Pr 7): 1953-1 Mad LJ 649 7
(D) (V37) AIR 1950 Nag 33 (Prs 18, 21, 24): ILR (1950) Nag 196 7, 21
(E) ('66-67) 11 Moo Ind App 551 (615): 2 Sar 259 (PC) 17
(F) ('07) 34 Cal 971 (980) 17
(G) (V23) AIR 1936 Mad 609 (611): 71 Mad LJ 499 17
(H) (V9) AIR 1922 Mad 399 (399, 401): 45 Mad 812 17
(I) (V27) AIR 1940 Mad 906 (906): 1940-2 Mad LJ 276 17
(J) (V11) AIR 1924 Mad 49 (55): 46 Mad 791 17
(K) (V22) AIR 1935 Mad 616 (619): 157 Ind Cas 968 17
(L) (V11) AIR 1924 All 391 (392): 46 All 210 17
(M) ('10) 6 Ind Cas 525 (527): 12 Bom LR 373 19
(N) (V23) AIR 1936 Bom 138 (147): 60 Bom 455 19
(O) (1848) 12 QB 120 (127): 116 ER 811 21

MOHAPATRA J.:

This is a plaintiff's First Appeal against the judgment and decree dated 14-5-1949, of Sri B. S. Patnaik, Additional Subordinate Judge of Cuttack, in a suit brought by the plaintiff for recovery of arrears of maintenance, for future maintenance, and for recovery of the value of gold and silver ornaments alleged to have been forcibly kept back from the plaintiff by the defendants. Defendant No. 1 is the husband of the plaintiff and defendant No. 2 is the father of defendant No. 1. Admittedly the plaintiff and defendant No. 1 married in the month of Baishakha, 1943. The plaintiff left the defendant's house in Ashardha, 1944 and has not gone to her husband's place since then. The further admitted feature of the case is that defendant No. 1 married another wife in Ashardha, 1945. The plaintiff's case is that she comes of a fairly well-to-do family, her father being an Union President and also a contractor. The defendants are also sufficiently rich owning properties valued at rupees fifty thousand and defendant No. 1 is also serving under the Government of Orissa on a salary of nearly seventy rupees.

At the time of her marriage, her father gave her dowry of gold and silver ornaments and other articles described in Schedule A of the plaint and also presented valuable articles to the groom including wrist watch and gold wristband. The further story of the plaintiff as to the origin of differences between the two families is that the plaintiff's father possesses about four acres of land in mouza Kolasahi adjoining to the lands of the defendants. The defendants pressed the father of the plaintiff to make a gift of those four acres of land in favour of defendant No. 1 Plaintiff's father, however, agreed to part with one acre only. The defendants put pressure upon the present plaintiff to persuade her father to accede to the aforesaid request of the defendants. The plaintiff having refused, the dissension between the husband and the wife started.

The plaintiff thereafter was looked upon with hatred and was neglected in all respects. Even she was not given food and drink properly and was to do all menial work in the household including cleaning of the cowshed and the utensils, etc. She was also physically tortured, slapped and kicked by the mother-in-law. Her husband joined hands with the parents in harassing her. She was also deprived of all the pleasures of a married life. She found it impossible to continue in the house of the defendants any longer and therefore left the house in Ashardha, 1944. While she left the house of the defendants, all

the ornaments described in the schedule were forcibly kept back by the defendants. The plaintiff therefore prays for past maintenance at the rate of fifty rupees from Ashardha, 1944 amounting to a sum of Rs. 1475/-. She claims future maintenance at the rate Rs. 50/- per month and charges for separate residence at the rate of Rs. 10/-. She valued the Articles in schedule A at Rs. 4084/-.

(2) The defence taken by the husband is that the plaintiff is an ill-bred and quarrelsome lady who has no fine sentiment for her husband and has no conception of a wife's duty towards her husband, and the only thing that she expected was the satisfaction of her physical needs, particularly her sexual satisfaction for which the husband was not fully capable since he had constant attacks from colic soon after his marriage. His further case is that she voluntarily left the defendants' house in Ashardha, 1944 and is not coming back in spite of repeated requests. The defendant, therefore, had married for the second time in Ashardha, 1945. The defendant asserts that as his parents were responsible for this unhappy marriage with the present plaintiff, soon after the marriage he is living away from his parents. He is drawing a salary of Rs. 64/-. In the circumstances, he is not liable for any separate maintenance claimed by the plaintiff.

He has taken the further plea that the amount charged is excessive. Both the defendants deny the fact that the plaintiff's father gave dowry of the ornaments of the value as alleged by the plaintiff. They further deny that no ornaments were forcibly kept back while the plaintiff left their house. On the contrary, their allegation is that the plaintiff went with all the ornaments on her body and has never come back.

(3) The learned Court below has dismissed the plaintiff's case for recovery of past maintenance and for future maintenance, but has passed a decree for a sum of Rs. 577/- as the value of the silver ornaments and furniture which were kept back by the defendants. In coming to his conclusions regarding the case of the pltf. claiming separate maintenance, the learned Court below after discussing the oral evidence on record, finds that the plaintiff has not been able to prove such physical cruelty as will entitle her to separate residence and separate maintenance. He finds that the only evidence on the point of physical cruelty is that of P. W. 3. that is, the plaintiff herself, which is to the effect that for the first six months she lived comfortably in her husband's place and after that she was being tortured. The only occasion on which she was assaulted was by the mother-in-law and in his opinion that cannot be taken to be sufficient reason for holding that there was such physical cruelty as to entitle her to live apart from her husband.

We are perfectly aware that the learned Court below trying the suit had the special advantage of examining and seeing the witness himself which advantage of course is denied to us; and further the only evidence adduced on behalf of the parties is the oral evidence of a few witnesses examined from either side. But we are compelled to observe that the learned Court below has completely misdirected itself in not considering at all whether in view of the circumstances transpiring from the written statement and the evidence of the defendants themselves, a case of legal cruelty has been made out to justify the plaintiff for a claim for separate maintenance & residence. Apart from the question of physical cruelty, torture or assault by the mother-in-law or by any other member of the family if the circumstances are such that it is (Sic-not?) possible for her to live as a wife with self-respect and dignity in the house of the husband, indeed she is entitled to separate maintenance and residence.

In this connection, we will refer to some passages in the written statement filed by defendant No. 1. In para. 22 of the written statement he avers as follows:

"..... That soon after the marriage when there was such conjugal difference between the plaintiff and the defendant, this defendant accused his parents and cut off all connections from them because it is for their choice that this defendant was put to such suffering since they had no business to select such an illiterate overbearing and in every sense undersirable lady like the plaintiff for ruining the life and pleasure of this defendant and soon after his marriage this defendant separated from his parents and has no concern with the parents or the family properties.

"That the plaintiff is an illiterate, ill-bred and quarrelsome lady who has absolutely no fine sentiment for a husband and had no conception of a wife's duty towards her husband and the only thing that she expected from this defendant was the satisfaction of her physical needs for which this defendant was not fully capable since he had constant attacks from colic soon after his marriage and so much was her displeasure that she went back to her father's house and never returned back to this defendant in spite of this defendant's strenuous efforts to get her back. Having forced a second marriage on this defendant and the burden of maintaining another wife the plaintiff is not entitled to get any maintenance."

From these averments, it is clear to us that almost from the beginning of their married life he had an abnormal sort of aversion for this girl. The aversion was to such an extent that, for this marriage, which he considers to be unhappy from the very beginning, he had to live away from his parents as the parents were responsible for this marriage. He calls this girl as illiterate and ill-bred. It is also clear from this written statement that he was not able to give sexual satisfaction to the girl. This position transpires also from the written statement filed by defendant No. 2.

Paragraph 6 runs thus:

"That the real facts are that soon after the marriage the plaintiff and defendant No. 1 had differences and this defendant found that neither plaintiff likes the defendant No. 1 nor the defendant No. 1 likes the plaintiff. However this defendant wanted to patch up the differences but the plaintiff was too obstinate to mend matters. Thereafter the defendant No. 1 accused this defendant and remained separate from this defendant since the later part of 1943.

.. . .
That the defendant is in possession of about 25 acres of ancestral land with another son and an unmarried daughter and besides 4 married daughters and his wife.

The defendant had to maintain himself, his wife, a younger son and a daughter and he is required to maintain them and bear the education expenses of the minor son who is now in the Ravenshow College.

Besides this defendant has to meet the expense of occasional presents and partly maintenance of the married daughters and her children."

* * * * *

It appears therefore from the case of both the defendants themselves that defendant No. 1 developed this aversion as against the plaintiff soon after the marriage and that on account of this unhappy marriage, as he calls it, he went to the extent of cutting off all connections with his parents since the later part of 1943. Defendant No. 1 in his examination admits that from the last part of 1943 to July 1944 he was seldom meeting the plaintiff in the same bed.

(4) The further circumstance which has been completely overlooked by the learned Court below and which appears to be an important one is that there is no explanation coming forth from the defendant's side as to why she is not coming back to her husband's place which she left in Ashardha 1944 except that the conjugal life between the parties is extremely unhappy. We have got to take into consideration the social habits of the people of the rank, status and caste of the parties that it was not really open for the plaintiff to contract a second marriage while defendant No. 1 was free to have a second wife even during the lifetime of the plaintiff.

On a consideration of this circumstance and on a perusal of the evidence adduced on behalf of both parties and particularly having regard to the very case of defendant No. 1 that he had an abnormal sort of aversion against this girl almost from the beginning of the married life on account of the reason that she was illiterate, we are definitely of the view that this unhappy situation is mainly, if not solely, due to the fault of defendant No. 1 and not of the plaintiff. We would further observe that the learned Court below has failed to consider an important omission on the part of the defendants that the mother-in-law has not been examined even though the plaintiff made definite and specific allegation against her behaviour towards the plaintiff.

(5) There is one more very important circumstance which also weighs with us, that is, the admitted second marriage of defendant No. 1 in Ashardhn 1945. This second marriage was manifestly against her sentiment. The question that then arises for consideration is that whether, in the particular circumstances of the case when defendant No. 1 on account of his abnormal aversion for the girl from the very beginning made it defficult for the girl (plaintiff) to carry on with their conjugal life in the house of her husband with dignity and self-respect and had to leave the husband's place and thereafter the husband within a year of such separation contracted second marriage without her consent and by flouting her sentiment, this itself will amount to legal cruelty. We are of the opinion that this conception of legal cruelty undergoes changes according to the changes and advancement in social concepts and standards of living.

We may refer in this connection to Central Act No. 19 of 1946 (The Hindu Married Women's Right to Separate Residence and Maintenance Act) which provides amongst other reasons that the mere fact of a second marriage is sufficient to entitle the wife to a separate residence and a separate maintenance. We are aware that the marriage took place in Ashardha 1945 while the Act came into operation only in April 1946. We are not here considering whether the Act is retrospective or prospective and whether the plaintiff will be entitled to her separate maintenance relying upon the provisions of the Act merely on the ground that defendant No. 1 has contracted the second marriage; but it is clear to us that with the advancement of our social conceptions, this feature has obtained the legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance.

(6) On a consideration of the features, therefore, I am definitely of the view that it cannot be said that in Ashardha 1944 she left the husband's place voluntarily and without any sufficient reason. On the contrary we find that the circumstances clearly indicate that she found it difficult to continue her conjugal life in the husband's place and that after the second marriage of defendant No. 1 in Ashardha 1945, in the circumstances discussed above, it was impossible for her to live with her husband with prestige and dignity of a wife. We are satisfied, therefore, that there is justifiable cause for her separate residence and, therefore, she is entitled to separate maintenance.

(7) Mr. B. N. Das, appearing for the appellant, strongly relies upon the provisions of the new Act 19 of 1946 (The Hindu Married Women's Right to Separate Residence and Maintenance Act) which came into force on 23-4-1946, in support of his contention that, as provided in Clause (4) of Section 2 of the Act, the second marriage of the husband is itself a ground for allowing a decree for separate residence and separate maintenance.

Section 2 of the Act enumerates several grounds for allowing a decree for separate residence and separate maintenance of a Hindu married woman, such as,

(1) if he is suffering from any loathsome disease not contracted from her;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable to live with him;

(3) if he is guilty of desertion, that is to say, abandoning her without her consent or against her wish;

(4) if he married again;

(5) if he ceases to be a Hindu by conversion to another religion;

(6) if he keeps a concubine in the house or habitually resides with a concubine; and

(7) for any other justifiable cause.

All other clauses excepting clause (4) are statutory codification and are declaratory of the existing law. So far as clause (4) is concerned there were some very old decisions of the Indian High Courts that a mere second marriage of the husband during the life time of the first wife was not sufficient for the first wife to claim for separate residence and separate maintenance; but in recognition of the fast advancement in our conception of married life, and the rights of the females of the country, the legislature has provided for it as an absolute ground that in itself the second marriage during the life time of the first wife will entitle the first wife for separate maintenance.

As to whether the Act applies to a case where the husband had married for the second time prior to the coming into operation of the Act, there has been within a short time a difference of judicial opinion amongst the Indian High Courts. In the case of — 'Lakshmi Ammal v. Narayanaswami', reported in AIR 1950 Mad 321 (A), Viswanatha Sastri J. observed that

"the words 'marries again' there in the section are merely descriptive of the position of the husband as a twice married man at the date

when the wife's claim for separate maintenance is made under the Act and do not exclude a husband who had taken a second wife before the Act from its operation. Therefore, wives superseded by a second marriage of the husband before the Act also are entitled to separate maintenance under Section 2 (4) of the Act".

In coming to this conclusion, Sastri J. has relied upon a previous decision of the Privy Council reported in — 'Duni Chand v. Mt. Anar Kali', AIR 1946 PC 173 (B), wherein their Lordships interpreted the words "dying intestate" appearing in the Hindu Law of Inheritance (Amendment) Act 2 of 1929. This view of Sastri J. was doubted in a subsequent decision of the Madras High Court reported in — 'Sidha Sethy v. Muniamma', AIR 1953 Mad 712 (C).

A view different from that of Sastri J. was taken in a Bench decision of the Nagpur High Court reported in — 'Mt. Sukhribai v. Pokharsingh', AIR 1950 Nag 33 (D) wherein their Lordships observed that

"the Act, as a whole, cannot be called a 'Declaratory Act' in the strict sense of the term. Before this Act was passed, neither Hindu custom nor statute law, nor dicta of Judges allowed a wife to live separate from her husband if he married a second time. The Act now virtually allows judicial separation between husband and wife if the wife resents a second marriage. Since this law never existed before, clause (4) of section 2 of the Act cannot be called 'declaratory' whatever one may say of the other clauses. Though the opening words of section 2 refer to a 'Hindu woman' making it applicable to all cases, the effect of clause (4) is to cut down the application to those cases in which the husband marries again after the date on which the Act became law."

(8) In view of my decision of the case on the grounds set forth earlier, it is not necessary to give any opinion on this question, that is, whether Section 2 (4) applies also to cases where the husband had married for the second time before the Act came into operation when he was not saddled with the obligation of giving separate allowance and maintenance to his first wife merely on the ground of the second marriage.

(9) As to the quantum, the learned trial Court has found, discussing the circumstances of the parties, that if he was to allow a decree in favour of the plaintiff he would fix the allowance at Rs. 30/-; (sic) but we find that he has not taken into consideration any allowance for plaintiff's separate residence which we fix at Rs. 5/-. We therefore, find that she is entitled to maintenance at the rate of Rs. 25/- (twentyfive) per month.

(10) Regarding arrears of maintenance, in my view, she is entitled to the arrears from the time of the second marriage, that is, since Shraban, 1945, as with the anterior circumstances the second marriage completed the situation to make impossible for her to live with her husband. Regarding the value of the ornaments and the furniture forcibly retained by the defendant the learned Court below has allowed a decree for Rs. 577/-. We confirm the trial Court's decree to that extent and agree with the findings of the Court below on that point.

(11) In conclusion, therefore, the appeal is allowed and the suit is decreed in part with proportionate costs. The plaintiff is entitled to recover charges for her separate maintenance and residence at the rate of rupees twentyfive (Rs. 25/-) per month from the date of the suit, that is, 9-4-1947 and for the future she is also entitled to recover arrears of maintenance and residence at the same rate from 1-8-1945 from defendant No. 1 personally. The decree will also be a charge on the coparcenary properties scheduled in the plaint as defendant No. 1 is a coparcener with his father (defendant No. 2). The plaintiff will be entitled to interest at the rate of six (6) per cent per annum from the date of the institution of the suit till realisation. The court-fee will be realised from the defendants.

PANIGRAHI C. J.:

(12) The primary facts & the points of law arising out of them have been set out by my learned brother and I would only add a few words giving reasons for my concurrence with the order proposed.

(13) The trial court found that cruelty had not been established and therefore dismissed the plaintiff's suit. To establish legal cruelty it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect and indifference on the part of the husband are all factors which may undermine the health of a wife. In such cases it would not be unreasonable to hold that the plaintiff may legitimately apprehend that if she goes to her husband there will be repetition of such conduct which may result in a complete breakdown of her health. Even in England the tendency of modern decisions is to widen the definition of the word 'cruelty'. Where a husband habitually insults his wife and behaves towards her with neglect and studied unkindness so as to impair her health he is held guilty of cruelty. Where evidence of physical violence is not per se sufficient to warrant a finding of cruelty the Court is bound to take into consideration the general conduct of the husband towards the wife and, if this is of a character tending to degrade the wife and subjecting her to a course of intense indignity injurious to her health the Court is at liberty to pronounce the cruelty proved.

(14) The facts alleged by the plaintiff and corroborated by her father are that she was assaulted and starved. She was constantly scolded by her husband and mother-in-law so that she was completely deprived of her peace of mind and apprehended that she would be poisoned to death either by her husband (defendant) No. 1) or her mother-in-law. The defendant-husband accuses the plaintiff as being unmannerly, ill-bred and over-sexed and complains that he was never consulted before his marriage with the plaintiff was performed. He says that three days before the marriage he informed his father that he was unwilling to be married to her as he wanted to marry after his own choice. He admitted in his deposition that from the last part of 1943 to July 1944 he was seldom meeting the plaintiff in the same bed. He further says:

"It is a fact that due to my inability I was avoiding to sleep together on the same bed during this period."

It is unnecessary to refer to the other evidence in the case as I am satisfied that the home that the plaintiff expected to build in her husband's house was completely broken and that she is now a frustrated and broken-hearted girl. Her husband confesses that he had no love for her at any time and the feelings between the two have been so exacerbated that the Court will never allow itself to be instrumental in exposing the plaintiff to further cruelties on the part of the husband. If bitter waters are flowing it is not

necessary to enquire from what source they spring.

(15) One fact, however, which has been proved in this case and not accepted by the trial Judge is the demand by the defendants upon the plaintiff and her father to make a gift of four acres of land which are situated in the defendant's village. The plaintiff swears that the husband (defendant No. 1) threatened that he would drive her out if her father did not make a gift of the land and this, according to her, is the reason for the ill-treatment. This fact is corroborated by her father who swears that the defendants asked him to make a gift of the land to them, but that he declined to give any land from that village and said he would only give one acre of land in some other village.

According to him, this was the reason why a "hitch began with the defendants and defendant No. 1 began assaulting the plaintiff". He was not cross-examined on the point. Nor is there any reference to it in the evidence of defendant No. 1. I am, therefore, inclined to accept the plaintiff's version that that is the origin of the discord between the plaintiff and her husband and the ill-treatment that followed.

(16) According to Hindu law, a wife is bound to reside in her husband's house and is not permitted to live apart from him on account of petty quarrels which are incidental to married life generally. The husband, in his turn, is bound to protect her and give her the comfort & security of a peaceful, domestic life. But where the husband is found guilty of desertion or abandonment and the wife is compelled to live away from her husband for justifiable reasons, separate maintenance and residence have to be decreed. It is one of the express conditions in the nuptial vow of the Hindus that each party is to become the associate of the other, and though practically all systems of ancient law strongly favour the husband and impose restrictions on the wife it is recognised by all systems, ancient and modern, that the right of conjugal cohabitation must be mutually available to the husband and the wife.

According to Narada

"it is a crime in both if they desert each other or if they persist in mutual altercations, except in the case of adultery by a guarded wife."

It is further said that he who abandons an affectionate wife "shall be brought to his duty by the King with severe chastisement." Yagnyavalkya says down:

"He who forsakes a wife though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay a third of his wealth; or, if poor, to provide maintenance for that wife."

If either the husband or the wife withdraws from the society of the other without reasonable excuse, either the wife or the husband may sue for restitution of conjugal rights.

The defence open in such a suit for refusing a decree for restitution of conjugal rights may be the ground for an action for separate maintenance and residence. Desertion without reasonable cause is a ground for judicial separation. This is recognised in the statutory law of India in S. 22, Divorce Act. If the wife refuses to live with her husband without sufficient reason she is not entitled to separate maintenance, but neglect on the part of the husband is a ground for awarding separate maintenance (S. 488, Criminal P. C.). The dicta of the Judicial Committee and the decisions given by Courts from time to time also favour this view.

(17) In — 'Buzloor Rahim v. Shumsoonissa Begum', 11 Moo Ind App 551 at p. 615 (PC) (E), the Judicial Committee observed:

"It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court".

As I understand this passage, the husband is not entitled to a decree for restitution of conjugal rights if he is found guilty of failure to discharge his marital obligations. 'A fortiori', a wife is entitled to live separate and claim maintenance if the husband is found guilty of abandonment. It is not essential, therefore, that physical violence on the part of the husband should be proved in order to entitle her to a decree for separate maintenance. Even if the conduct of the husband does not amount to cruelty but constitutes a gross moral offence such as habitual ill-treatment the wife would be entitled to separate residence and maintenance, see — 'Dular Koer v. Dwarka Nath', 34 Cal 971 (F).

In — 'Venkatapathy v. Puttama', AIR 1936 Mad 609 (G), Varadachariar J., held that cruelty and abandonment are not the only grounds on which separate maintenance could be allowed to a wife. Where a wife declined to live with her husband, on the ground of his being a leper, she was held entitled to get maintenance — 'Sheenappaya v. Rajamma', AIR 1922 Mad 399 (H). In another case reported in — 'Seethayyamma v. Venkataramana', AIR 1940 Mad 906 (I), it was held that if the husband is found to be not entitled to a decree for restitution of conjugal rights, the wife should be held entitled to a decree for separate maintenance. According to Manu: She who is averse from a mad husband, or a deadly sinner, or an eunuch, or one without manly strength, or afflicted with such maladies as punish crimes, must neither be deserted nor stripped of her property (Ch. IX v. 79).

Kuluka Bhatta explains the text thus:

"But she who attends not a husband whose mind is alienated by the effect of air or other constitutional ailment, or a deadly sinner (as described in the Eleventh Chapter) or un-mannered or destitute of manly strength (from the obstruction of seminal juice or the like), or degraded, because he is afflicted with leprosy or similar disease must not be deserted nor deprived of her property".

These are not exhaustive of the reasons which would justify a wife living separate from her husband. The principle is stated thus:

"Other causes, as well as infidelity operating to destroy the primary object of marriage lead to separation such as confirmed barrenness in the woman and corporal imbecility in the man, with loathsome and incurable diseases in either". Strange's Hindu Law (Vol. I. p. 47).

In — 'Kondal Rayal v. Ranganayaki Ammal', AIR 1924 Mad 49 (J), the husband took a second wife and had no marital relations with his first wife for period of more than 7 or 8 years. There were allegations similar to those in the present case of acts of violence and cruel treatment. The Court held that these circumstances were suffi-

cient to make out cruelty disentitling the husband to a decree for restitution of conjugal rights. Their Lordships observed:

"Hindu law does not recognise any divorce. It permits the husband to have as many wives as he likes. The husband in this case had no marital relations with his wife for a period of more than 7 or 8 years and it would be cruel now to force the wife to go back to her husband against her will."

In — 'Rukmini Ammal v. T. R. S. Chari', AIR 1935 Mad 616 (K), the husband had brought about the marriage with his wife by a false statement that he was a bachelor. This was held to be a ground for refusing the plaintiff a decree for restitution of conjugal rights. It was also found that though evidence that the wife had actually been abandoned was lacking, the treatment to which she was subjected was held to be cruel. In — 'Baburam v. Mt. Kokla', AIR 1924 All 391 (L), it was found that the wife had been turned out of doors, and the woman was living with her uncle. The Court refused to execute the decree for restitution of conjugal rights on the ground that the wife had reasonable apprehension of bodily injury if she returned to her husband.

(18) One principle running through all these reported decisions is that the Court primarily looks to the wife's safety and the impossibility of fulfilling the duties of matrimony in a state of constant dread. And if she is systematically subjected to pressure or force whether physical or mental, to such a degree as to injure her health, she would be justified in keeping away from her husband. The Court has no scale of sensibilities by which it can assess the quantum of injury done and felt but it does not require much imagination to hold, in the instant case, that it is impossible to restore normal relations between the plaintiff and her husband even if they were forced to live together as her husband has married a second wife and has practically deserted the plaintiff.

What amounts to desertion, in a particular case, depends upon the circumstances and the mode of life of the parties. But there can be no doubt that an active withdrawal from cohabitation and breaking off of marital relations is an indication of an intention of the husband to forsake his wife.

(19) The admitted fact that defendant No. 1 cut off matrimonial relations with the plaintiff would itself constitute abandonment with the intention of forsaking her. This constitutes desertion. The defendant himself admits that he is not going to have anything more to do with the plaintiff, and the plaintiff protests that she seriously apprehends that she might be poisoned if she lived with her husband. In a similar case reported in — 'Sitabai v. Ramachandra Rao', 6 Ind Cas 525 (Bom) (M), Chandavarker J. held that if a woman has been unjustifiably abandoned or forsaken by the husband she would be entitled to separate maintenance even if cruelty is not proved. See also — 'Appi Bai v. Khimji Kooverji', AIR 1936 Bom 133 (N), which is a case of abandonment without just cause.

There is, therefore, ample justification for the view that where a husband deliberately insults his wife or behaves towards her with unkindness and neglect, and brings about a cessation of matrimonial intercourse she would be justified in living separate from him and claiming maintenance.

"Married women must be honoured and adorned by their fathers and brethren, by their husbands, if they seek abundant prosperity. (Manu)."

This is as much a moral precept as a legal obligation. The husband is bound to give his wife the security and comfort of his house and she is entitled to the society and protection of her husband. If neither of these is present and if cohabitation which is the first object of marriage fails, separation is the only expedient which can be resorted to.

I would, therefore, in agreement with my learned brother, hold that the first defendant has been guilty of abandonment for unjustifiable cause, and his conduct even otherwise would amount to cruelty in law which would entitle the plaintiff to separate residence and maintenance.

(20) It was strenuously contended by the appellant that apart from these considerations the plaintiff would be entitled to separate residence and maintenance under the provisions of Act 19 of 1946 (The Hindu Married Women's Right to Separate Residence and Maintenance Act.) Learned counsel for the respondent argued that the plaintiff is not entitled to any relief under the Act as the second marriage with the first defendant (husband) took place before the Act came into operation. The question raised is one of intricacy owing in part to the language of the Act and in part to the conflicting decisions given under it.

(21) Strong reliance was placed upon a decision of the Nagpur High Court in — AIR 1950 Nag 33 (D)'. It was held in that case that cl. (iv) of S. 2 of the Act was not declaratory and was, therefore, not retrospective whatever might be said of the other clauses of the Act. A decision to the contrary effect is that reported in — 'AIR 1950 Mad 321 (A)', where it was held that the words "marries again" occurring in cl. (iv) of S. 2 of the Act are merely descriptive of the position of the husband as a twice-married man at the date when the wife's claim for separate maintenance is made under the Act and do not exclude a husband who had taken a second wife before the Act from its operation.

According to this view the wife superseded by the second marriage of the husband before the Act is entitled to separate maintenance under S. 2 of the Act. Their Lordships of the Nagpur High Court assumed:

"It is obvious that before this Act was passed neither Hindu custom nor statute law, nor the dicta of Judges allowed the wife to live separate from her husband if he married a second time."

I regret my inability to accept this observation as an accurate statement of the pre-existing law. As I have shown above Courts have held from time to time that a wife would be entitled to separate maintenance and residence if the husband abandons and breaks off marital relations. The very fact that a husband transfers his affections to another woman, whether married or not, is a justifying reason for not compelling the first wife to live with her husband.

The Hindu Women's Right to Separate Residence and Maintenance Act 1946, merely gave statutory recognition to the dicta of Judges who had on several occasions applied this principle to the facts of individual cases. This clause, therefore, like other clauses, uses the present tense and is descriptive of the status of the person against whom the suit is brought. An Act does not become retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing — 'Queen v. St. Mary's

White Chapel', (1848) 12 QB 120 (O). The clause is general and applies to all husbands who take a second wife. The Act is prospective in its direct operation as suits based on a statutory right for separate residence and maintenance can be laid only after the Act came into operation.

We cannot ignore the fact that the Act was intended to cure an existing evil and to afford to married women a remedy for separate residence and maintenance against a twice-married man, whether such marriage took place before or after the Act, provided it continued on the date of the suit. It is enough therefore as has been observed in the latest Edition of Mulla's Hindu Law, at page 641, for the purpose of this Section that

> "the grounds are in existence at the date when the claim for separate maintenance or residence is made by the wife, no matter whether they started before or after the passing of the Act."

In my judgment, this correctly interprets the intention of the Legislature, besides being equitable.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ORISSA 124 (Vol. 41, C.N. 36)

PANIGRAHI C. J. AND MOHAPATRA J.

Abdul Majid, Plaintiff-Appellant v. M/s Ganesh Das Kalooram Ltd. and another, Defendants-Respondents.

Second Appeal No. 47 of 1951, D/- 10-11-1953, from decision of Addl. Dist. J., Cuttack, D/- 8-11-1950.

(a) Contract Act (1872), S. 62 — **Negotiable instrument for pre-existing debt — Suit on original consideration** — (Negotiable Instruments Act (1881), S. 4).

Where A who owes money to B on account of price of paddy supplied to him, gives to B a cheque for the amount due, to be presented at a certain bank on a certain date but the cheque is dishonoured by the bank on presentment after due date, then B can sue upon the original consideration and get a decree for the recovery of that amount. If there is nothing to show that B had accepted the cheque as a complete and unconditional satisfaction of the dues, the presumption that it was only a conditional acceptance will prevail. 7 Cal 256 and 34 All 158, Foll.; AIR 1934 Rang 389 (FB), Rel. on. (Para 7)

Anno: Negotiable Instruments Act, S. 4 N. 10; Contract Act, S. 62 N. 10.

(b) **Negotiable Instruments Act (1881), S. 84(1) — Scope.**

A drawer of a cheque who wants to take advantage of S. 84 must prove two factors: (i) that he had sufficient money in deposit in the Bank in his account to honour the cheques, and (ii) that he had suffered actual damage on account of non-presentment of the cheque within a reasonable time. (Para 8)

Anno: Nego. Ins. Act, S. 84 N. 1.

(c) **Negotiable Instruments Act (1881), Ss. 30, 93 and 98 — Applicability.**

It is no doubt true that a holder of a cheque who brings a suit against the drawer of the cheque on basis of his liability on account of the dishonour of the cheque is bound to give previous notice to the drawer and further, if he takes up the plea that notice was not necessary under the circumstances as provided in S. 98 of the Act, it is for him to prove any of the conditions mentioned in S. 98. But where the suit by the holder is not for compensation on account of dishonour of the cheque but on the contrary for recovery of the balance of money due on the original transaction of having supplied paddy and in discharge of which the dishonoured cheque was given, no question of notice of dishonour can arise. AIR 1929 Lah 577 and 33 All 4, Ref. (Para 9)

Anno: Nego. Instruments Act, S. 30 N. 1; S. 93 N. 1; S. 98 N. 1.

M. S. Rao, for Appellant; K. Patnaik, for Respondents.

CASES REFERRED: Paras

(A) ('81) 7 Cal 256 (259, 260): 8 Cal LR 528 6
(B) ('12) 34 All 158 (161, 162, 164): 13 Ind Cas 133 6
(C) (V21) AIR 1934 Rang 389 (390): 12 Rang 500 (FB) 7
(D) (V16) AIR 1929 Lah 577 (578): 11 Lah 34 10
(E) ('11) 33 All 4 (6): 6 Ind Cas 793 10

MOHAPATRA J.:

This is a plaintiff's Second Appeal against the judgment and decree dated 8-11-1950 of Sri A. R. Guru, Additional District Judge of Cuttack, dismissing the plaintiff's suit after reversing the judgment and decree dated 31-3-1949 of Sri B. K. Misra, Munsif of Kendrapara. The appeal arises out of a suit for recovery of Rs. 3141/10/- on the allegation that defendant No. 1 being the purchasing agent under the Government of Orissa and defendant No. 2, the agent of defendant No. 1, the plaintiff supplied 971 maunds of paddy in three instalments in the months of October and November, 1946, to defendant No. 2 acting as agent of defendant No. 1, the value of the paddy being Rs. 4005/6/-. Defendant No. 2 made a cash payment of Rs. 1005/6/- towards the aforesaid value of the paddy supplied by the plaintiff and for the remaining amount of Rs. 3000/- defendant No. 2 drew three cheques on 20-11-1946 to be drawn from the deposit account of defendant No. 1 in the Darjeeling Bank Ltd. (defendant No. 3) and to be presented at the Branch Office of the Bank at Kendrapara.

The plaintiff further alleges that the cheques were presented on 22-11-1946, but the Manager of the Bank deferred payment from time to time and ultimately the cheques were dishonoured and the Bank closed all transactions with the public from 30-11-1946. The said amount of Rs. 3000/- remains still due from defendants 1 and 2 as the cheques were not encashed, so the plaintiff has brought the suit for recovery of the said amount with interest at 6¼ P.C.P.A.

(2) The defence was that defendant No. 2, as the agent of defendant No. 1, purchased from the plaintiff paddy worth Rs. 4005/6/- and made cash payment of Rs. 1005/6/- as alleged by the plaintiff. Defendant No. 2 issued three cheques of the total value of Rs. 3000/- for the balance dues. The main defence is that the cheques were not presented within a reasonable time to the Bank for encashment and the plaintiff did not serve any notice of the fact that the cheques were dishonoured. The Bank having closed all transactions from 30-11-1946 they have suffered a damage to the extent of Rs. 3000/-, that is, the value of the cheques issued in favour of the plaintiff, and, as such, they are absolved from the liability.

(3) The trial Court found that in fact the plaintiff presented the cheques on 22-11-1946 in the Bank for encashment and that the cheques were

not paid and the plaintiff also had given due notice of dishonour of the cheques to the defendants; as such, the plaintiff, according to the trial Court, is entitled to get a decree.

(4) The lower appellate Court, after discussing the provisions of several sections of the Negotiable Instruments Act dismissed the plaintiff's suit mainly relying upon the provisions of S. 84 of the Act. The basis of his judgment is his finding that, in fact, there was no presentation of the cheques; and, as such, under the provisions of S. 84, the defendants are absolved from the liability of the value of the cheques.

(5) It has got to be observed at the outset that both the Courts below have missed one of the elementary principles of law and have unnecessarily complicated the matter by entering into the discussion of several sections of the Negotiable Instruments Act. On a plain reading of the plaint itself, it is clear that the present suit of the plaintiff, as I have indicated above, is for recovery of the amount as the balance of the value of the paddy supplied to defendants 1 and 2 in three instalments. Indeed, he has set forth the fact of defendant No. 2 having drawn three cheques which were ultimately not encashed; but the suit is based upon the original cause of action arising on the supply of paddy by the plaintiff.

The matter is still more simplified on account of the admitted plea of the defendants that in fact they have taken delivery of paddy worth Rs. 4005/6/- and had made a cash payment of Rs. 1005/6/-. When manifestly the cheques issued by defendant No. 2 have not been encashed and the plaintiff has not been paid up the amount of Rs. 3000/- the value of the cheques, the amount is still due and the plaintiff is entitled to get a decree for the amount on the above admitted position.

(6) The position of law is very well settled ever since the time of the case of — 'Sheikh Akbar v. Sheikh Khan', 7 Cal 256 (A), which serves as the leading case on the subject. Garth C. J. in this judgment, laid down the position of law to the effect that:

"When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity may always as a rule sue for the original consideration provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person."

This proposition has been consistently followed by all the High Courts in India & it may safely be laid down as a settled proposition of law. We would, in this connextion, refer to just one other decision of Richards C. J. sitting with Banerjee J. of the Allahabad High Court reported in — 'Ram Sarup v. Jasoda Kunwar', 34 All 158 (B). The same principle has been reiterated that:

"If a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory note, separate from and independent of the note, he can recover upon such case, in case the note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed."

(7) The Courts below have misdirected themselves in also having ignored the position that this is not the defendant's suit for recovery of damages from the plaintiff on the allegation that they had suffered damages on account of the cheques not having been presented in time and that notice of dishonour of the cheques was not given to them, if it was presented and dishonoured. It is significant to observe here that it is not the defendant's case that in fact there was the agreement between the parties that the balance dues of the plaintiff were completely satisfied by defendant No. 2 having issued the cheques and the plaintiff accepted the cheques unconditionally in complete discharge of his dues existing then. The position of law is equally clear that when a creditor accepts a promissory note or a bill of exchange or a cheque on account of his outstanding loan it is taken as a conditional payment and the dues of the creditor will be discharged only when the creditor receives the cash.

We may in this connection refer to a Full Bench decision of the Rangoon High Court reported in — 'Chit Maung v. Roshan N. M. A. Kareem Oomer & Co.', AIR 1934 Rang 389 (C), where Page C. J. observed as follows:

"It is prima facie to be presumed (although the presumption is rebuttable) that the parties to the transaction have agreed that the promissory note or other negotiable instrument given and taken in such circumstances shall be treated as conditional payment of the loan; the cause of action on the original consideration for money lent being suspended during the currency of the negotiable instrument, and if and so long as the rights of the parties under the instrument subsist and are enforceable; but the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable. On the other hand the cause of action is extinguished when the amount due under the negotiable instrument is paid....."

In the case before us, as we have indicated above, there being no material to indicate that the cheques were accepted by the plaintiff as a complete and unconditional satisfaction of his dues, the presumption that it was only a conditional acceptance will prevail and when, in fact, he has not received the amount by encashing the cheques, he is, as a matter of law, entitled to fall back upon the original consideration and get a decree for recovery of the said amount.

(8) Indeed, as we have indicated above, the plaintiff is entitled to a decree on a consideration of the above simple point which has been ignored by the Courts below. But as the learned lower appellate Court has dismissed the plaintiff's suit mainly relying upon the provisions of S. 84, Negotiable Instruments Act, we should also like to make our observations on the point. Section 84(1) runs as follows:

"Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, 'at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay', he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid."

On a plain reading of the section itself, it is manifestly clear that in order that defendants 1

and 2 are entitled to take advantage of the provisions of S. 84 of the Act, it is incumbent upon them to prove two factors: namely,

(i) that defendant No. 1 had sufficient money in deposit in the Bank in his account to honour the cheques, and

(ii) that he had suffered actual damage on account of non-presentment of the cheques within a reasonable time.

The significant words in the section are

"the drawer.....at the time when presentment ought to have been made as between himself and the banker 'to have the cheque paid and suffers actual damage'."

In our opinion, the learned lower appellate Court has committed an error of law in examining the case entirely from a wrong point of view by throwing the onus upon the plaintiff to prove that the defendants had not the necessary credit in the Bank to pay the amount on cheques. The pertinent finding of the lower appellate Court is as follows:

"It is not the case of the respondent that the appellant had not the necessary credit in the Bank to pay the amount on the cheques either on 22-11-1946 or at any time subsequent till the Bank closed its business."

In our view, it was for the defendants to have proved that they had sufficient credit at the time and on the examination of the evidence on record we are definitely of the opinion that the defendants have failed to prove each of the above ingredients. To prove that defendant No. 1 had sufficient credit in the Bank at the time, evidence was led on his behalf by exhibiting the counterparts of the cheque-book in his possession (Ext. A series) to show that subsequent to 20-11-1946 defendant No. 2 had issued cheques in favour of other for larger amounts.

Defendant No. 2, Nishakar Mohanty who was examined as D. W. 1, states in his deposition that their credit in the Bank on 22-11-1946 was Rs. 6121/-. The mere fact that they issued cheques in favour of others for larger amounts after 20-11-1946 does not prove that, in fact, those cheques were honoured or that the defendants had sufficient money in the Bank at the time. D. W 1 admits that in fact it has been so entered in their account book that the cheques (Ext. A series) issued in favour of others have been honoured. The account book had not been produced even though admittedly it was in the custody of defendant No. 1.

No steps also had been taken to produce the account-books of the persons in whose favour the cheques were issued. Nor are the records of the Bank before us to prove the same. We have got to find, therefore, that the defendants have failed to prove that, in fact they had sufficient money in the Bank at the time to honour the cheques issued in favour of the plaintiff. In the absence of the best evidence on record, it is not possible to accept the statement of D. W. 1 alone that they had a sum of Rs. 6121/- as deposit in the Bank on 22-11-1946. It is also clear that the defendants have not been able to prove the actual damage suffered in order to take advantage of the provisions of S. 84 of the Act.

(9) Mr. Patnaik, appearing on behalf of the respondents, has drawn our attention to the provisions of Ss. 30, 93 and 98 of the Act, and a few decisions in support of his contention that the onus is upon the plaintiff to prove that the defendants had not sufficient money and that the defendants had not suffered any damage. Section 30 runs thus:

"The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided."

On the basis of this section, Mr. Patnaik contends that the plaintiff is bound to give notice of dishonour in order that he may claim compensation as provided under the section. The initial fallacy underlying this argument is that this is not a suit brought by the plaintiff for compensation on account of dishonour of the cheques, while, on the contrary, as we have clearly found, the plaintiff has brought the suit for recovery of the balance of money due on the original transaction of having supplied paddy to the defendants.

The further point, we should like to observe in this connection, is that the question of dishonour does not arise in view of the finding of the lower appellate Court that there was no presentment of the cheques at all. So the case is really confined to the provisions of S. 84. Section 93 indeed makes mandatory provisions for giving notice of the instrument having been dishonoured and S. 93 is an exception to S. 93 making provisions for the cases in which the holder is not bound to give notice.

If indeed the plaintiff bases his case on the liability of the defendants for the instrument having been dishonoured he is bound to give previous notice to the drawer and further if he takes up the plea that notice was not necessary under the circumstances as provided in S. 98 of the Act it is for him to prove any of the conditions mentioned in S. 98. The pertinent provision for our purpose is contained in cl. (c), that is, "when the party charged could not suffer damage for want of notice".

(10) As we have indicated already, the frame of the suit is entirely different and the plaintiff does not plead any of the conditions to dispense with notice. Mr. Patnaik relies upon a decision of Shadi Lall C. J. and Agha Haidar J. of the Lahore High Court in the case of — 'Bahadur Chand v. Gulab Rai', AIR 1929 Lah 577 (D) in support of his contention. Their Lordships observed as follows:

'It is provided by S. 30 that the drawer of a bill of exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided. A perusal of S. 106 of the Act leaves no doubt that the notice of dishonour should be given as soon as the bill is dishonoured. It is the duty of the holder to prove that due notice was given, and if not given, he was excused from doing so for any of the reasons specified in S. 98. The omission to give due notice of dishonour has the effect of discharging the persons who are entitled to such notice."

He has also relied upon a decision of the Allahabad High Court reported in — 'Madho Ram v. Durga Prashad', 33 All 4 (E). In that decision their Lordships had made it clear that if the plaintiff sought to excuse the want of notice of dishonour, it lay upon him to establish that the party charged could not suffer damage for want of such notice. From our earlier discussions, it is clear that the principles laid down in the above cases have no application to the present case.

(11) In conclusion, therefore, the appeal succeeds and is allowed. The judgment and decree

of the lower appellate Court are set aside. The plaintiff's suit is decreed with costs throughout.

(12) PANIGRAHI C. J.: I agree.

B/K.S.B. Appeal allowed.

A.I.R. 1954 ORISSA 127 (Vol. 41, C.N. 37)

NARASIMHAM AND MOHAPATRA JJ.

Chandrabhanu Deb, Petitioner v. State of Orissa and others, Opposite Party.

O. J. C. No. 71 of 1952, D/- 28-9-1953.

Tenancy Laws — Orissa Estates Abolition Act (1 of 1952), S. 2(g), (h) — Status of owner of killa Aul — (Bengal Land Registration Act (7 of 1876), S. 3(2)(a)) — (Orissa Tenancy Act (2 of 1913), S. 3(7)) — (Cuttack Land Revenue Regulation (12 of 1805), S. 35).

For the purpose of deciding whether killa Aul was an 'estate' within the meaning of S. 2(g), Orissa Estates Abolition Act, one has to examine whether it was an 'estate' as defined in S. 3(2)(a), Bengal Land Registration Act, 1876, and in S. 3(7), Orissa Tenancy Act. By the law of the land, it was expressly declared that the settlement made in 1803 with the Raja of Aul was nothing else but settlement of land revenue and that settlement was confirmed by Regulation XII of 1805. Further there was a clear admission on the part of the petitioner that killa Aul was an 'estate' as defined in the Bengal Land Registration Act and the Orissa Tenancy Act. It is, therefore, an 'estate' as defined in the Orissa Estates Abolition Act and the petitioner's status is that of an 'intermediary' as defined in that Act. O. S. No. 1 of 1953 (Orissa), Rel. on. (Paras 3, 4, 7)

S. G. Dhal and G. C. Jena, for Petitioner; Govt. Advocate, for Opposite Party.

CASES REFERRED: Paras

(A) (V40) AIR 1953 Orissa 185: (O. J. C. Nos. 13 to 16, 25 and 26 of 1952) 2

(B) (V40) AIR 1953 SC 375: 1953 SCJ 592 2

(C) ('53) O. S. No. 1 of 1953 (Orissa) 3, 4

NARASIMHAM J.:

This is a petition under Art. 226 of the Constitution by the owner of Killa Aul for a declaration that the provisions of the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952) do not apply to Killa Aul and for other consequential reliefs.

(2) The petition was filed on 17-12-52 and in that petition the validity of the said Act was challenged on various grounds. These are very similar to those taken by the zamindars of Ganjam in — 'Gajapati Narayana Deo v. State of Orissa', AIR 1953 Orissa 185 (A), which have been negatived by the Supreme Court on 29-5-1953, vide — 'Gajapati Narayan Deo v. State of Orissa', AIR 1953 SC 375 (B). The limited question for consideration at present is whether Killa Aul is an 'estate' as defined in S. 2(g), Orissa Estates Abolition Act, and whether the petitioner is an 'Intermediary' as defined in S. 2(h) of that Act.

(3) In the suit brought by the Raja of Kanika — 'O. S. No. 1 of 1953 (Orissa) (C)', the same question has been discussed at some length in respect of Killa Kanika which is adjacent to Killa Aul. There it was pointed out that for the purpose of deciding whether Killa Kanika was an 'estate' within the meaning of S. 2(g), Orissa Estates Abolition Act, one has to examine whether it was an 'estate' as defined in S. 3(2)(a), Bengal Land Registration Act, 1876 and in S. 3(7), Orissa Tenancy Act.

In the present petition also the same reasonings apply and the success or failure of the petition will ultimately depend on whether Killa Aul is any land subject to the payment of land revenue for the discharge of which a separate engagement has been entered into with Government as defined in S. 3(2), Bengal Land Registration Act, 1876.

(4) The petitioner has relied on the ancient history of Orissa and claimed descent from Raja Mukunda Deb, the last independent Hindu king of Orissa, who ruled over Orissa in the middle of the 16th century. This is, however, of purely historical interest. For the purpose of the present petition it is sufficient to say that when the British army entered Cuttack after defeating the Maratha army of the Bhonsla Rajas of Nagpur in October 1803 they granted Kaool-Namas to various local Chieftains including the then Rajas of Kanika and Aul. The terms of the Kaool-Nama granted to the Raja of Aul are not on record but it is admitted that they were identical with the Kaool-Nama granted to the Raja of Kanika reproduced at p. 348 of Aithison's Treaties, Vol. II, 5th edition.

By virtue of that Kaool-Nama, a certain sum known as peshkus was fixed in perpetuity payable by the Raja of Aul to the British Government. It also appears that some sort of limited sovereign rights in Killa Aul were allowed to remain with him at the time of the execution of the Kaool-Nama and its counter-part, namely, the treaty engagement in November, 1803. But with the gradual pacification of the country the then Governor-General in Council promulgated Regulation XII of 1805 for settlement of public revenue. The provisions of this Regulation have been dealt with at some length in my judgment in — 'O. S. No. 1 of 1953 (Orissa) (C)'.

For the purpose of this petition, however, I may quote clauses 1 and 2 of S. 35 of that Regulation.

"35. First: The late Board of Commissioners having concluded a settlement of the land revenue with certain zamindars, whose estates are situated chiefly in the hills and jungles, for the payment of a fixed annual quit rent in perpetuity, those engagements are hereby confirmed, and no alteration shall at any time be made in the amount of the revenue payable under the engagements in question to government.

Second: The following is a list of the mohauls to which the provision in the preceding clause is applicable :

Killah	Aul
"	Kojang
"	Puttia
"	Humishpore
"	Miritehpore
"	Bishenpore."

The first clause stated that the late Board of Commissioners had concluded a settlement of land revenue with certain zamindars for the payment of a fixed annual quit rent in perpetuity and it confirmed those engagements. The 'late Board of Commissioners' mentioned in this clause were Lieut. Col. Harcourt and Mr. Melville who executed the Kaool-Nama of 1803 for the purpose of 'settlement and pacification' of the old Soobah of Orissa. In clause 2 of S. 35 a list of the mahals in respect of which settlements were made was given and Killa Aul is the first in that list. Thus if the first and second clauses of S. 35

are read together it is clear that by the law of the land it was expressly declared that the settlement made in 1803 with the Raja of Aul was nothing else but settlement of land revenue and that settlement was confirmed by Regulation XII of 1805.

The power of the Governor-General to make such a Regulation in 1805 in respect of Killa Aul has not been challenged and consequently whatever might have been the historical importance of the Raja of Aul and whatever might have been the true significance of 'peshkus' payable by him to the Rulers of Orissa prior to 1805, the fact remains that by the law of the land he was reduced to the position of a zamindar liable to pay land revenue fixed in perpetuity and the engagement entered into between him and the British Government in 1803 was confirmed as settlement of land revenue in respect of Killa Aul.

(5) Mr. Dhal on behalf of the petitioner, however, contended that in Regulation XII, 1805, the expressions 'quit rent', 'land revenue', 'tribute' were used somewhat indiscriminately and that consequently merely because in clause 1 of S. 35 the expressions 'land revenue' and 'quit rent' occur they could not be given the same meaning which they have at present. In support of this argument he invited my attention to the provisions of S. 36 of the said Regulation in which while referring to the estates which subsequently became Tributary mahals it was stated that they were 'jungle or hilly zamindaries' and that the payment made by the 'proprietors' of those estates were 'quit rent' or 'tribute'. He also invited my attention to S. 37 (since repealed) where while referring to the territory of Mayurbhanj it was stated that the Collector of the Zilla should conclude a settlement with the proprietor of that estate for the payment of a fixed annual 'quit rent'.

But as against this argument, it should be pointed out that Regulation 36, while extending to the whole of the conquered territory of Orissa including Killa Aul, the Regulations in force in the old Province of Bengal, excluded the jungle and hilly zamindaries (Tributary mahals) from the operation of those Regulations on the ground that these zamindaries were occupied by a 'rude and uncivilized race of people'. Similarly, S. 37 excluded Mayurbhanj also from the operation of all the Bengal Regulations. It is thus clear that though the expressions 'zamindar', 'mahal', 'quit rent' were used in respect of the Tributary mahals also those mahals were excluded from the operation of the laws which were applied to the conquered territories of Orissa.

But S. 35 dealing with Killa Aul did not exclude that Killa from the operation of those Regulations. On the other hand, the words 'land revenue' are used only in S. 35 and not in S. 36 or S. 37. It is true that in cl. 1 of S. 35 the ambiguous expression 'quit rent' is also used. But in the same clause that expression has been explained as nothing else but land revenue and there can be no doubt about the meaning of the expression 'land revenue'. Moreover, after 1805 the Rajas of Aul never exercised sovereignty of even a limited nature within Killa Aul, though they have maintained some show of royal dignity due to their descent from the ancient Hindu Kings and the consequent respect shown to them by the residents of Killa Aul.

They submitted themselves to the jurisdiction of the Civil Courts established in Cuttack and at page 418 (para 608) of Maddox's Settlement Report it is stated that Aul estate remained under the attachment and administration of the Civil Court for sixteen years from 1868 to 1883. Again, at page 419 of the same book it is stated that though the Raja of Aul had first objected to the settlement operations taking place in that portion of Killa Aul which was known as Utihar Kotavshahi subsequently he himself made an application under S. 101(2), Bengal Tenancy Act, before the Collector.

This application by the proprietor under S. 101(2), Bengal Tenancy Act, for settlement of rent in a portion of his Killa clearly implies an admission that his Killa is nothing else but an 'estate' as defined in S. 3(4), Bengal Tenancy Act.

(6) The land revenue as fixed in the Kaoolnama of 1803 (converted into rupees) has all along been paid except for a slight change which is not material. During the Provincial Settlement of 1890-1900 the survey and preparation of record-of-rights in Killa Aul were ordered by a notification dated 12-12-1892 (see Maddox's Settlement Report p. 419, para 608) under S. 101(1), Bengal Tenancy Act, 1885, which was in force then. This shows that Killa Aul was treated as an 'estate' as defined in S. 3(4), Bengal Tenancy Act, which is identical with the definition of an 'estate' in the Orissa Tenancy Act. During the Revision Settlement of (1922-32) also Killa Aul was re-surveyed and record-of-rights was revised under Chapter XI of the Orissa Tenancy Act (see page 3, para 4 and pp. 139 to 140 of Dalziel's Settlement Report).

The then proprietor of Killa Aul Raja Braja Sundar Deb accepted this settlement and filed several applications before the settlement authorities under S. 128, Orissa Tenancy Act (para 400 of Dalziel's Settlement Report) for settlement of fair and equitable rent thereby admitting his position to be that of the proprietor of an 'estate' as defined in that Act. His name was also entered in the khewat. In Register-D his name was entered on 30-7-1931. After the death of Raja Braja Sundar Deb, the petitioner's name was mutated on 1-7-1947 in Register-D. The application of the petitioner for mutation of his name involves an admission that Killa Aul is an 'estate' as defined in the Bengal Land Registration.

The Government of Orissa have also filed copies of the plaints filed by the petitioner's father in rent suits under S. 193, Orissa Tenancy Act, against his tenants which show that Raja Braja Sundar Deb took advantage of the settlement entries and the provisions of the Orissa Tenancy Act for the purpose of realising rents from the tenants.

(7) Thus apart from the provisions of S. 35 of Regulation XII of 1805 the khewat, the entry in Register-D & the conduct of the petitioner & his father show that there was a clear admission on their part that Killa Aul was an 'estate' as defined in the Bengal Land Registration Act and the Orissa Tenancy Act. It is, therefore, an 'estate' as defined in the Orissa Estates Abolition Act and the petitioner's status is that of an 'Intermediary' as defined in that Act.

(8) The petition is, therefore, dismissed with costs. Hearing fee is assessed at Rs. 50/-.

(9) MOHAPATRA J.: I agree.

B/D.H.Z. Petition dismissed

A.I.R. 1954 ORISSA 129 (Vol. 41, C.N. 38)

JAGANNADHA DAS C. J. AND NARASIMHAM J.

Bhima Sahu and others, Petitioners v. Ramanath Sahu and others, Opposite Party.

O. J. C. No. 196 of 1951, D/- 12-1-1953.

Tenancy Laws — Orissa Tenants' Protection Act (3 of 1948), S. 7(6) — Proceedings under, compared with proceedings under S. 145, Criminal P. C. — "In due course of law" in S. 145, Criminal P. C. — Eviction order under S. 7(6), is order "in due course of law" — (Criminal P. C. (1898), S. 145).

There is a fundamental difference between an enquiry under the provisions of the Orissa Tenants' Protection Act and an enquiry under S. 145, Criminal Procedure Code. The latter is a summary enquiry in which the sole point for consideration is as to which party was in actual possession of the disputed lands on the date of the commencement of the proceeding or within two months preceding that date. But sub-s. (6) of S. 145, Criminal P. C. says that the order of the Magistrate declaring one of the parties to be in possession is only an interim order in the sense that his possession should not be disturbed until he is evicted therefrom 'in due course of law'. The words 'in due course of law' should not be construed as meaning in pursuance of an order or decree of a Civil Court. An order of eviction by a Revenue Court is also 'in due course of law' and for the purpose of sub-s. (6) of S. 145, Criminal P. C., it makes no difference as to whether the Revenue Court or the Civil Court directs the eviction of the party who was declared to be in possession in a summary proceeding under that section.

The fact that after the 1st day of September 1947, a bhag-chasi was dispossessed from the land and such dispossession was maintained by the Criminal Court in a summary proceeding under S. 145, Criminal P. C. would not disentitle the Bhag-chasi from being restored to possession and an order of the Revenue Court under sub-s. (6) of S. 7 directing the landlord to allow the Bhag-chasi to enter on the land forthwith and to cultivate the same would, in substance, be an order evicting the landlord "in due course of law" as required by sub-s. (6) of S. 145, Criminal P. C.

(Paras 4, 5)

Anno: Criminal P. C., S. 145 N. 53.

1953 Mitra: S. 145 P. 477 N. "Eviction....law' (5 Pts. extra in N. 53 to S. 145 in A.I.R. Com.)

H. Mohapatra, for Petitioners; B. K. Pal, R. K. Rath and Advocate-General, for Opposite Party.

NARASIMHAM J.:

This is an application under Articles 226 and 227 of the Constitution against the appellate order of the Additional District Collector of Ganjam in a case under the Orissa Tenants Protection Act.

(2) The material facts are as follows:

The opposite party claiming to be Bhag-chasis applied on 11-5-50 to the Second Officer of Berhampur for protection from eviction under Section 3, O. T. P. Act, alleging that they were cultivating some lands as Bhag-chasis on 1-9-1947 and that their immediate landlord, namely V. V. Raju, the predecessor-in-interest of the petitioners, was in possession of more than thirty-three acres of raiyati lands on 30-11-1947. They further admitted that they were forcibly dispossessed from the lands by the petitioners with the help of rowdies on 15-5-49 and that in a proceeding under section 145, Cr. P. C., in the Court of the Subdivisional Magistrate, Berhampur, the latter declared the petitioners to be in possession by his order dated 30-12-49. They, however, contended that notwithstanding the decision against them in the proceeding under Section 145, Cr. P. C. they were entitled to be restored to possession inasmuch as they were Bhag-chasis who were in possession of the disputed lands on the 1st day of September, 1947, and consequently the provisions of sub-s. (6) of Section 7 with s. 3 of the O. T. P. Act applied in their case.

(3) The learned Second officer in a summary order rejected their petition observing that in view of the order under Section 145, Cr. P. C., their remedy was by way of a suit in a Civil Court. On appeal, however, the Additional Collector set aside the order of the Second Officer and directed him to rehear the case observing that the decision in a S. 145, Cr. P. C., proceeding cannot oust the jurisdiction of the O. T. P. Act officer to make enquiries under sub-section (6) of Section 7 of the O. T. P. Act.

(4) I have no doubt that the learned Additional District Collector has taken the correct view. There is a fundamental difference between an enquiry under the provisions of the O. T. P. Act on the one hand and an enquiry under Section 145, Cr. P. C. on the other.

The latter is a summary enquiry in which the sole point for consideration is as to which party was in actual possession of the disputed lands on the date of the commencement of the proceeding or within two months preceding that date. But sub-section (6) of Section 145, Cr. P. C. says that the order of the Magistrate declaring one of the parties to be in possession is only an interim order in the sense that his possession should not be disturbed until he is evicted therefrom 'in due course of law'.

The learned Second Officer of Berhampur apparently construed the words 'in due course of law' as meaning in pursuance of an order or decree of a Civil Court. There is, however, no authority for such a narrow view. An order of eviction by a Revenue Court is also 'in due course of law' and for the purpose of sub-section (6) of Section 145, Cr. P. C., it makes no difference as to whether the Revenue Court or the Civil Court directs the eviction of the party who was declared to be in possession a summary proceeding under that section.

(5) The O. T. P. Act was a special piece of legislation intended primarily to protect from eviction those Bhag-chasis who were in actual possession of their lands on the 1st day of September, 1947, and a special machinery through Revenue Courts was provided in Section 7 of that Act for the restoration to possession of those Bhag-chasis who were evicted against the provisions of that Act by their landlords after that date. Therefore in an application before the Revenue Officer for relief under sub-section (6) of Section 7 of the O. T. P. Act all that he has to consider is (i) whether the applicant was in possession as a Bhag-chasi on the 1st day of September, 1947 and (ii) whether the applicant is a 'tenant' as defined in clause (g) of Section 2 bearing in mind the three exceptions (specially exception (iii)) of that clause.

The fact that after the 1st day of September, 1947, the petitioners were dispossessed from the land and such dispossession was maintained by the Criminal Court in a summary proceeding under Section 145, Cr. P. C., would not disentitle

the Bhag-chasi from being restored to possession and an order of the Revenue Court under sub-s. (6) of Section 7 directing the landlord to allow the Bhag-chasi to enter on the land forthwith and to cultivate the same would, in substance, be an order evicting the landlord in due course of law as required by sub-section (6) of Section 145, Cr. P. C.

(6) I would, therefore, affirm the order of remand of the lower appellate court and dismiss this petition with a direction to the trial court to expedite hearing of the application bearing in mind the observations given above.

(7) The question about the validity of the provisions of the O. T. P. Act has been decided by this Court in O. J. C. No. 38 of 1951.

(8) The petition is dismissed with costs. Hearing fee is assessed at one gold mohur.

(9) JAGANNADHA DAS C. J.: I agree.

B/R.G.D. Petition dismissed.

A.I.R. 1954 ORISSA 130 (Vol. 41, C.N. 39)

MOHAPATRA J.

Zahiruddin Muhommed, Defendant-Appellant **v.** M. Subba Rao, Plaintiff-Respondent.

Second Appeal No. 222 of 1949, D/- 28-10-1953, from decision of Addl. Sub-J., Cuttack, D/- 28-2-1949.

Contract Act (1872), Ss. 60, 61 — Scope and applicability — (Civil P. C. (1908), O. 8, R. 6)

In order that a creditor may take advantage of the provisions of S. 60, Contract Act and will be entitled to exercise his free option to appropriate towards any other debt, he (the creditor) has got to prove it to the satisfaction of the Court that there was a lawful debt actually due and payable to him from the debtor and that he had appropriated the same in discharge of the said debt. AIR 1928 Cal 229, Foll. (Para 3)

If the creditor is not entitled to the benefit of S. 60 and there is no other debt proved before the Court, the amounts admitted to have been received by the plaintiff are applied in part satisfaction of the claim of the plaintiff under the provisions of S. 61 of the Act. In such a case no question of set-off can arise. (Paras 4, 5)

Anno. Contract Act, S. 60 N. 1; S. 61 N. 1.

S. K. De, for Appellant; U. C. Misra, for Respondent.

CASES REFERRED: Paras

(A) (V15) AIR 1928 Cal 229 (229) 3

(B) (V6) AIR 1919 Mad 534 (535): 37 Mad LJ 367 3

(C) (1897) 1897 A. C. 286: (290): 76 LT 579 3

JUDGMENT: It is the unsuccessful defendant in both the Courts below who has filed this Second Appeal against the decree and judgment dated 28-2-1949 of Sri B. S. Patnaik, Additional Subordinate Judge of Cuttack, confirming the decree and judgment in favour of the plaintiff by Sri T. V. Rao, Second Munsif of Cuttack. The plaintiff, who happens to be a senior member of the Cuttack Bar, brought the suit for recovery of his dues under two registered simple mortgage bonds executed by the defendant on 22-9-1933 and 16-1-1943, the mortgage bonds being for consideration of Rs. 670/- and Rs. 800/- respectively. The properties described in the schedule KA were mortgaged by the first transaction and those described in schedule KHA by the second transaction. The plaintiff has claimed Rs. 1339/- as the due towards the first mortgage bond and Rs. 832/11/3 as the due towards the second transaction as per accounts given in the plaint.

The defence which is pertinent for our purpose is only in respect of a small part of the claim. According to the defence, the plaintiff, as his lawyer, recovered a sum of Rs. 175/- from the High Court towards refund of court-fee due to the defendant on 5-2-1934 in First Appeal No. 14 of 1930 and appropriated the same towards mortgage debt as was the understanding between the parties. The plaintiff also in the same capacity, that is, as the defendant's lawyer, withdrew from time to time a sum of Rs. 268/2/- towards the pension bill of the defendant from 11-1-1945 to 30-6-1946, the defendant being a retired Government servant. This amount also was to be adjusted towards the mortgage dues. The defendant, therefore, claims a deduction of the above amounts totalling Rs. 443/2/- from the dues of the plaintiff.

It is to be noted here that these averments, that the plaintiff had withdrawn the court-fee amount of Rs. 175/- on 5-2-34 on behalf of the defendant in F. A. 14/30 and further that the plaintiff in the selfsame capacity had also withdrawn a sum of Rs. 268/2/- towards the pension bill of the defendant between the dates as noted above, were specifically made in the written statement and the plaintiff, while deposing at the trial, admitted that he had received the said amounts on behalf of the defendant, but had appropriated the same towards his fees for some other litigations.

(2) The learned Courts below have concurrently found, giving sufficient reasons, that there was no understanding between the parties that the aforesaid amounts withdrawn by the plaintiff were to be adjusted towards the mortgage dues and in fact the amounts had not been so adjusted. On this finding they have decreed the plaintiff's suit in full observing that the defendant may seek his remedies by other appropriate proceedings.

(3) In my view, the above finding of the Courts below that there was no understanding between the parties that the said amounts withdrawn by the plaintiff would be adjusted towards mortgage dues is not sufficient to dispose of the matter. The principles of appropriation are codified under Ss. 59, 60 and 61, Contract Act.

Section 59 runs thus:

"Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly."

Even under the provisions of S. 59, the creditor has got to prove the existence of the several distinct debts. But that apart the above finding of the Courts below can, at the worst for the debtor, take the case out of the provisions of S. 59 of the Act and may bring it within the language of S. 60 of the Act which runs as follows:

"Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is

not barred by the law in force for the time being as to the limitation of suits."

Indeed where the debtor did not intimate as to which debt the payment was to be made and applied it was entirely at the option of the creditor to appropriate the amount received towards any lawful debt including a debt barred by limitation even. But to me it appears to be absolutely clear that in order that a creditor may take advantage of the provisions of S. 60 and will be entitled to exercise his free option to appropriate towards any other debt, he (the creditor) has got to prove it to the satisfaction of the Court that that there was a lawful debt actually due and payable to him from the debtor and that he had appropriated the same in discharge of the said debt.

In this view of the matter it was incumbent upon the present plaintiff to have proved in Court that his fees in respect of any litigation of the defendant was due as against the defendant and that in fact he had appropriated these two sums which he admits to have received on behalf of the defendant in satisfaction of these lawfully payable dues. The plaintiff did not in fact produce even his diaries and prove the existence of these aforesaid legal dues.

I will, in this connection, with respect, follow a Bench decision of their Lordships Sir Ashutosh Mukherjee and George Claus Rankin JJ. of the Calcutta High Court, (two of the eminent Judges of India) in the case of — 'Brindarani v. Narendra', AIR 1928 Cal 229 (A). Their Lordships laid down the principle that

"When the creditor invokes the aid of S. 60, it is incumbent upon him to establish that there was a lawful debt actually due and payable to him from the debtor for the satisfaction of which the sums paid have been applied by him."

In coming to this conclusion, their Lordships relied upon the decision of the Madras High Court reported in — 'Munuswami Mudali v. Perumal Mudaly', AIR 1919 Mad 534 (B) and an English decision reported in — 'Cory Brothers & Co. v. Owners of Turkish Steamship "Mecca"', 1897 AC 286 (C).

(4) Now that the creditor is not entitled to the benefit of S. 60 and there is no other debt proved before the Court, the above amounts, that is, the total sum of Rs. 443/2/-, admitted to have been received by the plaintiff are applied in part satisfaction of the present claim of the plaintiff under the provisions of S. 61 of the Act.

(5) Mr. U. C. Misra, appearing on behalf of the plaintiff-respondent, strongly contended before me that the plea taken by the defendant was one of set off and the plea was not entertainable as he had not paid the court-fee. In my opinion, this being purely a question of appropriation as provided under Ss. 59, 60 and 61, Contract Act, the question of set off does not arise in view of the admission of the plaintiff that in fact he had received the said sums on behalf of the defendant and had appropriated the same towards his other legal dues. In such a case, in my opinion, it is for the creditor to prove the existence of his other legal dues towards which he had made the appropriation as alleged and failing which the sums admitted to have been received would be applied towards satisfaction or part satisfaction, as the case may be, of the dues, in suit.

(6) Mr. Misra has also taken up the point that there is no material to indicate the date on which the plaintiff withdrew the court-fee amount in F. A. 14/30. The particular date 5-2-1934 was given in the written statement. The plaintiff in the box did not deny that he did not receive the said amount on that date. On the contrary on admitting that he had received the same he agreed that he adjusted it towards other dues. Both the Courts below have written their judgments on the basis that a sum of Rs. 175/- was withdrawn by the plaintiff on behalf of defendant as a refund of court-fee on 5-2-1934. This point also has no substance.

(7) In conclusion, therefore, the appeal succeeds and is allowed in part and the decree passed by the Courts below is modified to the extent that the plaintiff will be entitled to realise his dues after making an adjustment of a sum of Rs. 175/- on 5-2-1934 and a sum of Rs. 268/2/- on 30-6-1946. The appellant will be entitled to proportionate costs throughout. The decree will accordingly be framed.

B/K.S.B. Appeal partly allowed.

A.I.R. 1954 ORISSA 131 (Vol. 41, C.N. 40)

PANIGRAHI C. J. AND MOHAPATRA J.

Narashingh Das, Petitioner v. Municipal Council of Deogarh, Opposite Party.

O. J. C. No. 17 of 1952, D/- 6-10-1953.

Municipalities — Orissa Municipal Act (23 of 1950), S. 131 — Imposition of Octroi Duty by Deogarh Municipality — Validity.

The authority to impose a tax is vested in the municipality under S. 131 of the Orissa Municipal Act of 1950. That section does not authorise the imposition of an octroi duty and there is no other law of the State Legislature continuing the old law relating to the imposition of such an octroi duty in the Municipal area of Deogarh. In these circumstances, the imposition is not sanctioned by law, and the municipality of Deogarh is not entitled to impose any tax levy on the purchase price of articles imported into the town. (Paras 5, 6)

G. K. Misra, for Petitioner; Advocate-General, for Opposite Party.

PANIGRAHI C. J.:

This is an application under Art. 226 of the Constitution praying for the issue of a writ of mandamus prohibiting the opposite party, the Municipal Council of Deogarh, which was a part of the former State of Bamra, from collecting a levy known as octroi duty from the petitioner.

(2) The case for the petitioner is that the municipality of Deogarh while it formed a part of the State of Bamra used to collect a tax at the rate of three pies per rupee on the purchase price of articles imported into Deogarh town for sale and that this tax was being levied by the Municipality till October 1952. The petitioner objected to the payment of this tax as being opposed to the provisions of the Orissa Municipal Act, 1950, (Act 23 of 1950) which came into force on 16-4-1951 in that area.

(3) The opposite party relies on a resolution passed by the now defunct Municipality of Deogarh and contends that the imposition of the said octroi duty was legally levied at the time it was imposed with the sanction of the Ruler of Bamra in 1941, and it continues to be a legal levy even after the coming into force of the Orissa Municipal Act.

(4) The State of Bamra was integrated with the Province of Orissa in 1948 and the Bihar and

Orissa Municipal Act (Act 7 of 1922) was extended to Bamra by the Orissa Merged States (Laws) Ordinance (No. 4 of 1949). In spite of the Bihar and Orissa Municipal Act being extended to the State, however, the octroi duty continued to be levied in Deograh. This is sought to be justified on the ground that S. 391 of the said Act provides for the continuance of the municipalities constituted under the different laws, and of the taxes imposed by such municipalities. Section 391 makes provision for the transitional period and says that the taxes imposed under any of the enactments repealed by S. 2 shall, so far as may be, be deemed to have been respectively imposed under this Act. I have cut out the words which I have not considered necessary for bringing out the point made by the learned Advocate-General appearing for the opposite party. All that this section says is that any tax which had been imposed prior to the introduction of the Bihar and Orissa Municipal Act shall be deemed to have been imposed under that Act. But that would not justify the continuance of such taxes in the future if the Act itself does not warrant the imposition of such taxes.

Our attention was drawn to S. 32(1)(i) of the Act which makes a specific provision for the imposition of a "scheduled tax" with the sanction of the Local Government. The expression "scheduled tax" in the Government of India Act also mentioned an imposition called 'octroi duty' under the rules framed under the Government of India Act. Even if the tax imposed by the municipality of Deogarh is justified under the rules framed under the Government of India Act, its continuance as a valid imposition would still require the sanction of the Local Government, as contemplated in S. 82(1)(i). Learned counsel's contention however is that the rules themselves sanction the levy of the octroi duty. But that would be so only till the introduction of the Bihar and Orissa Municipal Act. After the introduction of the Act, however, the sanction of the Local Government, namely, the Provincial Government of Orissa, would be required for the imposition. But whatever be the merits of this contention the decision of the point will depend on the construction of the language employed in the Orissa Municipal Act 1950 (Orissa Act 23 of 1950) which was extended to the area on 16-4-1951.

(5) Section 418 of the Orissa Municipal Act also makes provision for the transitional period, and the language employed is identical with that of S. 391 of the Bihar and Orissa Municipal Act. The section says in substance that a tax imposed under a repealed enactment shall,

> "so far as may be, be deemed to have been imposed and taken under the 'corresponding provision of this Act'."

What the section declares is that a tax imposed under a repealed enactment shall be deemed to have been imposed under a corresponding provision of the Act so far as may be. The question therefore is whether there is a "corresponding provision" in Orissa Act, 23 of 1950, relating to an 'octroi duty', that is to say, whether there is a provision authorising the imposition of a levy on the entry of articles into the municipality of Deogarh.

The provision relating to taxation is contained in S. 131 which says that the Municipal Council may, with the sanction of the State Government, impose within the limits of the municipality the following taxes. A number of taxes such as holding tax, latrine tax, water tax, etc., are mentioned in the section, under none of which an 'octroi duty' such as the one contemplated here, can be brought. It should also be noticed that the levy of a charge on the purchase-price of articles imported into the town is not a tax but is a duty. It is not a tax in the sense that every citizen living within the municipality is liable to pay it. Properly speaking, it is a duty leviable upon a class of persons. Section 131 makes no provision for the imposition of a duty as such. The opposite party however places reliance on clause (k) of the section which says:

> "any other tax which the Municipal Council is empowered to impose under any law for the time being in force."

The expression "under any law for the time being in force" cannot certainly refer to any law made by the Ruler of the ex-State of Bamra, unless such a law can be said to be an Act of the State Legislature which is continued in force for the time being. We have not been referred to any such enactment which continues the operation of the municipal laws of Deograh municipality which were in force before the State was integrated into the Province of Orissa. The only law that the learned Advocate-General could refer to is contained in a number of Resolutions of the Deogarh Municipality passed from time to time, the latest one being a Resolution of November 1952. But that Resolution is clearly not a "law for the time being in force". The authority to impose a tax is vested in the municipality under S. 131 of the Orissa Municipal Act of 1950. It is clear that that section does not authorise the imposition of an octroi duty and there is no other law of the State Legislature continuing the old law relating to the imposition of such an octroi duty. In these circumstances, it must be held that the imposition is not sanctioned by law.

(6) We would accordingly hold that the municipality of Deogarh is not entitled to impose any tax levy on the purchase-price of articles imported into the town and that the amount of Rs. 227-6-0 paid by the petitioner as octroi duty has been illegally collected. We accordingly direct the opposite parties to refund the amount to the petitioner. We will not however make any order as to costs as the municipality appears to have collected the amount under a bona fide belief that it was empowered to do so under the law. It was the duty of the State Government to point out that the levy of an octroi duty by the municipality was not warranted by the provisions of the Orissa Municipal Act of 1950 which is now in force.

(7) MOHAPATRA J.: I agree.

B/D.R.R. Order accordingly.

A.I.R. 1954 ORISSA 132 (Vol. 41, C.N. 41)

NARASIMHAM AND MOHAPATRA JJ.

Batakrushna Sahu and another, Defendants-Appellants v. Kunja Behari and another, Plaintiffs-Respondents.

Second Appeal No. 168 of 1949, D/- 8-12-1953, from decision of Addl. Dist. J., Cuttack, D/- 29-1-1949.

(a) Tenancy Laws — Orissa Tenancy Act (2 of 1913), S. 4 — Test to determine whether lessee is governed by Orissa Tenancy Act — (T. P. Act (1882), S. 117).

In considering whether the relationship between a lessor and a lessee in respect of a piece of land situated within a municipal area

is governed by the provisions of the T. P. Act or by the provisions of the Orissa Tenancy Act, the main question for consideration is whether the lessee comes within the class of any of the 'tenants' described in S. 4 of the Orissa Tenancy Act. And if there is absolutely no evidence to show that the disputed land was let out for agricultural purpose it is idle to contend that the status of the person occupying the land is that of a tenant as described in the Orissa Tenancy Act. AIR 1951 Orissa 262, Disting.

(Paras 7 and 9)

Anno: T. P. Act, S. 117 N. 3 Pts. 9a, 14.

1949 Mulla: S. 117 P. 740 N. "Agricultural purposes" (10 Pts. extra in N. 3 to S. 117 in A.I.R. Com.— Definition of "agriculture" given in 24 Mad 421; AIR 1915 Mad 781 and AIR 1917 Mad 649 commented upon and what are and what are not leases for agricultural purposes illustrated in N. 3 to S. 117 in A.I.R. Com.).

(b) Tenancy Laws — Orissa Tenancy Act (2 of 1913), S. 3(3) — Chandnadar tenant.

The definition of a Chandnadar in S. 3(3) is very restrictive and whatever might have been the origin of the tenancy if the land is recorded as chandna in the course of a settlement of land revenue the person holding that land would become a Chandnadar and as such a tenant under the Orissa Tenancy Act.

(Para 8)

(c) Tenancy Laws — Orissa Tenancy Act (2 of 1913), S. 4(3) — Status of person recorded in settlement record as "pattadar" or "darpattadar" — Effect.

The mere entry of the status of a person in the settlement record as that of a 'pattadar' or 'darpattadar' is not conclusive on the question as to whether he will be governed by the provisions of the Orissa Tenancy Act or by those of the T. P. Act. It is always open to a Court on the evidence adduced by the parties to hold that he comes within one of the classes of tenants as defined in S. 4 (3) of the Act and is consequently governed by the provisions of that Act. (Para 10)

(d) Civil P. C. (1908), S. 11 — How to determine what issue was mainly decided.

In order to decide whether a previous decision operates by way of res judicata, in the absence of the pleadings the Court has to construe the judgment given in that decision and see whether the judgment indicates any issue as the main issue, the decision whereon is sought to operate as res judicata.

(Para 14)

Anno: Civil P. C., S. 11 N. 119 and 120.

(e) T. P. Act (1882), S. 108 (j) — Permanent tenancy — Right to transfer — (Landlord and Tenant).

Where it is clearly established that pucca houses originally stood on the holding and the tenancy is found to be a permanent tenancy, transferability may be assumed. This is an exception to the general rule that the tenancies of homestead lands created prior to the coming into force of the T. P. Act are non-transferable. AIR 1916 Pat 253; AIR 1932 Cal 431, Rel. on; AIR 1938 Pat 569, Ref.

(Para 16)

Anno: T. P. Act, S. 108 (j) N. 1 Pts. 1, 2.

B. N. Das and S. C. Chakravarty, for Appellants; **H. Mohapatra** and D. N. Sahu, for Respondents.

CASES REFERRED: Paras

(A) (V38) AIR 1951 Orissa 262 10
(B) (V9) AIR 1922 PC 241: 48 Cal 460 (PC) 14
(C) (V11) AIR 1924 Mad 469: 47 Mad 453 14
(D) (V37) AIR 1950 PC 80 14, 15
(E) (V25) AIR 1938 Pat 569: 17 Pat 358 16
(F) (V3) AIR 1916 Pat 194: 1 Pat LJ 253 16
(G) (V19) AIR 1932 Cal 431: 138 Ind Cas 72 16

NARASIMHAM J.:

This appeal is by defendants 1 and 2 against the appellate judgment of Additional District Judge of Cuttack confirming the judgment of the Munsif of Cuttack decreeing the plaintiff's suit for declaration of title and recovery of possession of a piece of homestead land situated in Cuttack town.

(2) In the Current Settlement (See Ext. 4) the disputed property was recorded under Khata No. 846 in the names of Haudi Bewa and Dura Bewa, the two widows of one Natha Behera. The said khata consisted of the following two plots; plot No. 1210 having an area of .035 cents, plot No. 1211 having an area of .004; the first plot was recorded as 'gharbari' and the second plot as 'dokan'. The nature of right of the said two widows was recorded as that of 'Darpattadar'. Defendants 1 and 2 are admittedly the Pattadars in respect of the two plots under the Khasmahal who is the superior landlord.

(3) The plaintiff's case was that Natha Behera had a permanent tenancy right in the said two plots and that after his death his two widows Haudi and Dura inherited that right. Haudi died subsequently and Dura thus became the sole surviving heir in respect of the property. On 26-10-1946, she transferred her interest to the plaintiff by a kabala (Ext. 1) for a sum of Rs. 500/-. As defendants 1 and 2 threatened to evict the plaintiff he was compelled to bring the present suit for declaration of title and other consequential reliefs.

(4) The main defence of the contesting defendants (Nos. 1 and 2) was that Natha Behera had no permanent tenancy right in the disputed plots; that in any case, after his death his widows abandoned the property and that thereupon the defendants as the immediate landlords obtained possession of the same. They also urged that the suit was barred by limitation.

(5) The learned trial Court held that Natha Behera and after him his two widows held a permanent tenancy right in the disputed plots and that in a previous litigation between the defendants and the two widows in T. S. No. 47 of 1932 this question was finally decided against the defendants and as such was affected by the principle of res judicata. It further negatived the defendants' contention that the relationship between them and Natha Behera was governed by the provisions of the Orissa Tenancy Act and held that it was governed by the provisions of the Transfer of Property Act. On the question of limitation, it held that the disputed property was abandoned by the widows within about ten years of the date of the institution of the suit and that consequently the suit was not barred under Art. 142. Limitation Act. It rejected the defendants' contention that the kabala (Ext. 1) executed by Dura Bewa in favour of the plaintiff was a collusive document representing a sham transaction and held that it was for consideration and that the plaintiff, therefore, became the successor-in-interest of Natha Behera. The learned appellate Court confirmed the findings of the trial Court on all the points.

(6) The findings of both the Courts to the effect that the kabala (Ext. 1) obtained by the plaintiff from Dura Bewa was genuine and was for consideration and the further finding that the dispossession of Dura Bewa took place within ten years of the institution of the suit are pure questions of fact and were rightly not pressed in the second appeal. The main points urged by Mr. Das on behalf of the appellants are:

(i) the provisions of the Orissa Tenancy Act would apply to the present case and not the provisions of the Transfer of Property Act;

(ii) the decision in T. S. No. 47 of 1932 would not operate as res judicata and the Darpattadar's right in the disputed property was that of a tenant-at-will; and

(iii) both the Courts committed an error of law in assuming that one of the incidents of a permanent tenancy was transferability.

(7) The disputed property is situated within Cuttack municipality; but as the said municipality was not excluded from the provisions of the O. T. Act by a notification under sub-s. (3) of S. 1 of that Act it is obvious that the provisions of that Act would apply within the municipality also. But in considering whether the relationship between a lessor and a lessee in respect of a piece of land situated within Cuttack municipality is governed by the provisions of the T. P. Act or by the provisions of the O. T. Act the main question for consideration is whether the lessee comes within the class of any of the 'tenants' described in S. 4, Orissa Tenancy Act. It was urged that the status of Natha Behera was that of an occupancy raiyat; but no evidence was led to show that when Natha Behera or his ancestors obtained this piece of land from the predecessors-in-interest of defendants 1 and 2 they obtained it for the purpose of cultivation. Similarly, the status of defendants 1 and 2 at the time when they granted lease to Natha Behera's predecessors-in-interest was also not proved by evidence. On the other hand, it was admitted by the defendants' witnesses themselves that there was a house with a pucca well on the disputed land in which Natha and his family members resided for several years. Thus when there is absolutely no evidence to show that the disputed land was let out for agricultural purpose, it is idle to contend that Natha Behera's status was that of an occupancy raiyat.

(8) It is true that Chandnadars are also recognised as a class of tenants under the Orissa Tenancy Act even though a chandna tenancy is taken for residential purpose and not for agricultural purpose. But the definition of a Chandnadar as given in S. 3(3), Orissa Tenancy Act, is limited to those persons holding land which has been recorded as chandna in the course of a settlement of land revenue. This definition is very restrictive and whatever might have been the origin of the tenancy if the land is recorded as chandna in the course of a settlement of land revenue the person holding that land would become a Chandnadar and as such a tenant under the Orissa Tenancy Act. But there is clear evidence to show that during the last settlement operations the land was not recorded as chandna. On the other hand, it is admitted that the status of defendants 1 and 2 were recorded as 'pattadars' and that of the two widows of Natha Behera as 'darpattadars' under them. The circumstances under which the settlement authorities recorded a certain class of non-agricultural tenants situated within Cuttack municipality as pattadars and darpattadars will be clear from the following extract taken from Dalziel's Settlement Report p. 44:

"A large number of unintelligible statuses were recorded at Provincial Settlement and such terms as pattadar, bajyafti and chandnadar seem to have been used rather loosely and indiscriminately. In this settlement we had to make careful enquiry to determine which tenants were entitled to chandna status under the Tenancy Act and which were holding under terms of a contract subject to the Transfer of Property Act. In the khas mahal areas the tenants hold under written leases & their rents are fixed only for the term of the leases; they are clearly pattadars. A proposal to change their status to that of chandnadars by agreement in order to enable their rents to be settled by Revenue Officers at time of settlement was rejected by Government. In the temporarily settled area it appeared from enquiry that most of the urban tenants are really chandnadars. Their description in the last settlement khatian or terij generally includes this term, and they were also found to be so described in the revenue assessment reports. Their rents had been fixed for the period of the settlement. Even leases granted after last settlement generally show the rents to be liable to alteration only at a new settlement. Such tenants come under the definition of chandna in the Tenancy Act.

"It was generally found that tenants who had taken leases since last settlement had been given permanent right. Those who specially claimed this and proved it were recorded as istimarari chandnadars or pattadars. But the absence of the term istimarari does not necessarily imply that the tenant is holding on a temporary lease.

"A few tenants even in the urban area were found with status sthitiban. Even when inappropriate to the present nature of the holding, this status was maintained, as no action had been taken to cancel it.

"Under-tenants in various degrees are recorded as darpattadar, daradarpattadars, darchandnadar and daradarchandnadar, etc."

A scrutiny of the above extract reveals that the settlement authorities made careful enquiries with a view to determine whether such tenants were entitled to chandna status under the Orissa Tenancy Act or else whether they were merely pattadars holding the land under written leases from the Khasmahal subject to the provisions of the T. P. Act. Under-tenants under the pattadars were recorded as darpattadars. Thus in view of the restricted definition of 'Chandnadar' as given in the Orissa Tenancy Act the mere fact that defendants 1 and 2 were not recorded as chandnadars in the last settlement is sufficient to show that they are not chandnadars and consequently they are not tenants of any of the classes described in S. 4, Orissa Tenancy Act.

(9) It was, however, urged that the settlement authorities were not concerned with the relationship between a pattadar and his under-tenant (described as a darpattadar) and that consequently the mere fact that the two widows of Natha Behera were shown as darpattadars in the settlement khatian (Ext. 4) would not be presumptive evidence of their status. It is true that the settlement authorities were not concerned with the right of a lessor and a lessee who are governed by the T. P. Act and the mere fact that the two widows of Natha Behera were recorded as darpattadars in the last settlement

would not necessarily attract the provisions of S. 117(3), Orissa Tenancy Act, and cast on the defendants the burden of proving that the entry was incorrect. But the settlement authorities were directly concerned with the question as to whether a holding was a chandna holding and if after due enquiry they did not record it as chandna it is decisive on the question that it is not a chandna holding in view of the special definition of 'Chandnadar' as given in s. 3(3). For that limited purpose, the settlement authorities were bound to enquire into the status of the lessor and the lessee and consequently the recording of the status of defendants 1 and 2 as pattadars and that of the two widows of Natha Behera as darpattadars would be of great evidentiary value under S. 35, Evidence Act, though such entries may not be presumed to be correct under S. 117(3), Orissa Tenancy Act. There is practically no evidence worth the name to show that the status of Natha Behera was not that of a lessee under defendants 1 and 2 who themselves admittedly obtained a lease from the Khasmahal. Hence, I would hold that neither defendants 1 and 2 nor the two widows of Natha Behera were tenants as described in the Orissa Tenancy Act and consequently the relationship between them was merely that of a lessor and a lessee governed by the provisions of the C. P. Act.

(10) Mr. Das drew my attention to — 'Banamali v. Padmalabha', AIR 1951 Orissa 262 (A), where there are some observations to the effect that persons described as pattadars and darpattadars may, under some circumstances, be governed by the provisions of the Orissa Tenancy Act. But if the facts of the case be carefully scrutinised it will be clear that there was clear evidence to show that the disputed land was let out for the purpose of cultivation. In the present case, however, not only is there no evidence to show that the pattadars (defendants 1 and 2) obtained the lease for the purpose of cultivation or else that they sub-let it to Natha Behera for the purpose of cultivation but there is also clear evidence of the defendants themselves to show that Natha Behera had constructed a building and was using the land for residential purpose. Hence, this case is clearly distinguishable from the case cited in — 'AIR 1951 Orissa 262 (A)'. It is true that the mere entry of the status of a person as that of a 'pattadar' or 'darpattadar' is not conclusive on the question as to whether he will be governed by the provisions of the Orissa Tenancy Act or by those of the T. P. Act and it is always open to a Court on the evidence adduced by the parties to hold that he comes within one of the classes of tenants as defined in S. 4(3) of the Act and is consequently governed by the provisions of that Act. But where there is clear evidence to show that the land was used for residential purpose and not for agricultural purpose and there is no evidence to show that purpose for which the land was originally let out and where during the last settlement the settlement authorities after careful enquiries did not recognise the land as a chandna holding it is idle to contend that the provisions of the Orissa Tenancy Act would apply.

(11) Both the Courts were, therefore, right in holding that the present case was not governed by the provisions of the Orissa Tenancy Act and the plaintiff's suit would not be barred by the special rule of limitation laid down in Sch. III, Orissa Tenancy Act, even though the finding was that his predecessor-in-interest was dispossessed within about ten years of the institution of the suit.

(12) I now take up the question of res judicata. In 1932 defendants 1 and 2 brought a suit (T. S. No. 47 of 1932) in the Court of the Munsif of Aska for ejecting the two widows of Natha Behera from the disputed property alleging that they were mere tenants-at-will and that they had been served with a registered notice to quit. The pleadings in that suit were not proved in the present litigation; but from the judgment of the Munsif (Ext. 3) it appears that Dura Bewa contested the suit on the following three grounds : (i) she was a permanent tenant and not a tenant-at-will and was consequently not liable to be evicted; (ii) no notice to quit was served on her; and (iii) the suit for eviction must, in any case, fail as the permission of the superior landlord, namely, the Khasmahal was not obtained. Three specific issues were framed covering the three grounds. The question as to whether Dura Bewa's status was of a permanent tenant or that of a tenant-at-will was discussed at some length and the Munsif held that she was not a tenant-at-will but a permanent tenant. As regards the service of notice (which was issue no. 2), he came to a finding that the service of notice was not proved. He did not decide the third issue as to whether the permission of the Khasmahal was necessary saying "so I need not give any finding on this issue as the first issue is sufficient to decide the case". The first issue referred to by him was the issue as to whether the defendants were permanent tenants or tenants-at-will.

(13) A fair reading of the judgment of the Munsif (which was not taken up in appeal and is thus final) reveals that the main controversy between the parties in that litigation was whether Natha Behera was a permanent tenant or a tenant-at-will. Evidence was led to show that the disputed land was originally let out for residential purpose; there were old pucca houses on it and that subsequently a kutcha house was constructed on the land and occupied by Natha Behera for nearly thirty or forty years and that the annual rent payable was a fixed sum of Rs. 3/3/-. The question as to whether notice to quit was validly served on the defendants was doubtless decided on the assumption that even if the status of the defendants was not of a permanent tenant the plaintiff's suit must in any case fail due to non-service of valid notice to quit. Mr. Das urged that it was issue No. 2 which was the main issue in that litigation & that the question about the permanent status of the defendants was a matter incidentally dealt with. I am, however, unable to accept this argument. In fact, the learned Munsif in the last portion of his judgment refused to decide issue 3 saying that the first issue alone was sufficient for deciding the case thereby making it absolutely clear that in his opinion the issue as to whether the tenancy was permanent or not was the decisive issue in the case.

(14) Mr. Das next relied on — 'Midnapur Zamindari Co. Ltd. v. Naresh Narayan', AIR 1922 PC 241 (B); — 'Ramaswami Reddi v. Marudai Reddi', AIR 1924 Mad 469 (C) and — 'Shankarlal v. Hiralal', AIR 1950 PC 80 (D), in support of his argument that the previous decision would not operate as res judicata. His main point seems to be that once the issue on the question of valid service of notice was decided against the plaintiffs in T. S. No. 47 of 1932 there was no point in their taking up the litigation, on appeal, to a higher Court inasmuch as even if they succeeded on the question about the permanency of the tenancy their appeal would fail on the question of valid service of notice. The question ultimately

depends on whether the permanency of the tenancy was a matter directly and substantially at issue in T. S. No. 47 of 1932 and for that purpose in the absence of the pleadings one has to construe the judgment. I have already shown that the judgment indicates that this was the main issue in the case as expressed by the Court itself. The judgment and decree were against the plaintiffs in that suit (defendants in the present litigation) and they had, therefore, the right of appeal. They, however, did not care to file an appeal against the judgment of the Munsif. The three decisions on which Mr. Das has relied are clearly distinguishable.

In — 'AIR 1922 PC 241 (B)', the previous suit for eviction was contested on two grounds : (i) the defendants had occupancy right; and (ii) the suit was premature. The trial Court held that the suit was premature but that the defendants had not occupancy right. The plaintiff took up the matter on appeal to the High Court and the defendants also filed a cross appeal against the finding of the lower Court to the effect that they did not have a right of occupancy in the land. Both the appeal and the cross appeal were dismissed. But notwithstanding the fact that the defendants filed a cross appeal, their Lordships of the Privy Council held that the finding of the trial Court as regards the absence of an occupancy right of the defendants would not operate as res judicata, inasmuch as, once they succeeded on the plea that the suit was premature there was no occasion to go further as to the finding against them.

This decision was followed in — 'AIR 1924 Mad 469 (C)'. In that Madras case a suit for eviction was contested by a defendant on two grounds; firstly, that he had a permanent occupancy right in the land and secondly, that there was no valid notice to quit. The trial Court held that the defendant had failed to establish his right of permanent occupancy but that the plaintiff's suit would in any case fail because no notice to quit was given. But as the decree was in favour of the defendant he did not prefer any appeal. But the plaintiff filed an appeal which was dismissed by the District Judge on the ground that no notice to quit was given. The District Judge did not decide the question as to whether the defendant established his claim to right of permanent occupancy. Thus it was clear that the question as to whether the defendant had a permanent right of occupancy though decided by the Munsif was practically left open by the District Judge and also by the High Court in second appeal and the litigation was disposed of on the ground of failure to give proper notice to quit. The question was clearly left open by the superior Courts and was not finally decided so as to operate as res judicata.

(15) Similarly, — 'AIR 1950 PC p. 80 (D)', will not be of any material assistance to the appellants. In that decision it was held that when a suit was rejected under R. 11 of O. 7, C. P. C., as non-maintainable on the preliminary ground that a valid notice under S. 80, C. P. C., had not been issued any observations which the Court might have made regarding the merits of the suit were of an incidental nature and would not operate as res judicata in any subsequent suit between the parties. Here the position, however, differs fundamentally. The previous suit was not disposed of on any preliminary ground but was keenly contested and the question as to whether the tenancy was of a permanent nature or not was most important issue in that suit. Hence, the Privy Council decision would not apply.

(16) Next it was contended that both the Courts were wrong in assuming that free transferability was one of the incidents of a permanent tenancy. Both the Courts proceeded on the footing that as Natha Behera was a permanent tenant he had unrestricted right of transfer. This view was, however, challenged. The exact date when Natha Behera or his predecessor in interest obtained lease of the property from the predecessor-in-interest of defendants 1 and 2 is not on record. But the judgment of the Munsif (Ext. 3) in T. S. No. 47 of 1932 seems to be based on the assumption that the lease was prior to the commencement of the T. P. Act. Mr. Das, for the appellants, relied on — 'Bansi Singh v. Chakradhar Prasad', AIR 1938 Pat 569 (E), in support of his argument that under the general law one of the incidents of such a tenancy was non-transferability and the onus was on the plaintiff to show that the lessee had the right to transfer his interest. But it will be noticed that the said decision was itself based on certain observations in — 'Ambica Prasad Singh v. Baldeo Lal', AIR 1916 Pat 194 (F), and on several decisions of the Calcutta High Court the latest of which was — 'Kamala Mayee v. Nibaran Chandra', AIR 1932 Cal 431 (G). In all those decisions, however, it was clearly stated that the general rule that tenancies of homestead lands created prior to the coming into force of the T. P. Act are non-transferable is subject to one important exception, namely, that where there has been an erection of pucca buildings, right of transferability may be assumed. In the present case it is clear from the recitals in the judgment of 1932 (Ext. 3) that there were originally two pucca houses on the disputed land. There was also a pucca well. It is true that subsequently there was a kutcha house on the land which was occupied by Natha Behera's family. But where it is clearly established that pucca houses originally stood on the holding and the tenancy is found to be a permanent tenancy, transferability may be assumed in view of the exceptions provided in the aforesaid decisions themselves. Hence, the transfer in favour of the plaintiff cannot be attacked on this ground.

(17) It was faintly argued that the permission of the khasmahal was not obtained to the transfer by Dura Bewa in favour of the plaintiff. The lower Court rightly rejected this argument. The terms of the lease between the Khasmahal and the defendants are not on record. There is also no evidence to show that the permission of the Khasmahal was not obtained. No specific issue was raised on this point and as the Khasmahal is not a party to this litigation it is unnecessary to consider how far it will be bound by the transfer.

(18) For the aforesaid reasons I would dismiss the appeal with costs.

(19) MOHAPATRA J. : I agree.

B/V.S.B. Appeal dismissed.

A.I.R. 1954 ORISSA 136 (Vol. 41, C.N. 42)

NARASIMHAM AND MOHAPATRA JJ.

Hati Pratihari and another, Plaintiffs-Appellants v. Alekh Mohapatra and others, Defendants-Respondents.

Second Appeal No. 415 of 1949, D/- 8-12-1953, against judgment of Addl. Sub-J., Puri, D/- 20-7-1949.

(a) Civil P. C. (1908), Ss. 148, 151, O. 32 R. 4 — Conditional order dismissing appeal for failure to deposit costs.

Under the provisions of O. 32, R. 4(4), the Court has power to pass an order calling upon the appellants to deposit the costs of the minor respondents' guardian. The Court in such cases has inherent power to make it a condition precedent for the non-compliance of which the Court can pass an order that the appeal should stand dismissed without reference to a Bench; otherwise further proceedings in the appeal as against the minor-respondents would be unworkable and may lead to further complications. A peremptory order of such a nature is quite permissible in law. 1896-1 Ch 644; AIR 1928 Mad 154 and AIR 1940 Pat 50, Rel. on. (Paras 5, 6)

Anno: Civil P. C., S. 148 N. 2.

1953 Mulla: S. 148 P. 470 N. "Act.....Court" (3 Pts. extra in N. 2 to S. 148 in AIR Com. — Patna, Nagpur, Rangoon and Peshawar views on Pt. (u) and Patna and Oudh views on Pt. (v) not noticed in Mulla — 4 Pts. extra in Mulla).

Civil P. C., O. 32 R. 4 N. 9.

1953 Mulla: O. 32 R. 4 P. 1045 N. "Sub-rule 4 .....litem" (Proposition (O) in Mulla is doubtful in view of AIR 1931 Mad 674 which is not noticed in Mulla — 2 Pts. extra in Mulla).

(b) Specific Relief Act (1877), S. 15 — Contract to sell by member of Hindu joint family.

The undivided interest of a coparcener of a joint Mitakshara family under the School to which Orissa State belongs cannot be the subject-matter of alienation, be it for consideration or gratuitous. The plaintiffs in the suit for specific performance of contract for sale cannot obtain a decree for specific performance of contract to sell an undivided interest of a coparcener. AIR 1921 Mad 172 (FB), Distinguished. (Para 7)

Anno: S. R. Act, S. 15 N. 4.

H. Mohapatra, for Appellants; G. C. Das and P. C. Chatterjee, for Respondents.

CASES REFERRED: Paras.

(A) (1896) 1896-1 Ch 644: 65 LJ Ch 375 5, 6
(B) (V15) AIR 1928 Mad 154: 105 Ind Cas 124 5, 6
(C) (V27) AIR 1940 Pat 50: 186 Ind Cas 870 6
(D) (V8) AIR 1921 Mad 172: 44 Mad 605 (FB) 7

MOHAPATRA J.:

This is an appeal against the judgment dated 20-7-1949 of Sri S. K. Mohapatra, Additional Subordinate Judge of Puri, confirming the decree dated 8-9-1948 of Sri N. K. Das, Munsif of Puri, arising out of a suit brought by the plaintiffs for specific performance of contract alleged to have been entered into between the plaintiffs and the original defendant 1 (Jagabandhu Mohapatra) as manager of the Hindu joint family consisting of himself, and his minor sons and nephews (defendants 2 to 8).

Jagabandhu and Dinabandhu were two brothers. Dinabandhu predeceased Jagabandhu in a state of jointness leaving his widow Suryamani and his two minor sons (defendants 7 and 8). The original defendants 2 to 6 are the sons of Jagabandhu who were minors at the first date of the contract, that is, 20-6-1942 but defendant 2 attained majority in the meantime and defendant 1 (Jagabandhu) died during the pendency of the suit. The plaintiffs' case is that the said Jagabandhu executed an agreement in favour of the plaintiffs on 20-6-1942 on a plain paper and received a sum of Rs. 50/- as advance of the consideration for the sale of a homestead land with a house thereon, the area of the homestead being .055 situate in the town of Puri. The consideration was settled at Rs. 800/-.

On 30-9-1942 Jagabandhu purchased stamps worth Rs. 12/- and handed over the same to the plaintiffs. On 18-6-1945 both defendant 1 and his son defendant 2 (who had by then attained majority) jointly executed a sale-deed in pursuance of the aforesaid contract in favour of the plaintiffs. The sale-deed was executed by defendant 1 on his own behalf and on behalf of his minor sons and nephews. The sale-deed in favour of the plaintiffs however could not be registered as the plaintiffs fell ill and on account of other reasons. Thereafter Suryamani, as mother guardian of defendants 7 and 8, executed a sale-deed in favour of defendant 9 on 5-1-1946 for a consideration of Rs. 1000/- in respect of half of the property and defendant 1 for self and as guardian of his minor sons and defendant 2 both executed a sale-deed in favour of defendant 10 on 23-1-1946 for a consideration of Rs. 1100/- in respect of the other half of the property.

The plaintiffs have therefore brought the suit for specific performance of contract on the allegation that the Kabalas in favour of defendants 9 and 10 are bogus transactions, or in any event they (defendants 9 and 10) having notice of previous contract the plaintiffs are entitled to a decree for specific performance against all the defendants.

(2) The defence taken was that the contract for sale in favour of the plaintiffs was not bona fide and genuine and did not take place prior to the Kabalas in favour of defendants 9 and 10.

(3) Before the hearing of the appeal commenced, a preliminary point was taken on behalf of the respondents by reference to previous order passed by this Court on 12-9-1950 that the present appeal could not proceed. The order dated 12-9-1950 is as follows:

> "We direct that the Deputy Registrar be appointed the guardian of the minors. The plaintiffs must pay a sum of Rs. 20/12/- as guardian cost within two weeks hence, failing which the appeal shall stand dismissed as against minor respondents 2 to 6 without further reference to a Bench."

In fact the plaintiffs failed to comply with the present order and a subsequent order was passed by the Deputy Registrar on 27-9-1950 to the effect that

> "Guardian's cost for minor respondents 2 to 6 not having been deposited in time, appeal against the said minor respondents stands dismissed in pursuance of Order No. 8, dated 12-9-1950."

Respondents 2 to 6 are minors and were represented in the lower Court by a pleader guardian ad litem. The pleader guardian having intimated in an application by post to the Court on 22-6-1950 that he might be excused from representing the minors in the High Court, the Registrar passed an order on 28-8-1950, at the request of the appellants for time to take necessary steps for change of guardian for the minor respondents 2 to 6, that failing compliance of necessary steps, that is, Court guardian may be appointed for the said minors on the appellants depositing Rs. 20/12/- as guardian's cost—vide office note, D/- 19-8-1950 —within ten days the case should be placed before the Bench for orders.

Accordingly the case was placed before the Bench on 12-9-1950 and order No. 8, dated 12-9-1950, as quoted above, was passed. The respon-

dents' contention is that the appeal having been dismissed as against respondents 2 to 6 and as the case arises out of a suit for specific performance of contract, the entire appeal must fail, or else it will lead to inconsistent decrees.

(4) Mr. Mohapatra, appearing on behalf of the appellants, takes up the first point that the order No. 8 dated 12-9-1950 is without jurisdiction inasmuch as the Court has no power to pass an anticipatory conditional order of dismissal. He further contends that the Court has no power to order the appellants to deposit costs for the guardian of the minors and to make it a condition precedent for the appeal to proceed further. He argues that there is no provision of law authorising such an act of the Court.

(5) To our mind, it is clear that under the provisions of O. 32, R. 4(4) the Court has power to pass an order calling upon the appellants to deposit the costs of the minor guardian. The present case, indeed, as we have indicated above, comes within the language of sub-cl. (4) of R. 4 which runs as follows:

> "Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."

In the present case there was no other person fit and willing to act as guardian of the minor respondents. Therefore the Court appointed the Deputy Registrar as the guardian of the minors and in so appointing, they give the direction of calling upon the appellants to deposit Rs. 20/12/- as the costs for the guardian in the performance of his duties as such guardian. Clearly, therefore, the Court is empowered under the law to pass such an order calling upon the appellants to make the aforesaid deposit. But the further question that remains is whether the Court can make the order as a condition precedent for further proceedings of the appeal to continue as against the minor-respondents.

In our opinion, the Court in such cases has inherent power to make it a condition precedent for the non-compliance of which the Court could pass an order that the appeal should stand dismissed without reference to a Bench, otherwise further proceedings in the appeal as against the minor respondents would be unworkable and may lead to further complications. If the costs of the guardian are not deposited, the Court cannot reasonably compel due diligence on the part of the guardian of the minors in the conduct of the appeal on their behalf. This practice of passing peremptory order, that a party is to deposit a particular sum in accordance with the order passed by the Court within a fixed time, failing which the appeal will stand dismissed without further reference to a Bench, is very well recognised in the Courts both in England and in India.

We may in this connection refer to a decision in the case of — 'Collinson v. Jeffery', reported in 1896-1 Ch 644 (A). A passage appearing in the judgment of Kekewich J. at page 647 is worth being quoted in this connection :

> "There is another form of order available and appropriate where the Court thinks that severe terms should be imposed — namely, that on failure to do certain acts within a specified time then 'the action do stand dismissed without further order'."

In that case before Kekewich J. in a redemption action an order was made giving the plaintiff leave to lodge the mortgage money in Court, and that, in default of such lodgment within two months from the date of this order, the action be dismissed with costs. Under a bona fide mistake the plaintiff failed to lodge the money in Court until after two months fixed by the Court. It was held that notwithstanding the expiration of the two months, the action was not dead, but that the Court had jurisdiction, at the instance of the plaintiff, to extend the time limited by the order.

Much significance was attached in that case to the absence of the clause in that order "that the action do stand dismissed 'without further orders' ". Therefore, it was held that

> "it is comatose; it is moribund; but a final stroke is required to effect death. That final stroke has not been delivered, and therefore in my opinion, the application is properly made and the order asked for may be granted."

In that case, therefore, it was necessary to pass a final order of dismissal. But it clearly appears from that decision that a peremptory order of the nature of the present case is quite permissible in law.

This decision came up for examination before Odgers and Curgenven JJ. in the case of — 'Balakrishna v. Parvathammal', reported in AIR 1928 Mad 154 (B), and the principle laid down there was fully approved. Curgenven J. observes as follows in the passage appearing at page 157:

> "It has not been contended before us that it is beyond the competence of a Court to pass an order allowing an application upon certain terms and providing that, if within the time allowed these terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed. If any such contention were raised it could be met by a reference to a number of cases, English and Indian, where orders of this nature have been recognised by the Courts."

In that case, an order was passed allowing an application upon certain terms and providing that if within the time allowed those terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed. Their Lordships in the face of that order observed that they had no power to further extend the time fixed by the Court.

(6) A similar point for extension of time under the provisions of S. 148, Civil P. C., arose in the case of — 'Surajmal v. Bhubaneswar', reported in AIR 1940 Pat 50 (C). There the Court decreed the plaintiff's suit and ordered to pay deficit court-fees in the following terms :

> "The plaintiffs must file deficit Court-fees within a fortnight from to-day otherwise the suit will be dismissed."

It was held that final order had not been passed in the suit and so the Court having still retained control over the proceeding had jurisdiction to accept the deficit court-fees after the period fixed. It is to be noted that the above mentioned cases reported in — '(1896) 1 Ch 644 (A)' and — 'AIR 1928 Mad 154 (B)', were fully considered and the principle laid down was approved.

Fazl Ali J. (as he then was) quoted with approval the passage from the Chancery Division case which we have quoted above. But while accepting the principle laid down in those two cases their Lordships (Harries C. J. and Fazl Ali J.) distinguished the case before them that the order in that case was not of a peremptory nature to mean that the suit had to be dismissed automatically without further reference to the Court but that a final order of dismissal had to be passed. On a discussion of the above three cases, it is clear to us that it is a well recognised principle, both in England and in India, that the Court has got power to pass such a peremptory order calling upon a party to make a deposit or to do some other acts within a particular time failing which the action before the Court may stand dismissed without further reference to a Bench. The Order No. 8 dated 12-9-1950, therefore, is legal and within the powers of the Court, we should also refer to a passage appearing at page 481 of 12th Edition of Mulla's Civil Procedure Code wherein it is laid down that the Court has inherent power

> "to strike off the defence and proceed ex parte where a suit is adjourned on the conditions that the defendant should pay the costs of the adjournment within a prescribed period and he fails to do so."

This may be taken by way of analogy and a parallel case.

(7) The next point raised by Mr. Mohapatra is by referring us to the provisions of S. 15, Specific Relief Act, which runs as follows :

> "Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

At the outset he undertakes to pay the entire consideration if he is allowed a decree in respect of the share of respondent 1 alone. It also appears that the part which must be left unperformed forms a considerable portion of the whole. The present case might have come within the language of S. 15 and there would be some force in the contention of Mr. Mohapatra but for the position that here the contract is being enforced against a member of a joint family. It is very well known that the undivided interest of a coparcener of a joint Mitakshara family under the School to which we belong cannot be the subject matter of alienation be it for consideration or gratuitous. In view of this settled position, the plaintiffs in the present suit cannot obtain a decree for specific performance of contract to sell undivided interest of a coparcener, i.e., the interest of defendant 1.

We would simply quote a passage from the Indian Contract and Specific Relief Act, Seventh Edition, by Pollock and Mulla at p. 676 :

> "It is submitted that in Bengal and the United Provinces where the law does not recognise an alienation by a Hindu coparcener of his undivided coparcenary interest, no specific performance should be decreed in respect of a coparcener's interest. And even in Bombay and Madras, where the law allows such an alienation, the Court, it is submitted, should not decree such performance. The reason is that such alienations are 'inconsistent with the strict theory of a joint and undivided Hindu family and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes'."

The view of the Madras High Court as expressed in the Full Bench decision reported in the case of — 'Baluswami v. Lakshmana Aiyar', AIR 1921 Mad 172 (D), is that in Madras in such a case, S. 15, Specific Relief Act, may apply and the Court may pass a decree in respect of the interest of one or more of the coparceners relying on the position that in Madras the interest of a coparcener is alienable. But the position of law of alienation in respect of the undivided interest of a coparcener in our province is entirely different. The plaintiffs cannot place reliance on the provisions of S. 15.

(8) In conclusion, therefore, the preliminary point taken on behalf of the respondent must preva and the appeal, therefore, fails and is dismissed with costs.

(9) NARASIMHAM J. : I agree.

B/D.H.Z. Appeal dismissed.

A. I. R. 1954 ORISSA 139 (Vol. 41, C. N. 43)

NARASIMHAM J.

H. Naik, O. L. Puri Bank Ltd., Petitioner **v.** Jitendranath Das, Opposite Party.

Execution Case No. 29 of 1953, D/- 1-12-1953.

(a) Banking Companies Act (1949), S. 45-B (1) — Provincial Insolvency Act (1920), S. 4(1) — Distinction between.

Section 45-B (1), Banking Companies Act, is very similar in language to S. 4(1), Provincial Insolvency Act, with two important distinguishing features. Firstly, the opening words of S. 45B (1) make it absolutely clear that even the provisions of the Provincial Insolvency Act must give way before the provisions of the Banking Companies Act. Again, while S. 4(1) of the Provincial Insolvency Act is limited to questions which may 'arise in' any case of insolvency, S. 45-B (1) is wider and refers to questions which may 'relate to or arise in 'the course of the winding up of the banking company.' (Para 5)

(b) Banking Companies Act (1949), as amended by Act 20 of 1950), Ss. 45A and 45B (1) — 'Matter relating to the winding up'.

The question as to whether a debtor of a banking company under liquidation should be adjudged an insolvent and should get the protection of the insolvency law is a matter relating to the winding up of the banking company and consequently, the High Court alone has exclusive jurisdiction under Ss. 45A and 45B (1) to decide this question and all other questions arising out of the same. The District Judge as an insolvency Court has no jurisdiction to entertain the petition of the judgment-debtor. Hence, no question of granting permission to the judgment-debtor to prosecute his petition before the insolvency Court arises. AIR 1952 Bom 223; AIR 1952 Cal 506 (SB) and AIR 1953 Punj 145, Rel. on; AIR 1953 Punj 256, Distinguished. (Para 10)

Sections 45A and 45B were inserted by the amending Act of 1950 with the main object of conferring even extra-territorial jurisdiction on a High Court so that all claims by a banking company against its debtors may be realised as soon as possible. For that purpose, exclusive jurisdiction was conferred on the High Court and on no other Court in respect of any matter relating to the realisation of the assets of the banking company. It will not only be opposed to the scheme of the amending Act but it will also materially affect speedy realisation of the assets of a banking company under liquidation if the various debtors of that company are given leave by the High Court to prosecute their petitions for insolvency in the various District Courts. (Paras 4, 6, 7)

U. N. Rath, for Petitioner; H. C. Mukherjee, for Opposite Party.

CASES REFERRED: Paras

(A) (V39) AIR 1952 Bom 223: ILR (1952) Bom 873 8

(B) (V39) AIR 1952 Cal 506: 56 Cal WN 92 (SB) 9

(C) (V40) AIR 1953 Punj 145: ILR (1952) Punj 349 9

(D) (V40) AIR 1953 Punj 256: 54 Pun LR 308 9

ORDER: This is an execution petition filed by the official liquidator of Puri Bank Ltd. (which is Banking Company) against one Sri Jitendranath Das against whom an ex parte decree was obtained by the liquidator on 17-1-1951 in M. S. No. 25 of 1951. When the notice under Order 21, R. 22, C. P. C. was served on the judgment-debtor the latter filed two petitions stating that he had already filed a petition before the District Judge of Mayurbhanj for being adjudged an insolvent and requesting this Court to grant him permission under Section 171, Companies Act, read with Section 2, Banking Companies Act, 1949, to proceed with the said insolvency petition at Baripada. On behalf of the liquidator, however, an objection was taken to the filing of such an insolvency petition by the judgment-debtor and it was urged that under Section 45A, Banking Companies Act, 1949, as amended by the amending Act of 1950 (Act 20 of 1950) this Court alone had jurisdiction to entertain the insolvency petition of the judgment-debtor.

(2) The sole question for decision now is whether a 'Banking Company' under liquidation is a decree-holder, its judgment-debtor is entitled to prosecute his petition for insolvency before a District Court with the permission of this Court or else whether this Court alone has jurisdiction to entertain such a petition.

(3) The relevant sections for this purpose are Sections 45A and 45B, Banking Companies Act, as amended in 1950. They are as follows:

"Part IIIA

Special provisions for speedy disposal of winding up proceedings.

45A. Court defined:— In this Part and in Part III, 'Court means the High Court exercising jurisdiction in the place where the registered office of the banking company which is being wound up is situated or in the case of a banking company incorporated outside India which is being wound up, where its principal place of business is situated, and notwithstanding anything to the contrary contained in the Indian Companies Act, 1913 (7 of 1913), or in any notification, order or direction issued thereunder or in any other law for the time being in force, no other Court shall have jurisdiction to entertain any matter relating to or arising out of the winding up of a banking company.

45B. Power of Court to decide all claims by or against banking companies: 1. Notwithstanding anything to the contrary contained in the Indian Companies Act, 1913 (7 of 1913), or in any other law for the time being in force, the Court shall have full power to decide all claims made by or against any banking company including claims by or against any of its branches in India) and all questions of priorities and all other questions whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of the banking company coming within the cognizance of the Court".

This Court is undoubtedly the Court as defined in Section 45A of the Act mentioned above. That section says that no other Court shall have jurisdiction 'to entertain any matter relating to or arising out of the winding up of a banking company'. The Puri Bank Ltd. is now being wound up and the question is whether the petition for being adjudged an insolvent filed by a judgment-debtor of the banking company is a matter 'relating to or arising out of' the winding up of the company. It was rightly conceded by the learned Counsel for the liquidator that such a petition under the Insolvency Act will not be a matter 'arising out of' the winding up proceedings. But he urged that it will be a matter 'relating to' the winding up proceedings inasmuch as the expression "relating to" is wider than the expression 'arising out of'.

(4) I am inclined to accept this argument. The primary object of the winding up of a banking company is to ensure speedy realisation of the assets so as to effect an equitable distribution amongst the various creditors of that company. In fact, the heading of Part IIIA which was inserted in the Banking Companies Act, 1949, by the amending Act of 1950 (under which Sections 45A and 45B are found) is as follows: "Special provisions for 'speedy' disposal of winding up proceedings."

Section 45A seems to have been thus specially enacted with a view to ensure 'speedy disposal of winding up proceedings' by conferring on the High Court exclusive jurisdiction in respect of all matters relating to the winding up of a banking company notwithstanding anything to the contrary under any law for the time being in force. Hence, if the debtors of a banking company are permitted to prosecute their petitions for insolvency in the various District Courts within their jurisdiction the result would be that the winding up proceedings in the High Court may be brought to a complete standstill by the debtors applying to their respective District Courts under the provisions of the Provincial Insolvency Act and obtaining interim protection.

One of the main objects of the insolvency law is to give protection to a person who is adjudged an insolvent against his creditors by vesting all his property in the Court and conferring exclusive jurisdiction on the Insolvency Court to realise his assets and make an equitable distribution of the same amongst his creditors. Section 4, Provincial Insolvency Act, confers exclusive jurisdiction on the Insolvency Court to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact which may arise in any case of insolvency. As soon as a petition for being adjudged an insolvent is filed, if the Court admits the petition, it may under Section 20 of that Act

appoint an interim Receiver to take charge of the assets and also grant the petitioner interim protection against arrest and detention in civil prison. Hence if the Insolvency Court is also given concurrent jurisdiction in respects of the insolvency petition of a judgment-debtor of a banking company the Receiver appointed by the Insolvency Court will take charge of all his assets even at the interim stage and thereby hold up the winding up proceedings in this Court until the insolvency proceedings terminate in due course. There will thus be not only inordinate delay in the disposal of winding up proceedings but the effective functioning of this Court for the purpose of realisation of the assets of the banking company would be seriously jeopardised.

(5) It will be noticed that sub-section (1) of S. 45B, Banking Companies Act, gives similar exclusive jurisdiction to the High Court in respect of any question relating to or arising in the course of the winding up of a company. This section is very similar in language to Section 4 (1), Provincial Insolvency Act, with two important distinguishing features. Firstly the opening words of Section 45B (1) are 'Notwithstanding anything to the contrary contained in the Indian Companies Act, 1913 (7 of 1913) or in any other law for the time being in force'. These opening words make it absolutely clear that even the provisions of the Provincial Insolvency Act must give way before the provisions of the Banking Companies Act. Again, while Section 4 (1), Provincial Insolvency Act, is limited to questions which may 'arise in' any case of insolvency, Section 45B (1) is wider and refers to questions which may 'relate to or arise in' the course of the winding up of the banking company. It thus seems clear that when the Legislature amended the Banking Companies Act by inserting Sections 45A and 45B they intended to confer exclusive jurisdiction on the High Court notwithstanding any provision in the Provincial Insolvency Act in respect of any matter relating to the winding up of a banking company.

(6) In an insolvency proceedings the first question for determination by the Insolvency Court is whether the debtor has committed an act of insolvency as described in Section 6, Provincial Insolvency Act. The same question will arise for consideration before the High Court in a winding up proceeding of a banking company if that debtor happens to be a debtor of the banking company. This Court has to decide whether it is worthwhile continuing the execution proceeding against that debtor in view of his inability to pay debts or in view of his having committed other acts of insolvency. Moreover, even after coming to a decision on this point, this Court has to take charge of his assets and then decide whether the banking company or the other creditors of that debtor should be given priority so far as distribution of his assets are concerned. Section 45B (1) expressly confers exclusive jurisdiction on this Court to decide 'all questions of priorities' in respect of all claims made by or against a banking company. Hence this Court alone has exclusive jurisdiction to decide whether the banking company should be given preference over other creditors of the debtor. This power cannot be properly exercised, if the Insolvency Court is also given concurrent powers to take charge of his assets.

(7) It was, however, urged that if leave is given to the debtor of a banking company under S. 171, Companies Act, to prosecute his insolvency petition before the District Judge most of the difficulties anticipated would be solved. This argument, however, overlooks the primary object of the insertion of Part IIIA in the Banking Companies Act by the amending Act of 1950. In the original unamended Act of 1949 it was stated in Section 2 that the provisions of that Act were in addition to the provisions of any other law for the time being in force, that is to say, they were intended to supplement the existing law relating to insolvency and other allied matters.

But the amending Act of 1950 conferred exclusive jurisdiction on the High Court under Sections 45A and 45B (1). It will not only be opposed to the scheme of the amending Act but it will also materially affect speedy realisation of the assets of a banking company under liquidation if the various debtors of that company are given leave by this Court to prosecute their petitions for insolvency in the various District Courts. It seems to me that Sections 45A and 45B were inserted by the amending Act of 1950 with the main object of conferring even extraterritorial jurisdiction on a High Court so that all claims by a banking company against its debtors may be realised as soon as possible. For that purpose exclusive jurisdiction was conferred on this Court and on no other Court in respect of any matter relating to the realisation of the assets of the banking company. The solvency of a debtor of a banking company and the question as to whether he should be given protection under the insolvency law are matters so intimately connected with the realisation of the assets of the banking company that it may be fairly inferred that they 'relate to the winding up' of the company.

(3) In — 'Associated Banking Corporation of India Ltd. v. Nadaralli Kassambhai and Company', AIR 1952 Bombay 223 (A) while construing Section 45A it was held that the expression "relating to the winding up" is much wider and much more extensive than the expression 'arising out of the winding up' and that a suit filed by an official liquidator to recover a claim due to a banking company from its debtor is a matter relating to the winding up of a banking company and that the High Court alone has exclusive jurisdiction to decide that suit. In that decision also, it was pointed out that one of the main functions in the winding up proceeding was to consider what were the possibilities of recovering the debts, what costs were likely to be incurred and whether from every point of view it was advisable to prosecute the claim.

It was also pointed out that the sole purpose and the whole object of the amending Act was to wind up the banking companies as expeditiously as possible and that the legislature must have intended that the assets should be realised as quickly as possible. Hence, if the debtors of a banking company are given permission to apply in the various insolvency Courts of the State for being adjudged insolvents and the liquidator of the company is thus made a party in all those Courts he will have to wait indefinitely until the insolvency proceedings terminate and rateable distribution of the insolvent's assets amongst his creditors is made. Any construction of Ss. 45A and 45B which would lead to an indefinite protraction of such winding up proceedings will be clearly opposed to the plain intention of the Legislature and also to the language used in the Act.

(9) In —'Jadunath v. Bank of Calcutta Ltd' AIR 1952 Cal 506 (SB) (B), it was held that the test to be applied in deciding whether a particular proceeding arises 'in the course of' the winding up proceeding is that if at any stage of the pro-

ceeding the liquidator becomes a party to it it arises in the course of the winding up proceeding. Hence, an insolvency proceeding by a debtor of the company would necessarily arise in the course of the winding up proceeding of the company inasmuch as the liquidator must as one of the creditors of the debtor be impleaded as a party in the insolvency proceeding itself. I would in this connection refer to — 'Discount Bank of India v. Triloki Nath AIR 1953 Punj 145 (C), where also Ss. 45A and 45B and S. 11 of the amending Act came up for consideration.

Doubtless, in a later Punjab decision reported in — 'Discount Bank of India Ltd. v. A. N. Misra', AIR 1953 Punj 256 (D), a somewhat narrow construction was put on the expression 'relating to or arising out of' occurring in S. 45A and it was held that an appeal filed against a banking company prior to the commencement of the winding up proceeding of the company will not be a matter relating to or arising out of the winding up proceeding. This decision is of a single Judge and as on facts it is distinguishable from the present case it is unnecessary to consider how far it is correct.

(10) I am, therefore, of the view that the question as to whether a debtor of a banking company under liquidation should be adjudged an insolvent and should get the protection of the insolvency law is a matter relating to the winding up of the banking company and consequently, this Court alone has exclusive jurisdiction under Sections 45A and 45B (1) to decide this question and all other questions arising out of the same. The District Judge of Mayurbhanj as an insolvency Court has no jurisdiction to entertain the petition of the judgment-debtor. Hence, no question of granting permission to the judgment-debtor to prosecute his petition before the insolvency Court arises and the prayer for such permission is rejected.

(11) Let a copy of this order be sent to the District Judge of Mayurbhanj who should return the insolvency petition to the debtor for presentation before this Court.

B/K.S.B. Application rejected.

A.I.R. 1954 ORISSA 142 (Vol. 41, C.N. 44)

PANIGRAHI C. J. AND MOHAPATRA J.

Gangadhar, Appellant v. Dindayal and another, Respondents.

Second Appeal No. 341 of 1949, D/- 13-11-1953, from decision of Dist. J., Sambalpur, D/- 25-4-1949.

(a) Hindu Law — Impartible estate — Succession — Unprotected thikedars — Applicability of S. 109, C. P. Land Revenue Act (C. P. Land Revenue Act (2 of 1917), S. 109).

Succession to impartible property is governed by the ordinary Hindu law of succession applicable to partible property, except to the extent modified by custom. (Para 3)

It is also settled law that when impartible property passes by survivorship from one line to another, it devolves not on the coparcener nearest in blood, but on the nearest coparcener of the senior line: 4 Mad 250 and 28 Mad 508 (PC), Ref. (Para 4)

Section 109, C P. Land Revenue Act, does not apply to the case of succession to unprotected Thikadari villages. Even the principle embodied in S. 109 which is a statutory enactment not based on custom does not apply to the case. (Para 3)

(b) Hindu Law — Impartible property — Separation — Right to property when lost.

In order to establish that a family has ceased to be joint it is not sufficient to show separation in food and worship merely. The impartible estate still retains its character of joint family property and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in a joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. (Para 6)

The right of the senior member is capable of being renounced or surrendered. It is therefore necessary to prove an intention on the part of the separate member of the family to renounce his right of succession to the estate; and mere separation in food and worship or division of the partible properties cannot, by themselves, constitute renunciation of the right to succeed to the impartible property: AIR 1932 PC 216 and AIR 1934 PC 157, Rel. on. Case law referred. (Para 6)

Where therefore the only thing that was established in a case was that A and his brother took some property from the family and were in separate enjoyment of that property for about 20 years and it was not alleged that the impartible estate was the subject-matter of partition and was allotted to their father or that A had renounced his right to succeed to the impartible property when he took his share in the partible property;

Held that A being the eldest son was still joint in regard to the impartible property and could not be said to have surrendered his birthright to claim the impartible property by survivorship. (Para 8)

M. S. Rao, for Appellant; B. Mohapatra, for Respondents.

CASES REFERRED: Paras

(A) ('82) 4 Mad 250 4
(B) ('05) 32 Ind App 261: 28 Mad 508 4
(C) ('67-69) 12 Moo Ind App 523: 3 Beng LR 13 (PC) 4
(D) ('61-63) 9 Moo Ind App 539: 2 WR 31 (PC) 4
(E) ('69-70) 13 Moo Ind App 113: 3 Beng LR 41 (PC) 5
(F) ('69-70) 13 Moo Ind App 333: 13 WR 21 (PC) 5
(G) ('78) 5 Ind App 61: 1 Mad 312 (PC) 5
(H) ('88) 15 Ind App 51: 10 All 272 (PC) 5, 6
(I) ('99) 26 Ind App 83: 22 Mad 383 (PC) 5, 6
(J) (V5) AIR 1918 PC 81: 45 Ind App 148 (PC) 5, 6
(K) (V8) AIR 1921 PC 62: 48 Ind App 195 (PC) 6
(L) (V15) AIR 1928 PC 68: 55 Ind App 114 (PC) 6
(M) (V19) AIR 1932 PC 216: 59 Ind App 331 (PC) 6
(N) (V21) AIR 1934 PC 157: 61 Ind App 286 (PC) 7

PANIGRAHI C. J.:

The litigation giving rise to this second appeal has had a chequered career. The plaintiffs sued for a declaration that the registration of defendant No. 1 as the thikadar of village Jhidki in Tahsil Nawapara is contrary to law and that plaintiff No. 1, Gangadhar Kumbhar (who is the appellant before us) is entitled to be the sole thikadar of the village which forms the subject-matter of the suit. The plaint allegations are that the father of the parties, the deceased Bhakti Kumbhar, was the last recorded thikadar of the village and that Gangadhar plaintiff 1 and Dinabandhu father of plaintiff No. 2 are the sons of the deceased Bhakti Kumbhar by his first

wife and that the defendants Dinadayal and Kaiana are the illegitimate sons of Bhakti through a mistress kept by him.

It is further alleged that the village Jhidki having been carved out of the impartible Khariar estate is inalienable and impartible and that succession is regulated by the rule of primogeniture. Gangadhar being the eldest son of the senior-most line claims to have succeeded by survivorship to the thikadari interest, to the exclusion of the other sons of the deceased Bhakti. The defendants resist this claim on the ground that the plaintiffs had separated from the family and were living as divided members at the time of the death of Bhakti. The defendants also allege that they are the legitimate sons of the third wife of Bhakti and were living joint with him at the time of his death. It is accordingly claimed that they are entitled to succeed to the thikadari tenure under S. 109, Central Provinces Land Revenue Act (C. P. Act II of 1917). The revenue authorities upheld the claim of the defendants relying on the aforesaid Section and directed that Dindayal should be registered as thikadar of the village in preference to the plaintiff.

(2) Two of the issues raised in the court of first instance need only be considered in this appeal, namely,

(1) whether the plaintiffs had been separate from the defendants and Bhakti and defendants were living joint in all respects as alleged?

and (2) Has the suit property devolved upon the defendants by law of survivorship as alleged?

The trial court found that the defendants were the legitimate sons of Bhakti and that the plaintiffs had been living divided from their father. It was further held that succession to the suit property was governed by the law of primogeniture as, admittedly, the thikadari interest was impartible.

In the opinion of the trial court the Hindu Law of succession was modified by S. 109, Central Provinces Land Revenue Act, 1917 and the defendants were entitled to succeed to the tenure in preference to the plaintiffs. The suit was accordingly dismissed. On appeal the learned District Judge while upholding the findings of the trial Judge on the issue of the illegitimacy of the defendants and the divided status of the plaintiffs was of the view that S. 109, Central Provinces Land Revenue Act was not applicable to the facts of the case as that Section governed succession to protected thikadari tenures and had no application to the facts of the present case which related to an unprotected thikadar. The learned District Judge, therefore, framed an additional issue, set aside the judgment of the trial court and remanded the suit for a fresh trial. The additional issue framed was as follows:

"What is the rule of succession that prevails in the case of an ordinary thikadari interest?"

On the re-hearing of the suit by the learned Subordinate Judge, Sambalpur, additional evidence was adduced by both parties regarding the custom that prevailed in the case of succession to thikadari interests. The learned Subordinate Judge held, on a consideration of the evidence, that plaintiff No. 1 being the eldest son, was entitled to get the suit thikadari tenure after the death of Bhakti, and passed a decree in his favour. This judgment was, however, reversed by the lower appellate court on the view that the plaintiff having separated from his father had lost his right as a senior member to take by survivorship. It is against this judgment of reversal that the plaintiff No. 1 has come up in appeal.

(3) The concurrent findings of fact of the Courts below are that the plaintiff was living divided from his fatner at the time of his death; that the late Bhakti Kumbhar was an unprotected thikadar of the suit village which, admittedly, is impartible; that the suit village was joint family property in the hands of Bhakti and had not been the subject-matter of partition among the members of the family at any time

Mr. Mohapatra learned counsel for the respondents, attempted to raise a new question of fact before us, namely that it had not been proved that the suit village was the ancestral property of the parties. It had been assumed throughout that the property belonged to the family though the manner in which and the time when the property was acquired for the family were differently stated by the parties. According to the plaintiff the property was acquired during their grandfather's lifetime, while according to the defendants it was acquired by Bhakti himself. It is clear, however, that the defendants neither alleged, nor attempted to prove, that it was the self-acquisition of Bhakti. It is not open to the respondents to raise a new point at this late stage particularly when it had not been alleged in the pleadings.

It was also conceded by learned counsel for the respondents that S. 109, Central Provinces Land Revenue Act, 1917, has no application here as that Section, in terms, applies to protected thikadars. It was, however, contended that the principle underlying that Section should be applied to cases of upprotected thikadars as well. We are not prepared to accept this contention as sound. Succession to impartible property is governed by the ordinary Hindu law of succession applicable to partible property, except to the extent modified by custom. No custom has been proved in this case so as to enable a junior member to succeed to an impartible estate in preference to the senior line; and the principle embodied in S. 109, Central Provinces Land Revenue Act is a statutory enactment not based on custom. If there was such a custom there would have been no need for a legislative enactment.

(4) The only point therefore that requires consideration is whether the plaintiff, by reason of his living separate from his father, has forfeited his right to succession by survivorship. It is settled law that when impartible property passes by survivorship from one line to another, it devolves not on the coparcener nearest in blood, but on the nearest coparcener of the senior line — a position held by the appellant here. See — 'Naraganti v. Venkatachalapati', 4 Mad 250 (A); — 'Rangappa v. Rangappa', 32 Ind App 261 (PC) (B). Certain decisions of the Judicial Committee of the Privy Council to which reference will be made presently, were at one time understood as laying down that there is no coparcenary in an impartible estate and that as a necessary consequence succession to an impartible estate is not governed by survivorship. In — 'Nilkristo Deb v. Birchandra', 12 Moo Ind App 523 (PC) (C), the Judicial Committee held that an impartible estate devolved by inheritance, but that was a case under the Dayabhaga law. In — 'Katama Nachiar v. Rajah of Sivagunga', 9 Moo Ind App 539 at pp. 543, 593 (PC) (D), Lord Justice Turner held that if a zamindar at the time of his death and his nephews were members of an undivided Hindu family, and the zamindari though impartible was part of the com-

mon family property, one of the nephews was entitled to succeed to it on the death of his uncle. In that case it was held that the zamindari was the self-acquired property of the zamindar, and the actual judgment proceeded on that ground. But it was definitely recognized that if the zamindari was family property the selection of the next holder would be determined by defining the senior member judged by survivorship.

(5) This point was made clear in a later case of the Judicial Committee in — 'Narasimham Roy v. Lakshmi Venkama', 13 Moo Ind App 113 (PC) (E) where it was observed that the judgment of the Board would have been the other way if the zamindari had been shown to have been ancestral zamindari. This principle was followed in several cases following the 'Sivaganga's case, (D)', as in — 'Rajah Yanumula v. Rajah Yanumula', 13 Moo Ind App 333 (PC) (F); — 'Periasami v. Periasami', 5 Ind App 61 (PC) (G). Then came the case of — 'Sartaj Kuari v. Deoraj Kuari', 15 Ind App 51 (PC) (H), where the Board held that an estate, though impartible, could be alienated as, in their Lordships' opinion, the right to claim partition is inextricably connected with the right of coparcenery, and that where there is no right to partition the right to succeed by survivorship is not available.

A logical extension of this doctrine is to be found in the First Pithapur case — 'Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards', 26 Ind App 83 (PC) (I), where an alienation by a will was upheld, following 'Sartaj Kuari's case, (H)'. Nor was this doctrine confined to cases of alienation alone. In a suit for maintenance, the Board again held that a claim to maintenance being based on the ground of coparcenary, a junior member could not claim maintenance on the ground of his being a member of the coparcenary as a coparcenary was held not to exist in an impartible estate. This was the principle laid down in the second Pithapur case — 'Rama Rao v. Raja of Pittapur', AIR 1918 PC 81 (J). It should be observed that none of these cases were cases of succession.

(6) All these cases were reviewed in — 'Baijnath Prasad Singh v. Tej Bali Singh', AIR 1921 PC 62 (K) and Lord Dunedin pointed out that the custom of impartibility does not touch the general law regarding the selection of the head of the family and that the effect of the decision in 'Sartaj Kuari's case, (H)' and in the 'Pithapur cases, (I) & (J)', does not justify a contrary conclusion. In a later case of the Board reported in — 'Komammal v. Annadana', AIR 1928 PC 68 (L) Sir John Wallis had again occasion to review the previous decisions of the Board and made the following observation:

> "Those authorities in their Lordships' opinion, go far to support the inference deduced by Ramesam J., from an examination of the cases. that in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention, expressed or implied on behalf of the junior members of the family, to give up their chance of succession to the impartible estate. If an impartible estate is joint family property, the fact that the members of the joint family or of any branch of the family have exercised their right of partition over their partible property, does not divest them of their interest in the impartible estate over which they have no right of partition".

This proposition was re-affirmed in — 'Shiba Prasad Singh v. Prayag Kumari Debi', reported in AIR 1932 PC 216 (M), where Sir Dinshaw Mulla delivering the judgment of the Board held that in order to establish that a family has ceased to be joint it is not sufficient to show separation in food and worsnip merely. The impartible estate still retains its character of joint family property and its devolution is governed by the general Mitakashara law applicable to such property. Though the other rights which a coparcener acquires by birth in a joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. It is a right which is capable of being renounced on surrendered. It is therefore necessary to prove an intention on the part of the separate member of the family to renounce his right of succession to the estate; and mere separation of food and worship or division of the partible properties cannot, by themselves, constitute renunciation of the right to succeed to the impartible property.

(7) In — 'Collector of Gorkhpur v. Ram Sundar Mal', reported in AIR 1934 PC 157 (N), it was found that the common ancestor of the junior holder and of the claimant had lived for a long period in complete separation in worship, food, and social intercourse. The Board held that those were not sufficient circumstances, from which renunciation of the right to succeed so as to terminate the joint status for the purpose of that right, could be inferred.

(8) All that the defendants have tried to establish in this case is that the plaintiff and his brother took some property from the family and were in separate enjoyment of that property for about 20 years. It is not their case that the impartible estate was the subject-matter of partition and was allotted to their father. Now is it alleged that the plaintiffs renounced their right to succeed to the impartible property when they took their share in the partible property. We must, therefore, hold that plaintiff No. 1 being the eldest son is still joint in regard to the impartible property and cannot be said to have surrendered his birthright to claim the impartible property by survivorship. We would. therefore, set aside the judgment under appeal and grant a decree to the plaintiffs in terms of the plaint. We would however direct each party to bear his own costs in the peculiar circumstances of the case.

(9) MOHAPATRA, J.: I agree.

B/D.R.R. Appeal allowed.

A.I.R. 1954 ORISSA 144 (Vol. 41, C.N. 45)

MOHAPATRA J.

Bulei Barika, Defendant-Petitioner v. Lokanath Muduli, Plaintiff-Opposite Party.

C. R. No. 35 of 1952, D/- 8-8-1952, from order of Sm. C. C. J., Cuttack, D/- 5-12-1951.

Debt Laws — Orissa Money Lenders Act (3 of 1939, as amended by Act 24 of 1950), S. 8 — Expiry of period of registration during suit — Plaintiff money-lender not registered — Suit dismissed.

Suit by money-lender on loan advanced on 18-5-1950, filed on 17-8-1951 — Two years period for registration of money-lender under S. 8, expiring on 1-4-1952 during pendency of suit — Nothing to show that plaintiff had got himself registered before that date — Suit must be dismissed. (Para 2)

D. N. Sahu, for Petitioner.

ORDER: This is a revision under S. 25, Provincial Small Cause Courts Act.

Defendant 1 is the petitioner. The plaintiff had brought a suit for recovery of a sum of Rs. 185/- on a promissory note dated 18-5-50 on the allegation that defendant 1 executed the document. He (the plaintiff) had also made defendants 2 and 3 parties to the suit on the allegation that they were joint with defendant 1. Defendant 1 alone contested the suit. He had taken three points on contest: (i) that the suit is not maintainable as the plaintiff has not got himself registered as a money-lender; (ii) he denied the loan claimed and the execution of the promissory note; and (iii) that defendants 2 and 3 are separate, and as such, they are not bound.

The learned Court below dismissed the suit against defendants 2 and 3 but decreed the suit against defendant 1 for recovery of a sum of Rs. 184/- with full costs.

(2) The learned advocate, appearing on behalf of the petitioner (defendant 1) takes up only one point that the suit must stand dismissed on account of the reason that the plaintiff has not registered himself as a money-lender. He relies upon S. 8, Orissa Money Lenders Act. Section 8 runs thus:

"8. Suit for recovery of loan maintainable by registered money-lenders only—

A money-lender shall not be entitled to institute a suit for the recovery of a loan advanced by him after the date on which this section comes into force unless he was registered under this Act at the time when such loan was advanced:

Provided that a money-lender shall be entitled to institute a suit to recover a loan advanced by him at any time in the course of two years after the date on which this section comes into force, if he is granted a certificate of registration under S. 5 at any time before the expiration of the said years."

The words 'one year' have been amended subsequently by Act 24 of 1951 as "two years". Section 8 came into force on 1-4-1950. Of course the period of two years within which a money-lender can get himself registered under the proviso has expired on 1-4-52.

The learned lower Court finds:

"Admittedly the plaintiff has got money-lending transaction, but he has not got himself registered.... The loan was advanced on 18-5-50 and the suit was brought on 17-8-51."

So by the time the matter came up for hearing before (me?) the time allowed for the plaintiff to get himself registered under S. 8 has expired. No one appears for the plaintiff-opposite party to show that as a matter of fact in the meantime the plaintiff has got himself registered prior to 1-4-50 (52?). Section 8 applies to the present case inasmuch as the loan was advanced on 18-5-50. There having been nothing to show that the plaintiff has got himself registered within the period prescribed under S. 8 the suit must fail and the objection must prevail. The petition, therefore, is allowed and the suit is dismissed. There being no appearance for the opposite party, there will be no order as to costs in this Court. C/R.G.D. Revision allowed.

A.I.R. 1954 ORISSA 145 (Vol. 41, C.N. 46)

PANIGRAHI C. J. AND MOHANTY J.

Damei Sethi and others, Accused-Petitioners v. Udi Behera, Opposite Party.

Criminal Revn. No. 47 of 1953, D/- 21-9-1953, from order of Magistrate, 1st Class, Cuttack, D/- 21-10-1952.

(a) Criminal P. C. (1898), S. 423 — Scope.

Section 423 deals with powers vested in all courts, whether High Courts or subordinate courts, except that clause (a) of sub-section (1) of that section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that Court, while clause (b) of sub-section (1) of that section is not so restricted and embraces all courts. (Para 4)

Anno: Criminal P. C., S. 423 N. 1.

(b) Criminal P. C. (1898), S. 423(1)(a) — Acquittal.

An order of acquittal may be either express or implied and S. 423 covers both kinds of orders. AIR 1928 PC 254, Foll. (Para 7)

Anno: Criminal P. C., S. 423 N. 15.

(c) Criminal P. C. (1898), S. 423(1)(b) — 'After the finding' — (Cattle Trespass Act (1871), S. 24 — Conviction, legality of) — (Penal Code (1860), S. 426).

The expression "alter the finding" occurring in S. 423(1)(b)(2) is not subject to any limitation except that the sentence cannot be enhanced by the appellate court. That power is undoubtedly subject to the provisions contained in the chapter dealing with joinder of charges and the appellate court cannot afford to ignore the provisions of Ss. 236 and 238. But it would be unduly restricting the scope of the appellate powers under S. 423 (1)(b)(2) to hold that that power can be exercised only in cases falling within Ss. 236, 237 and 238. (Para 9)

In a case under S. 24, Cattle Trespass Act the trying Magistrate holding that the cattle of the accused had damaged the crop of the complainant but another ingredient, namely "seizure of the cattle" was not proved convicted the accused under S. 426, Penal Code. The appellate Magistrate holding that S. 426, I. P. C., was not applicable to the facts proved in the case altered the finding of conviction under S. 426, I. P. C. into one under S. 24, Cattle Trespass Act and reduced the sentence. On revision it was contended that the Appellate Court had no power to alter the implied acquittal into one of conviction:

Held, that the appellate Magistrate was dealing with an appeal against a conviction under S. 423(1)(b), Criminal P. C. and could alter the conviction under S. 426, I. P. C. into one under S. 24, Cattle Trespass Act, on the same facts which had been held to have been proved against the accused persons. The procedure adopted by the lower appellate court did not contravene any of the other provisions of the Code. The only question that both the courts below had to deal with was: what is the law to be applied to the facts proved in the case and when the trial court had taken a wrong view of the law, it was open to the appellate court to correct it. Case law discussed. (Para 13)

Anno: Criminal P. C., S. 423 N. 31; Cattle Trespass Act, S. 24 N. 2; Penal Code, S. 426 N. 1.

B. Mohapatra, B. C. Dasgupta and P. Bhagat, for Petitioners; K. M. Swain, for Opposite Party.

CASES REFERRED: Paras

(A) (V31) AIR 1944 All 137: 46 Cri LJ 38 (FB) 2, 8, 9, **13**

(B) (V35) AIR 1948 Pat 435: 49 Cri LJ 589 2, **12**

(C) (V15) AIR 1928 PC 254: 55 Ind App 390: 29 Cri LJ 828 (PC) **7, 8**

(D) (V1) AIR 1914 Mad 258: 37 Mad 119: 15 Cri LJ 180 **7**

(E) (V9) AIR 1922 All 487: 44 All 332: 23 Cri LJ 202 **7**

(F) (V22) AIR 1935 PC 89: 62 Ind App 129: 36 Cri LJ 838 (PC) 7
(G) (V22) AIR 1935 PC 35: 62 Ind App 36: 36 Cri LJ 482 (PC) 7
(H) ('96) 23 Cal 975 8
(I) (V19) AIR 1932 Cal 723: 60 Cal 179: 34 Cri LJ 177 8
(J) ('12) 35 Mad 243: 12 Cri LJ 269 8
(K) (V5) AIR 1918 Pat 257: 3 Pat LJ 565: 19 Cri LJ 735 8
(L) (V21) AIR 1934 Oudh 200: 9 Luck 607: 35 Cri LJ 973 8
(M) (V28) AIR 1941 Lah 465: 43 Cri LJ 235 (FB) 8
(N) (V31) AIR 1944 Cal 92: 45 Cri LJ 431 8
(O) (V26) AIR 1939 Pat 611: 41 Cri LJ 191 8
(P) (V38) AIR 1951 Pat 296: 52 Cri LJ 154 8
(Q) (V17) AIR 1930 Lah 338: 32 Cri LJ 56 10
(R) (V12) AIR 1925 Oudh 723: 26 Cri LJ 1364 11
(S) ('86) 22 Cal 377 12

PANIGRAHI C. J.:

This is an application under S. 439, Criminal P. C. challenging the legality of an order of conviction passed by Sri B. C. Patnaik, Magistrate, First Class with appellate powers, Cuttack. The petitioners were accused of having allowed their cattle to stray into the field of the complainant (P. W. 1) and damage his chilly crop. The complaint filed by P. W. 1 was taken cognizance of by the Subdivisional Magistrate, who transferred it for trial to the file of Sri P. Tripathy, Magistrate, II Class, Cuttack. The Magistrate found that damage had been caused to the crop of the complainant (P. W. 1) by the cattle of the petitioners. He also found that the cattle were being led to the pound by P. W. 1 when the petitioners forcibly rescued them.

The trying Magistrate was of opinion that these two facts were not sufficient to constitute the ingredients of an offence under S. 24, Cattle Trespass Act. He however convicted the petitioners under S. 426, I. P. C. and sentenced them to pay a fine of Rs. 50/- each. Against this order of conviction the petitioners preferred an appeal before Sri B. C. Patnaik, Magistrate, First Class with appellate powers, Cuttack, and he held that S. 426, I. P. C. was not applicable to the facts proved in the case and that the lower court had taken an erroneous view of the law. The appellate Magistrate therefore altered the finding of conviction under S. 426, I. P. C. into one under S. 24, Cattle Trespass Act and reduced the sentence. It is against this appellate judgment that the present petition has been filed, under S. 439, Criminal P. C.

(2) Mr. B. Mohapatra, learned counsel for the petitioners, has addressed a lengthy argument on the powers of an appellate court under S. 423, Criminal P. C. and contends that the trial Court having acquitted the petitioners of the offence of cattle trespass, the lower appellate court had no power to alter that finding of acquittal into one of conviction and that it has thus exercised a power beyond its jurisdiction. Strong reliance was placed on the minority view propounded in — 'Zamir Qasim v. Emperor', AIR 1944 All 137 (FB) (A), and the decision of a single Judge in — 'Panu Nayak v. Chintai Mallik', AIR 1948 Pat 435 (B). Even at the time of admitting this revision, Narasimham J. appears to have doubted the correctness of the decision in — 'AIR 1948 Pat 435 (B)' and directed that this matter should be placed before a Division Bench.

(3) Sub-section (1) of S. 423, Criminal P. C. says:

"423 (1) The appellate court .....may (a) in an appeal from an order of acquittal reverse such order and direct that a further enquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass a sentence on him according to law;
(b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for re-trial; (2) or 'alter the finding maintaining the sentence' or alter the finding reducing the sentence; or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, subject to the provisions of S. 106 not so as to enhance the same;
(c) in appeal from any other order, alter or reverse such order;
(d) make any amendment or any consequential or incidental order that may be just or proper."

The Section, therefore, defines the powers of an appellate court both in an appeal against acquittal and in an appeal against conviction. An appeal against an order of acquittal is provided for in S. 417, Criminal P. C. and the power to appeal is vested exclusively in the State Government. Section 423 (1) enables the appellate Court to reverse the order of acquittal and direct a further enquiry to be made or direct that the accused may be committed for trial, or find him guilty and pass a sentence on him according to law.

It should be noted that these orders can be passed only if the order of acquittal is reversed or set aside. Section 423 (1) (b) deals with appeals against orders of conviction. In dealing with such appeals the Court may do one of three things. Firstly, it may reverse the finding and sentence and acquit the accused, or order him to be re-tried or committed for trial. So far, it would appear that the appellate court has the power, when it reverses a finding of acquittal or conviction, to direct the subordinate court to re-try him or commit him for trial, if it is of opinion that a further inquiry should be made into the case. Secondly, the appellate Court, in dealing with appeals against convictions, has some further powers, one of them being to alter the finding maintaining the sentence, or reduce the sentence without altering the finding. Thirdly, it has also the power to alter only the nature of the sentence without interfering with the finding, or reduce the sentence itself. The only limitation is that it cannot enhance the sentence while altering the finding or the sentence.

(4) It is necessary, here, to refer to the provisions of S. 439, Criminal P. C. as most of the decisions placed before us relate to the combined powers of the High Court under Ss. 423 and 439. Sub-section (4) of S. 439, Criminal P. C. says that nothing in that section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction. The powers of the High Court are delimited by the two sections. While exercising the powers of an appellate Court, it can set aside an order of acquittal and convert it into one of conviction. But while exercising its revisional powers it cannot do so.

There is another limitation placed on the appellate court under S. 423 which says that in altering the finding of conviction it cannot enhance the sentence. Section 423 deals with powers vested in 'all' courts, whether High Courts or subordinate courts, except that clause (a) of sub-section (1) of that Section is restricted to the powers of

the High Court only, since an appeal against an order of acquittal lies only to that Court, while clause (b) of Sub-section (1) of that Section is not so restricted and embraces all courts. Under S. 439 (1) the power to enhance the sentence is expressly conferred upon the High Court.

It would appear, therefore, that the High Court, while dealing with an appeal against conviction, may act under S. 439(1) and give notice to the accused to show cause why the sentence should not be enhanced. Section 290 of the old Criminal Procedure Code, 1872, enacted that the appellate court may alter and reverse the finding and sentence or order of the court below and may, if it saw reason to do so, enhance any punishment that had been awarded. This power of enhancing the sentence was expressly taken away by S. 423 of the Code of 1882 and has been retained in the same form in the present Code. It would appear that the Legislature did not think it desirable that the power to enhance the sentence should be entrusted to more than one Court and that it should be confined to the High Court alone. Section 439 of the Code of 1882 was retained, in the present Code, and it enacted that the High Court may, in its discretion, exercise all the powers conferred on a court of appeal by Ss. 423, 426 and 428, or on a court by S. 338, and may enhance the sentence.

(5) I shall now examine the contention raised on behalf of the petitioners. It is urged that the refusal of the trying Magistrate to convict the petitioners under S. 24, Cattle Trespass Act amounts to a finding of acquittal of that charge — though, it should be noted, no formal charge was framed, this being a summons case. A finding of acquittal may be either express or implied, and such a finding cannot be altered by an appellate court other than the High Court and converted into a finding of conviction. It is, therefore, claimed that the lower appellate court acted without jurisdiction in convicting the petitioners under S. 24, Cattle Trespass Act thereby setting aside an implied order of acquittal recorded by the Trial Court.

(6) I shall later examine the soundness of the contention whether the trying Magistrate did in fact record any order of acquittal, either implied or express, in holding that he was unable to punish the accused under S. 24, Cattle Trespass Act. I shall assume, for the moment, that there is an implied order of acquittal and then examine the soundness of the contention which seems to be based upon certain decisions.

(7) That an order of acquittal may be either express or implied and that S. 423 covers both kinds of orders can no longer be in dispute, after the decision of the Judicial Committee in — 'Kishan Singh v. Emperor', AIR 1928 PC 254 (C). In that case their Lordships were discussing the scope of S. 439(4), Criminal P. C. and referred to the observation of the Madras High Court in — 'Kambam Balli Reddy v. Emperor', AIR 1914 Mad 258(D), where it had been decided that S. 439(4) must be construed as referring to cases where the trial had ended in a complete acquittal. The reason for this decision was that any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of revision, by virtue of this power to exercise the powers of a Court of appeal conferred by S. 423(1)(b).

The Judicial Committee distinguished the Madras case on the ground that the accused had appealed to the High Court against their conviction under Ss. 147 and 304, I.P.C. and the High Court had given them notice to show cause why they should not be convicted of murder. It will be noticed that the Madras case was one where there had been a 'complete acquittal' by the trial Court, of the charge of murder. The High Court had before them an appeal against an order of conviction for a minor offence and were discussing the effect of the combined operation of Ss. 423 and 439. Their Lordships of the Judicial Committee declined to express any opinion as to whether the facts of the Madras case would justify the decision at which the learned Judges of that Court had arrived, and observed:

> "Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in sub-section (4) of S. 439 refers only to cases where the trial has ended in a complete acquittal of the accused in respect of the charges or offences, and not to a case such as the present where the accused have been acquitted of the charge of murder but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of the decision".

Their Lordships also referred, with approval, to the decision of the Allahabad High Court in — 'Emperor v. Sheo Darshan', AIR 1922 All 487 (E), where it was held that an acquittal could be converted into a conviction only through the medium of an appeal filed on behalf of the Local Government. It will be noticed that the applicability of S. 423(1)(b)(2) was not under consideration and the Privy Council case affords no guidance for determining the scope of the expression "alter the finding, maintaining the conviction" occurring therein.

In — 'Emperor v. Dahu Rout', AIR 1935 PC 89 (F), their Lordships of the Judicial Committee had, again, to consider the powers of a court of appeal under S. 423, Criminal P. C. and said that the powers conferred on the appellate court under that Section "appeared to be as ample as the powers that the High Court would have on revision, under S. 439, with the exception of the power to enhance the sentence". The only question before the Privy Council in Kishan Singh's case was whether the High Court could, in exercise of its revisional powers, alter the finding of acquittal into one of conviction, irrespective of whether it is a partial acquittal or complete acquittal. It had no occasion to consider the scope of the power vested in an appellate court under S. 423(1)(b)(2).

In another case reported in — 'Chundibya v. Emperor', AIR 1935 PC 35 (G) the Judicial Committee expressly held that the powers vested in the High Court under S. 439, Criminal P. C. could be combined with S. 423 and that the High Court, upon having the record of a criminal proceeding brought to its notice by an appeal from conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced. It would appear therefore from the later decisions of the Judicial Committee that the view taken by the Madras High Court in Balli Reddy's case is correct and that its authority has by no means been affected by the pronouncements of the Privy Council.

(8) The view taken by the several High Courts both before and after the decision of the Judicial Committee in Kishan Singh's case is reflected in the leading case reported in — 'Queen Empress v. Jabanulla', 23 Cal 975 (H). This has been followed in — 'Hanuman Sarma v. Emperor', AIR 1932 Cal 723 (I); 'In re Galla Hanumappa', 35 Mad 243 (J); — 'Mahangu Singh v. Emperor', AIR 1918

Pat 257 (K); — 'Lakshman Singh v. Emperor', AIR 1934 Oudh 200 (L). The question whether the Privy Council decision in 'Kishan Singh's case, (C)', may be regarded as having overruled the view of law as laid down in these cases was considered in — 'AIR 1944 All 137 (FB) (A); — 'Bawa Singh v. Emperor', AIR 1941 Lah 465 (FB) (M); — 'Sailendranath v. Emperor', AIR 1944 Cal 92 (N); — 'Ambika Thakur v. Emperor', AIR 1939 Pat 611 (O); and — 'Mahabir Singh v. The State', AIR 1951 Pat 296 (P). All these cases would appear to follow the decision in 23 Cal 975 (H) and say that Kishan Singh's case is no authority for the proposition that an appellate court acting under S. 423 (1) (b) (2) is not competent to alter the finding of acquittal while maintaining the sentence.

(9) Mr. Mohapatra submitted, however, that the minority view in the Full Bench decision reported in — 'AIR 1944 All 137 (A) is much the better view and is more consistent with the provisions of Criminal P. C. After considering the conflict of opinion on the point, Mulla J. held that the power to alter a finding, under S. 423 (1) (b) (2), should be exercised 'subject to the provisions contained in Ss. 236, 237 and 238 of the Code'. Those sections make provision for altering the conviction and prescribing the limits within which it can be exercised and the learned Judge says that no alteration which is not covered by those sections is permissible. It was, therefore, observed that an appellate Court cannot convict an accused person of a major offence when he was charged with, and tried only for, a minor offence. The learned Judge, however, held that the finding must really be one of acquittal, that is to say, a finding relating to the facts tending to establish the ingredients of the offence and not merely a categorical finding which is, on the face of it, inconsistent with the finding of conviction recorded by the court. His Lordship then observed:

> "In such cases, the finding of acquittal can be ignored or set aside as a clerical mistake or blunder apparent on the face of the record".

I am unable to see how this caution will work in actual application. If the appellate court has got the option to set aside a finding of acquittal merely on the ground of a "clerical mistake or blunder apparent on the face of the record", words which are not to be found in the Code, why should it not set aside the finding when a wrong view of the law has been taken by the trial Court? Otherwise, it may be that the appellate court would be powerless to correct the finding of the trial court even in cases where the finding of acquittal would result in a failure of justice.

The safe rule of law to follow, in such cases, therefore, appears to me to hold that the expression "alter the finding" occurring in S. 423(1)(b)(2) is not subject to any limitation except that the sentence cannot be enhanced by the appellate court. That power is undoubtedly subject to the provisions contained in the Chapter dealing with joinder of charges and the appellate court cannot afford to ignore the provisions of Ss. 236 and 238. But it would be unduly restricting the scope of the appellate powers under S. 423 (1)(b)(2) to hold that that power can be exercised only in cases falling within Ss. 236, 237 and 238.

(10) Our attention was drawn to — 'Emperor v. Sada Singh'. AIR 1930 Lah 338 (Q) where the accused persons were charged under S. 302, I. P. C. and were convicted under S. 302 read with S. 109, I. P. C. The court held that there was an acquittal under Section 302, I. P. C. and an appeal from such acquittal was competent. This case does not assist the contention of the petitioners.

(11) Nor does the case of — 'Sitaram v. Emperor', AIR 1925 Oudh 723 (R) where the High Court declined to enhance the sentence under S. 439, Criminal P. C. as the Local Government had not appealed against acquittal of a major offence help the petitioners. There it was held that Government was competent to appeal even though it was a case of partial acquittal.

(12) In — 'AIR 1948 Pat 435 (B)', Ray J. (as he then was) held that a conviction under S. 426, I. P. C. could not be altered by the appellate Court to one under S. 379, I. P. C. in view of the provisions of Ss. 237 and 238, Criminal P. C., and held that the power to reverse a finding of acquittal is not exercisable in all cases but only in some cases. The learned Judge, however, expressed his agreement with the following principle laid down in — 'Krishna Dhan Mandal v. Queen Empress', 22 Cal 377 (S):

> "When an act, or series of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences, must lay the whole case open to the interference of the appellate court notwithstanding any order of acquittal by the first court with regard to any of the other offences. Interference of the appellate court in such cases is directed primarily not against the acquittal but against conviction which is called in question by the accused, though, if the interference is to be rational and complete, the appellate court must deal with the whole case".

This case is no authority for the extreme proposition advanced by learned counsel that in no case can an appellate court set aside a finding of acquittal except by way of an appeal under S. 417.

(13) Let me now examine Mr. Mohapatra's contention in the light of what transpired in the present case. The trying Magistrate held that the cattle of the petitioners had damaged the crop of the complainant (P. W. 1) and that they had been rescued by them while they were being taken to the pound. These facts, in his opinion, were insufficient to constitute the offence under the Cattle Trespass Act as, according to him, another ingredient, namely "seizure of the cattle" had also to be proved. The trial court did not record an acquittal, nor did it say in so many words that the accused had not committed any of the acts alleged against them. The observation of the trial court which is said to constitute a finding of acquittal is: "As such the accused persons cannot be punished under S. 24, Cattle Trespass Act". If the two facts, namely, (1) causing damage to the complainant's crop, and (2) forcibly rescuing the cattle, had not been believed by the trial court, it would not have convicted the petitioners under S. 426, I. P. C. The appellate Court held that the trial court's view of the law, on the facts proved, was erroneous and that for a conviction under S. 24, Cattle Trespass Act proof of seizure of the cattle is not necessary.

In this case, the appellate court was dealing with an appeal against a conviction under S. 423 (1)(b), Criminal P. C. and could alter the conviction under S. 426, I. P. C. into one under S. 24, Cattle Trespass Act, on the same facts which had been held to have been proved against the accused persons. Even according to the minority view of the Allahabad High Court in 'Zamir Qasim's case, (A)', this could be done because the procedure adopted by the lower appellate court does not contravene any of the other provisions of the Code. The only question that both the courts be-

low had to deal with was: what is the law to be applied to the facts proved in the case. If the trial court had taken a wrong view of the law, it was open to the appellate court to correct it.

(14) We are, therefore, satisfied that there has been no illegality committed by the lower appellate court in the present case. We would, therefore, dismiss the revision.

(15) MOHANTY, J. I agree.

B/H.G.P. Revision dismissed.

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NARASIMHAM AND MOHAPATRA JJ.

The State v. Editors, Printers and Publishers of the Newspapers Matrubhumi and Krushak and others, Opposite Party.

Criminal Misc. Case No. 8 of 1952, D/- 20-1-1954.

(a) Contempt of Courts Act (1952), S. 3 — Contempt of Court — Articles in newspapers, during pendency of proceedings in court.

When a case is pending or imminent any matter published in a newspaper which has a tendency to prejudice one of the parties or to mobilise public opinion in favour of a rival party would amount to contempt. (1870) 39 LJ Ch 398; (1890) 44 Ch D 649; (1894) 11 TLR 38; (1930) 2 Ch 368; AIR 1932 Mad 26; AIR 1939 Cal 672 (SB); AIR 1941 Pat 185 and AIR 1945 Lah 206, Rel. on. (Para 10)

(b) Contempt of Courts Act (1952), S. 3 — Contempt by articles in newspapers — Jurisdiction of Court — Limits of.

The law of contempt should not be unduly strained. The jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. AIR 1953 SC 185, Rel. on.; (1889) 58 LJ QB 490; (1896) 1 QBD 577 and AIR 1931 Cal 257, Ref. (Para 12)

(c) Contempt of Courts Act (1952), S. 3 — Action for defamation by politician — Articles in newspapers during its pendency — Considerations involved — (Constitution of India, Art. 19(1)(a)).

Where a pending case in respect of which contempt is alleged to have been committed is a case of defamation and the person alleged to have been defamed is a politician other important questions also arise for consideration. Article 19(1)(a) of the Constitution guarantees freedom of speech and the Press should have freedom to criticise the activities of public men belonging to one party or the other. Hence, though any attempt of trial by the press of a pending case should be sternly put down by enforcing the law of contempt in appropriate cases, the said law should not be so strained as to materially affect the freedom of speech of newspapers. A line has to be drawn between the law of contempt on the one hand and the freedom of speech of the newspapers on the other. (Para 13)

Thus where an article is published with the 'intention' of prejudicing the fair trial of a pending case there can be no hesitation in applying the law of contempt against the offending newspaper. But where such intention is absent and the Court is asked to infer that the article has a tendency to prejudice the fair trial of a pending case many other considerations such as the nature of the proceedings which are pending, the conduct of the parties, the time, the manner, and the locality of the publication in relation to the time, the mode, and the locality of the trial have all to be carefully weighed and the Court must be satisfied that a case for its "arbitrary and summary interference" has been made out. (1912) 28 TLR 308 and (1928) 44 TLR 303, Rel. on. (Para 13)

For instance, an anti Congress paper is undoubtedly entitled, in exercise of the right of freedom of speech, to carry on its agitation against what it considers to be the undesirable activities of a Congress member subject of course to the right of the aggrieved person to seek redress against the paper in the Criminal Court or Civil Court if the articles offended the law of defamation. But where a paper asserts that what it has said in a previous publication is true and that it was made in public interest and is ready to justify its action in the Criminal Court it will not be proper to use the law of contempt to stifle all criticisms of the activities on the ground that the previous publication was intended to prejudice the fair trial of the case or else that it has substantially such a tendency. (Para 13)

The absence of any explanation for the delay in instituting a defamation case by a public man is a factor which cannot be ignored in considering whether one of the objects, if not the main object, of instituting the defamation case, is to stifle hostile criticism in respect of his other public activities under threat of contempt of Court. (Para 13)

A general appeal to the public and the newspapers of the province to help in revealing all the facts before the Court in a pending defamation case, without touching the merits of the case, does not amount to contempt. (1901) 1 Ch 860 and (1881) 17 Ch D 49, Ref. (Para 19)

But where such a general appeal contains a clear statement that the alleged defamatory article contained a true statement of facts, it in effect, tries to pre-judge one of the main points for decision by the Court in the defamation case and hence, though its primary intention is not so to pre-judge the issue, still it has the tendency to prejudice the fair trial of the case and hence amounts to contempt. (Para 22)

Advocate General, Govt. Advocate, B. M. Patnaik, S. Patnaik and A. K. Roy, for the State; M. S. Mohanty, A. L. J. Rao, A. Das and L. Pasayat, for Opposite Party.

CASES REFERRED: Paras

(A) (1742) 2 Atk 469: 26 ER 683 9
(B) (1870) 39 LJ Ch 398: 22 LT 55 10
(C) (1890) 44 Ch D 649: 59 LJ Ch 767 10
(D) (1894) 11 TLR 38 10
(E) (1930) 99 LJ Ch 560: (1930) 2 Ch 368 10
(F) (V19) AIR 1932 Mad 26: 33 Cri LJ 270 11
(G) (V26) AIR 1939 Cal 672: 41 Cri LJ 148 (SB) 11
(H) (V28) AIR 1941 Pat 185: 42 Cri LJ 225 11
(I) (V32) AIR 1945 Lah 206: 47 Cri LJ 115 11
(J) (1889) 58 LJ QB 490 12
(K) (1896) 1 QBD 577: 65 LJ QB 426 12
(L) (V18) AIR 1931 Cal 257: 32 Cri LJ 675 12
(M) (V40) AIR 1953 SC 185: 1953 Cri LJ 911 (SC) 12
(N) (1912) 28 TLR 308 13, 17
(O) (1928) 44 TLR 303 13, 14
(P) (1901) 1 Ch 860: 70 LJ Ch 355 19
(Q) (1881) 17 Ch D 49: 50 LJ Ch 406 19

NARASIMHAM J.:

This case was started on a reference made by the Sub-divisional Magistrate of Cuttack, against the Editors, Printers and Publishers of two Oriya

newspapers of Cuttack named 'Matrubhumi' and 'Krushak' on the allegation that during the pendency of two criminal cases of defamation (C. C. No. 787 of 1952 and C. C. No. 786 of 1952) the said papers published a series of articles which have a tendency to interfere with the fair trial of those cases and that the Editors, Printers and Publishers have committed contempt of Court.

(2) The said two complaint cases were filed before the Sub-divisional Magistrate of Cuttack, Sadar, by one Sri Bijayananda Patnaik who has figured somewhat prominently both in the political and industrial circles of Orissa in recent years. He is a member of the Orissa Legislative Assembly and belongs to the Congress Party which has been the Party-in-office ever since the Congress came to power in 1947. It has been alleged and not denied that he is a close friend of Sri Harekrushna Mahatab who was for some time the Chief Minister of Orissa and also the Hon'ble Minister for Industries in the Government of India. It is also an unchallenged fact that during recent years several industrial companies such as Orissa Textiles Mills Ltd., the Kalinga Refrigerator Co., and the Kalinga Tubes Co. were floated in Orissa mainly through the efforts of Sri Bijayananda Patnaik and for some of these companies Government gave substantial financial help.

The 'Krushak' is admittedly an organ of the Socialist Party of Orissa which is somewhat hostile to the Congress Party. The political affiliations of 'Matrubhumi' are not on record. But a perusal of the impugned articles appearing in that paper leads to a fair inference that it is also anti-Congress. When Sri Harekrushna Mahatab was the Hon'ble Minister for Industries at Delhi there were some allegations to the effect that Sri Bijayananda Patnaik and some other local Congress men obtained permits for controlled commodities through their influence with him in the names of bogus companies and resold the permits at great profit.

On 5-6-1952, 'Matrubhumi' came out with an article under the caption "Fifty bales of yarn disappeared. "Congress leader's mysterious" (sic). It was alleged therein that due to the mischief of a Congress M.L.A. and with the assistance of Sri Mahatab permits for fifty bales of yarn were obtained for the purpose of dyeing the same in the name of a bogus company and that the entire quantity of yarn disappeared mysteriously. In that article there was also a reference to the securing of quota of flour for a bogus biscuit company by some Congress M.L.As. and high officials who were 'pets' of Sri Mahatab. Though in this article Sri Bijayananda Patnaik was not specifically named the reference to a Congress M.L.A. in charge of companies would, in the then political context of Orissa, lead to a reasonable inference that the article was a veiled attack on none else but himself. However, Sri Bijayananda Patnaik took no action on that article.

(3) Some time in the 1st week of June, 1952, the Central Intelligence Police Department carried out extensive searches in the houses of several persons at Cuttack including the residence of Sri Bijayananda Patnaik. At about the same time during the reshuffle of the Central Ministry Sri Harekrushna Mahatab was not included in the Central Cabinet. This fact inevitably led to all sorts of rumours about the alleged black-marketing in permits said to have been indulged in by Sri Bijayananda Patnaik and other favourites of Sri Mahatab when he was Minister for Industries and the anti-Congress papers of Orissa began to publish a series of articles attacking both of them, basing their attack on the admitted search by the Central Intelligence Police of the house of Sri Bijayananda as the background.

In the 'Matrubhumi' of 17-6-1952 the following article (translated into English) appeared.

"'MATRUBHUMI', DATED 17th JUNE, 1952.

Extensive searches in the Town of Cuttack. Dangerous fraud and conspiracy about to be unearthed. Theif's house does not remain dark always'.

(From our own correspondent)

Cuttack — 12.6.

At present the Central C.I.D. are carrying on extensive searches in the town of Cuttack. With the help of the Police of Cuttack and with the co-operation of the staff of the Central C.I.D., Puri, officer of the Central C.I.D. in the afternoon of last Saturday searched the house of Nandalal Modi in Nayasarak, the house of Uchhab Samantrai in Rajabagicha, Pearl Cycles Store of Ranihat, the house of Mayadhar Mohanty in Petinsahi and the residential house of Congress M.L.A. Sri Bijayananda Patnaik.

The local officers were not intimated of the purpose of the searches. The searches were conducted with the help of armed constables who kept guard. People of the town gathered on the road and were seeing the sight.

Before search brother of Sri Bijayananda Patnaik raised several objections to the search of Bijayananda's house. But the town Inspector explained the position that if there is obstruction to search serious situation will arise and thereupon he agreed to the search.

'It is reported that the reason for the search is that a company by the name of Eastern Mercantile Corporation was formed under the leadership of Sri Bijayananda Patnaik. Permits for importing several crores of cement, maida, sugar, steel goods, screw, unmbrella stick, cycle, yarn were obtained from the Central Government in the names of members of this company and illegally, profits of lacs of rupees were made by selling those to several persons outside Orissa. It is alleged that by such action they have cheated the Central Government, the State Government and the people. From the papers it appears that the office of the company is located at "Ananda Bhavan" in Tulsipur; but there does not appear to be any such office in Tulsipur'. It is rumoured that these permits were got hold of when Mahatab was the Central Minister for Industries. It is further rumoured that apart from the persons whose houses have been searched, another M.L.A. of Cuttack, some distinguished people of Nayasarak & an important man of Barang Factory have manoeuvred to obtain permits from Central Government and have helped in the illegal sale of permits and are directly involved in certain transactions. During these searches, it is understood, some papers have been seized from the house of Mayadhar Mohanty, former Secretary of Mahatab.

Yesterday from 1 p.m. to 4 p.m. the offices of Narasing Ratha & Co. and Kalinga Tubes were searched by the Central C.I.D. with the help of Manglabag Police and they have taken some extracts from some papers.

Besides it is rumoured that there has been serious allegation that Sri Patnaik has taken lacs of rupees from the Government in the name of development of industries and has not done anything.

It is learnt that the company in whose name import licence has been obtained is not an established company nor is the company assessed to income-tax. It is being seriously investigated

as to how crores worth of permits were granted for transaction from the Central Secretariat to a company consisting of private share-holders. 'The mysterious manner in which the permits were sold outside viz., Madras and Bengal and lacs of rupees worth of profit were made have already been investigated by the Central C.I.D. in those States'. It is learnt that Poddar and Co. of Calcutta are implicated in this matter. The application addressed to the Central Government for permits and other papers have been seized.

It may be remembered that it was published in Daily Matrubhumi a few days back that although it has no dyeing factory 50 bales of yarn were obtained from the Secretariat of the Insustries Minister Mahatab and were not to be traced. It was also published that without intimating the State Government permit for maida was obtained from the Central Government and was not to be traced. It was published similarly without having a biscuit factory, maida for two months quota was obtained and was not to be traced'.

'As it is learnt that Central C.I.D. even though belated will systematically investigate into every matter and frame proper charges against some persons'.

'It is rumoured that some of the share-holders of the company were running to Delhi prior and subsequent to elections and gave substantial financial help at the time of elections'."

That the article is grossly defamatory of Sri Bijayananda Patnaik will be apparent. The substance of the allegation contained in that article is that he organised a bogus company named 'Eastern Mercantile', obtained several permits for various controlled commodities from the Central Government taking advantage of the presence of Sri Harekrushna Mahatab as Minister for Industries and resold them at great profit to black-marketeers of Madras and Bengal. It was also alleged that there was a rumour to the effect that Sri Bijayananda Patnaik obtained lacs of rupees from the State Government for the purpose of development of industries but had not done anything. There was also a reference to the previous article dated 4-6-1952 regarding the mysterious disappearance of fifty bales of yarn and the permit for flour for manufacture of biscuits. Strangely enough Sri Bijayananda Patnaik did not take any action against the newspaper soon afterwards.

In the meantime, agitation against the activities of Sri Harekrushna Mahatab and Sri Bijayananda Patnaik was started in other anti-Congress papers of Orissa such as 'Krushak'. The 'Matrubhumi' also came out with two other articles on 21-7-1952 which were as follows:

" 'MATRUBHUMI' DATED 21st July, 1952'
IS MAHATAB AT THE ROOT OF ALL MISDEEDS?

He should be immediately arrested with his friends and followers.
Straightforward statement by ex-Congress M.L.A.

Pandit Lakshminarayan Misra, a well known Congress leader and worker of Sambalpur, was a Congress member of the previous Legislative Assembly of Orissa. The follower of Mahatab had taken the shelter of bribery, falsehood, black-marketing etc., with his help, support and active co-operation when he was the Chief Minister and thereafter when he was promoted from this office to the post of the Union Minister of Industries and Commerce, in respect of which the C.I.D. was investigating recently. In that connection Pandit Misra wrote in the paper 'Subrati' which is published under his editorship from Sambalpur dated 3-7-1952 under a headline 'Arrest' as follows:

It is a matter of great surprise that Bijayananda Patnaik and others are not yet arrested. These are the charges against them that they have opened a false, i.e., fraudulent company, arranged permits for flour, cycle, yarn, iron and other articles of daily use worth many lakhs and received a huge amount through black-marketing. It is, however, understood that no scent of the matter named Bijayananda Patnaik & Co. is even known to the Income-tax Department. All their fraudulent attempts are thoroughly known to the Government of India. But we want to make it known through the clearest language according to the doubt and demand of the public that Harekrushna Mahatab himself is at the root of all sorts of misdeeds and he should be arrested at the first instance. If Jawaharlal's Government was prepared to prevent corruption, then they should arrest Mahatab, Bijay and Biren immediately without showing them any kindness and sympathy and should not utter the name of surety until the end of the investigation.

x x x

In this way they are collecting a huge amount and again taking lakhs after lakhs from the Kendu leaves lessees and others under the leadership of Mahatab, created so vicious atmosphere in the political field of Orissa at the time of election that the people became impatient with hatred and irritation. Land-Rover cars which were brought by Bijayananda through his gambling and cheating were sent to different districts as the property of the Congress.

Pandit Misra is one of the influential leaders of the Congress Circle of Sambalpur. We have no language to have stronger remarks than the strong remarks which have been published out of his aforesaid writing regarding the movement of Mahatab with his friends and followers."

"'MATRUBHUMI:' DATED THE 21st JULY, 1952.
FIRE SMOULDERING INSIDE.
It will burn one day to destroy the black-marketeers of Orissa.
The result of the investigation of C.I.D.

Recently some business firms of Cuttack were under the strict vision of the C.I.D. Articles of lakhs of rupees were imported on the strength of some import permits issued from the office of Mahatab when he was the Minister of Commerce and Industries and were sold in Calcutta, Madras and other places through black-marketing. Such allegations were heard at that time. The name of Kalinga Mercantile Corporation was alleged specially in this connection and the houses of the so-called Directors of this firm were searched. After the departure of the C.I.D. from Orissa on completion of their work, it is understood that a case on behalf of Bijayananda Patnaik has been filed in High Court showing that such investigations and searches have no reasonable grounds of their own.

However, in this connection it is propagated on behalf of some papers and institutions connected with Bijayananda Patnaik that the allegations for which the C.I.D. was investigating & searching in Orissa are baseless and such of their works are entirely illegal. But the correspondent of Matrubhumi has come to understand through the secret enquiry in this connection

that the propaganda which is now made regarding the extinguishing of the fire is smouldering inside and will burn violently in flaming tongue. The profiteer of his party who, getting Mahatab in the office of the Commerce and Industries in the Centre, made the flow of the black-marketing in the country on the strength of the import permits, will be captured one after one and will be properly punished according to their malpractices. The C.I.D. is still engaged in their primary work relating to it."

Apparently, being an anti-Congress paper it wanted to utilise the series of incidents that had taken place with a view to discredit the two of the prominent Congress men of Orissa, namely, Sri Harekrushna Mahatab and Sri Bijayananda Patnaik.

(4) The 'KRUSHAK' also started a similar agitation. On 18-7-1952 it published an article under the caption—

"SEARCH IN ORISSA AND DEEDS OF MAHATAB. Mahatab had to quit his office of minitership as he was detected in his attempt to hoodwink Nehru.

Not even one out of cycles of ten lakhs of rupees was consigned to Orissa."

A major portion of the article is devoted to a venomous attack on Sri Harekrushna Mahatab which is not material for the purpose of this case. But the later portion which deals with the alleged activities of Sri Bijayananda Patnaik may however be quoted.

"'KRUSHAK, DATED THE 18th JULY, 1952'. 'Not even one of the cycles consigned to Orissa'.

It was demanded first on behalf of the Orissa Government to issue import license to Oriyas to import cycles to Orissa. It was a loss to Orissa from the first instance when it was so planned to tender the license to Bijayananda Patnaik ignoring the people whose name Orissa Government recommended. Cycles of five lakhs of rupees was quota for Orissa. One clever businessman of Delhi snatched away the license of two lakhs of rupees out of that when it was very hastely planned to issue the licence in the name of 'Eastern Mercantile Co.' and consequently Orissa got licence to import cycles of only three lakhs of rupees. Not even one of those cycles is yet consigned to Orissa. It is exhausted just there. Now Bijayanand Patnaik points out a very fine legal defect that he got the licence to import the cycles, but no such particular condition was imposed on him to consign the cycles to Orissa. He says that he has not sold over the licence to outsiders but has sold the articles. All who sell away the permits manage cleverly to colour the transaction as of articles in paper.

HOW DID THE SILK DISAPPEAR.

License to import silk of high standard of about some lakhs from America was obtained and it is ascertained from the papers that such has been imported. But not even a string out of it has crossed the boundary of Orissa and brought into. Such silk is much appreciated in Indonesia. Bijayananda is well acquainted in Indonesia. Some enquiry is being taken up in this connection. The list did not end here. Nothing is known about the license to import screws of lakhs of rupees."

"GOVERNMENT OF INDIA COULD NOT BE ENTRAPPED. BIJAYANANDA PATNAIK RETURNED DESPERATE.

Minister, Industry, declared in Orissa Assembly that there is no reason to apprehend about the future of the Kalinga Refrigerator as the Managing Agent of the company has left for Delhi to arrange for money.

Many, at this statement, apprehended that India Government shall no more be entrapped by Bijayananda Patnaik. It so happened in the long run.

There is one institution of India Government named Industrial Financial Corporation which grants loan to different industrial institutions of the country. Bijayananda's Orissa Textile Mills has incurred a loan of about forty lakhs of rupees from that institution. It is so inferred that perhaps that institution did not grant loan to Kalinga Refrigerator this time. Patnaik has returned desperate. The company in Madras to which this Oriya institution was to be handed over refused for the last time to take it up. Negotiation is going on with one Marwari at Cuttack. It will be final by this week as far as it is understood.

THE INNER AFFAIRS OF THE REFRIGERATOR CO.

Many must be anxious to know why this company failed. It is understood after enquiry that the capital of the Company rose to about 25 lakhs of rupees. The industrialists of Delhi and Bombay so opine that this amount is sufficient for a refrigerator Co. It also availed some facilities through the grace of Mahatab, the then Chief Minister, Orissa. But there is no cash balance of the Company except a few machinery and instruments. Accounts show that articles for about more than ten lakhs of rupees have been purchased. The article which is available in India at three hundred rupees is shown in accounts to have been purchased from England at more than double the amount. Not only this, but also up to twenty thousand rupees have been spent in each tour of Bijayananda Patnaik to England and he has gone several times on behalf of the company. There is no limit to the expenditure on cars and petrol. When the expenditure for the workers was six thousands a month eight thousands were on the supervising staff.

WHAT THE FACTORY WAS DOING?

The Minister, Industry, Orissa replied in Assembly that this factory began to function from the August, 1951. But till now only 161 units have come out whereas the capacity of the factory is to produce 75 units a week. These really seem mysterious.

GIVE OUT THE REAL FACT.

Government money was poured out to strengthen the narrow party which Mahatab formed in Orissa. The authorities of the Company should inform the public at once how far the rumours regarding this company are true or otherwise. Let the company give out the real truth if the rumours are not true. If the authorities remain silent it would be better if the Government appoint an enquiry committee who would give out the real truth to the public."

.....

It will be noticed that the substance of the allegation against Sri Bijayananda Patnaik in the 'KRUSHAK' is also similar to that published in the 'MATRUBHUMI' of 17-6-1952, namely, that he has misused his position as Congress M.L.A. and as a friend of Sri Mahatab by obtaining permits in the names of bogus companies in Orissa and reselling them in black-market and that he

had persuaded the Government to invest huge sums of money on some of the companies started by him thereby causing heavy loss to tax-payers. A special mention was made of the Kalinga Refrigerator Co. In the next issue dated 25-7-1952 also the same topic was discussed as will be clear from the extract given below.

"KRUSHAK. DATED, THE 25th JULY, 1952.
ANOTHER NINE LAKHS OF RUPEES SHALL GO FROM THE ORISSA TREASURY.

A NEW DEVICE OF BIJAYANANDA PATNAIK.

AN ATTEMPT TO MAKE CHOUDHURY, THE CHIEF MINISTER, AGREEABLE.

Cuttack, 23.7.

A complicated situation has come up after India Government's refusal to finance to run the Kalinga Refrigerator Factory. Bijayananda Patnaik has approached the Orissa Government for nine lakhs of rupees pointing out that the factory cannot run unless at best another ten lakhs of rupees are given. None but one in Orissa Ministry agrees to the proposal. Bijayananda Patnaik with that Minister approached the Chief Minister and explained that there is little possibility of getting back the amount which the Orissa Government have already advanced to the company unless further amount be given. The Chief Minister has expressed neither his assent or dissent after hearing all these.

LET THERE BE ENQUIRY FIRST.

Let us leave what amount of the poor people of Orissa has already been spent, it is rather surprising how again device is being contrived to throw away further amount. Let there be an enquiry first regarding the machinery and instruments already in stock of the factory and also as to possibility of at best the amount the Government can recover out of ten lakhs already given.

It was declared on behalf of the Government in the assembly that the managers of the factory are arranging money and will run the factory in no time. Now the Government should inform how far the amount has been arranged and to what extent the proposal of running the factory has reached.

Nothing should be done in secret in such a big affair."

(5) Apparently, Sri Bijayananda Patnaik's patience became exhausted. On 12-8-1952 he served registered notices on the editors, printers and publishers of the two news-papers calling upon them to make amends for publishing defamatory articles against him and threatening them with legal proceedings if no satisfaction was given. The notices were received by them on 14-8-1952. The 'MATRUBHUMI' sent a reply dated 16-8-1952 in which it requested Sri Bijayananda Patnaik to specify which portions of the articles were considered to be defamatory. The 'KRUSAK' also sent a reply on 20-8-1952 stating that the articles were published after careful enquiries from reliable sources so that the public might know the truth. Then Sri Bijayananda Patnaik filed a complaint (C. C. No. 787/52) on the 21st August in the Court of the Sub-divisional Magistrate of Cuttack against the editor, printer and publisher of 'MATRUBHUMI' and another complaint (C. C. No. 786/52) against the editor, printer and publisher of 'KRUSHAK' on the same date. We were informed that processes under S. 500, I. P. C. have been issued against these persons and the cases are still pending in the Court of a Magistrate at Cuttack.

(6) It was alleged that after the receipt of the notice from Sri Bijayananda Patnaik both the aforesaid newspapers published a series of articles extending over several dates, the contents of which were not only defamatory but had a tendency to prejudice the fair trial of the two defamation cases. The impugned articles in the 'KRUSHAK' (translated into English) are seven in number and they are as follows:

"KRUSHAK'. DATED THE 15th AUGUST, 1952.
INDIA WIDE ENQUIRY AGAINST MAHATAB.
AFTER THE ENQUIRY AT CUTTACK MANY NEW INFORMATIONS WERE AVAILABLE.
PERMIT WORTH Rs. 70 LACS TO PATNAIK.

Reply of the Government of India to the effect that the enquiry about the sale of permits is not yet over. Question in the Council of States with regard to the search of Mahatab's residence.

* * *

LIST OF IMPORT LICENSES.

A list of import licenses given by Mahatab at one instalment to the Eastern Mercantile Corporation constituted by one young man Mayadhar Mohanty who is the Secretary of Mahatab, & Bijayananda Patnaik and others is in our hands. That is given below.

1. Imitation silk yarn (resam).	.. Rs.	2,00,000/-
2. Cotton twisted yarn	..Rs.	1,00,000/-
3. Suji	.. Rs.	13,75,000/-
4. Maida of superior quality	.. Rs.	33,75,000/-
5. Imitation of silk yarn	.. Rs.	1,00,000/-
6. Imitation of pearls	.. Rs.	1,00,000/-
7. Silk of inferior quality	.. Rs.	4,00,000/-
8. Cycles	.. Rs.	2.00,000/-
9. Screw	.. Rs.	2,00,000/-
Total	.. Rs.	69,50,000/-

In words (Rupees sixty nine lacs and fifty thousand only).

Now investigation is going on all over India as to commodities worth how many rupees which was given to a Company in Orissa as import license in order to import goods from the foreign countries where the said commodities were sold and who sold them.

INDIA WIDE INVESTIGATION AGAINST MAHATAB.

D. O. letter written by Patnaik to Mahatab while getting these import licenses.

It is said that Mahatab promised to Bijayananda Patnaik that nobody else would be permitted like this to import goods of such nature. Patnaik can safely sell them in India. While Bijayananda Patnaik was carrying the import licenses in a hot haste, he received a piece of sad news. Some other businessmen managed to do some sleight in the effect that some of the said commodities were declared to be open general licence, that means import restrictions were waved out of the said commodities. Things so happened in Delhi that Mahatab was compelled to sign such an order. Receiving such information it is said that Bijayananda Patnaik returned some of the import licences with a D. O. letter to Mahatab. The said D. O. letter is in the hands of the Government at present and it discloses the relationship of Mahatab and Bijayananda. Then the Eastern Mercantile Corporation got back the import permit and carried

on some business. Investigation is now going on about the said matter.

Many substantial matters have come out of trifle searches.

* * *

What the people are asking? Now the people are asking each other.

1. Have these people got so much of capital to receive import licences worth seventy lacs?

2. What commodities have come to India?

3. What are the commodities which have not at all seen the soil of India?

4. How much of income-tax has the said company paid to the Government when it received import licences worth so much?

5. Did any portion of the food stuffs like Suji and Maida come to Orissa?

6. If not, what happened to them?

7. It was published in newspapers that one of the ministers of the Government of Orissa fought his best at Delhi in order to issue some of the import licences in favour of the businessmen in Orissa. Did the Government of Orissa recommend to issue import licences worth so much money in favour of this company?

8. If not, did the Government of India issue such permit on proper investigation?

9. Did the licences which are said to have been returned go out of the share of Orissa?"

(2) " 'KRUSHAK' DATED, THE 29th AUGUST, 1952. OBSTACLES IN THE INTEREST OF ORISSA AT HIRAKUND.

Secret collusion with Madras campany though contracts worth rupees two crores were undertaken in the name of the Oriyas.

The Government of India believes that the Orissa Firm got the work.

Another story about Bijayananda Patnaik.

We have got some proofs regarding the happenings at Hirakud and the things being done in the names of the Oriyas. Uptil now the idea of the people of Orissa was that the party of Mahatab Bijayananda Patnaik were running business by taking lakhs of rupees from the poor tax payer in the name of the development of industry.

But they were not only industrialists but also they have undertaken contractory work of crores of rupees.

All sorts of things are going on in the name of 'Kalinga'.

Along with Kalinga refrigerator, Kalinga Airways and other works of Kalinga, the Kalinga Construction Company was established. That company first of all started the work Hirakund. Works are being entrusted to the Oriyas.

Vigorous objections were raised in the Parliament and Council of State in the month of July last that the Punjabi and people outside Orissa are getting the same. In reply thereto, the Minister of the Government of India said that the biggest work has been offered to the Kalinga company and it is a firm of Orissa.

On getting this reply the people must be anxious to know the actual whereabouts of this company. Bijayananda Patnaik is the founder of this company. In the year 1949, the company was favoured with works for the first time worth repees 67 lakhs. But no progress was made due to ignorance about works. 34 lakhs of rupees were sanctioned for the fourth gap of power channel. After lapse of few days, alteration was made in the Hirakund project & the work entrusted to the company was suddenly closed. Thereby the company got opportunity to present any kinds of grievances.

Again earth-work of rupees 150,00,000.

Although no distinct progress of work was made by the company tender was opened on 25-12-1951."

(3) " 'KRUSHAK'. DATED THE 29th AUGUST 1953.

The acts of the Government of Orissa in the plea of development of industry. Don't throw dust in the eyes of the people confusing statements. Sarangadhar Das, Memeber of the Parliament insists to set up a Judicial Commission. Congratulation to 'Krushak' as it discloses true facts.

Sarangadhar Das, Member of the Parliament and leader of the Socialist-Praja Party in the house of Commons has given the following statements about the aims and objects of the Orissa Government.

Since last five or six years, the Government of Orissa is trying to establish work-shops like cloth factory, factory for ice box, work-shop for making petrol from coal, workshop for making tractors and work-shop for making steel pipes by giving lump sum of money to Bijayananda Patnaik the Pilot and rising industrialist, and 'Krushak' has been much praised by the tax payers of Orissa by bringing the most confidential (bhitiri) news to broad day light. I praise 'Krushak' for the same. The interest of the public is the chief interest and it is the duty of the newspapers to safeguard that interest.

'Krushak' has done its duty by presenting the 'hak katha' before the public on minutely scrutinising the subject-matter and by sacrificing the wishes and interests of favourites. Let the public of Orissa and their representatives do their duties henceforward.

It is very hopeful that Dr. Parija and other leaders of the opposition party in Assembly have begun this work. I believe that they will try till the end to bring out the real fact.

From the publications made in the last few editions of the 'Krushak' I come to this conclusion that the Government of Orissa entrusted to anybody and anybody nominated by Orissa Congress and Harekrishna Mahatab, the entire amount contributed by the tax payers of Orissa, the entire donation of the India Government towards development as also the loans taken from the Government of India, even though such person was entirely a stranger in the affairs of trade, commerce and machinery etc. The Orissa Congress is silent in these circumstances. Harekrushna Mahatab has no zeal to read 'Krushak' and the present Orissa Government is also silent. Yes, to-day afternoon I read the Press note published in defence of the Orissa Government. There was no satisfactory reply.

When I was a member of the Orissa Legislative Assembly in the year 1948-49, I pointed during the discussions made in the Assembly that the people of Orissa should gain the knowledge of craftmanship of making the materials of daily use instead of going after manufacturing petrol and making tractors. After this, the question of petrol and tractor will come automatically. If you don't follow this prin-

ciple, you will find that after 3 or 4 years crores of rupees have to be wasted for nothing. It is true that petrol workshop has not been established but Rs. 6,00,000/- (six lakhs) have been spent for its investigation and not a single report even available. Therefore the Government of India determined to extract petrol from the coals of Jharia. Workshop cannot be established due to scarcity of money. There is little possibility of establishing the workshop. On whose strength Harekrishna Mahatab and the Orissa Government gave this six lakhs of rupees without asking the Government of India? When and from whom the said money will be realised? The Government of Orissa is in traps.

Again, in the year 1950, I invited the gentlemen who devoted themselves in the service of the public for the purpose of dismissing the matter by pointing out of the misappropriation of Government's money in a book styled 'Government of Orissa is in trap'.

But neither during my speech in the Assembly nor in the year 1950, I have not heard anybody showing interest in the matter. The bureaucracy are treading on wherever they wish as public are not alive. Once I exposed the matter about corrugated-sheet of a person having equal status of a Congress Minister. But the then Prime Minister and the Congress leaders suppressed the matter. At that time the public did not utter a word. Let the public discuss the matter in an impartial way that has been published in the 'Krushak'. Then only the favouritism and playing with the money of the tax payers can be checked in future.

The Government does not give frank statement. The facts that an agreement was signed at the time of giving loan to the Orissa Textiles Ltd. and the particulars of the properties given a security have not been clearly stated in the Press Note published today by the Government of Orissa. I wanted to see that agreement during the time when the matter relating to this loan was discussed in the Board of Industries. But Narasimham Aiyangar, Chairman of the Board, said that agreement has been made and has been kept in the custody of the Government. It is not desirable to disclose it here. Why not the Government state definitely that an agreement has been made? How long Mahatab will throw dust in the eyes of the people by giving collusive statements?

I urge as the representative of the public that let the Government publish the Audit Report of the year 1951 and let the public know as to what is true and what is false.

There are some honest men in the Government and I respect them. For the welfare of those men, I urge that let a Judicial Commission of high status be appointed and let that commission state the real facts after investigating into these allegations."

(4). "'KRUSHAK'. DATED THE 12th SEPTEMBER, 1952.

The conscious public will give the reply. The statement given by the Secretary to the Socialist Party, Orissa, about the suit against the paper.

Cuttack, 5-9- — Bankabihari Das, the Secretary to the Socialist Party, Orissa, has given the following statement about the suits filed against Matrubhumi and Krushak. He has written — I am not at all astonished to know about the defamation suit filed by Sri Harekrushna Mahatab against Matrubhumi. Capitalists and bankrupt politicians instead of opposing through newspapers any statement published in any paper take to such recourses. Now as the case has been instituted in a Court of law I have nothing to say about its consequences etc. The Court will ascertain the truth of it. But now it is a war cry for the newspapers and the public. The responsibility of disclosing all the facts relating to a politician like Mahatab lies with the public and the newspapers. The weekly newspaper Krushak also confronted with such a call from an industrialist who is a man of the Congress Party. The said suit is now pending for decision & as such I have nothing to say with regard to that. The conscious public of Orissa will surely give its proper reply. The public and the newspapers of Orissa will surely help us in order to reveal all the facts before the Court."

(5). "'KRUSHAK', DATED THE 12th SEPTEMBER, 1952.

Defamation suit filed by Bijayananda Patnaik. The bankers are unwilling to give him loans.

He has alleged that the news published in the Krushak is false and baseless and it has damaged his reputation. The case is fixed for trial on the 22nd."

(6). "'KRUSHAK', DATED THE 12th SEPTEMBER, 1952.

Case against us.

Everybody in Orissa is aware of the fact that a defamation suit has been filed against Krushak. The allegation against us is that we have published some false and baseless news as a result of which the reputations of the persons concerned have been damaged. It will be known at the end of the suit what we have written; why we have written; from which source we have received the information; and whether we have written the same in order to guard the interest of the public or to defame individuals. If at all we have written anything in order to defame a particular individual then we should be punished by the Court. But if we have written anything in order to guard the interest of the public and to serve humanity then those who have alleged against us will be known by the people. The people must thank us because we have given them the opportunity to know everything while the case is continuing. Before the interest of the public the harm caused to an editor or the reputation of an individual, however rich or big he may be, is very meagre. Hence we consider ourselves fortunate being impleaded in such a suit.

But we want to say one thing. The people who are incharge of the administration of Orissa today are much aware of their faults and weakness than ourselves. They always suspect that the people may know their secret affairs. The suspicion makes them perturbed. They shall be always careful to see that their opponents do not get justice. But for that we cannot lose our confidence from our judiciary. People should always have the confidence to get justice from the judiciary. We are sorry to admit that money is necessary in order to get justice in the present system of law that prevails. We believe that our readers and well-wishers will bear the cost that we would incur in order to summon the persons as witnesses by whom the real truth will be revealed. We are grateful to some of the pleader and advocate friends who have come forward to help us. Some of the famous citizens of Cuttack are trying to form a Committee known as the

'Krushak Atma Rakshya Committee' (Committee to save the interest of Krushak) and they are keeping letter correspondence with all classes of people in Orissa.

We request the public of Orissa to co-operate fully with the 'Krushak Atma Rakshya Committee' in order to publish truth."

(7). " 'KRUSHAK', DATED THE 12th SEPTEMBER, 1952.

(Surendranath Dwivedi)

Cases have been instituted against Krushak. This is not new. When Krushak was first published the Zamindars instituted cases against it and tried to make an end of it. But Krushak did not die. It gathered new strength out of that. Zamindaries have been abolished. But a new type of blood has grown up. They have behind them either direct or indirect support of the Government machinery. They have spoiled and polluted our society and political life through vice and corruption. To-day they have focussed their eyes upon Krushak. They want to trouble Krushak and stop its publication.

Krushak is the paper of the Public. Its duty is to publish the public opinion strongly without any fear. Failing which there is no need of Krushak. Hence Krushak is publishing regularly all the flaws and injustices done in the Government sphere and general sphere. The capitalists and the party in power are trembling due to this. Their secret becomes out. Source of exploitation is being choked. They have not got the courage to say that the items published in the Krushak are false. They are unable to face the public straight.

The Court will decide the matter and the editor and publisher of Krushak will give its proper reply. It is not a thing to either win or lose a case. They are ready to make any sacrifice for truth. But money is necessary in order to contest a suit. It is impossible to continue a litigation without money. The Krushak has no financial strength. Its readers and well-wishers are its only strength. It is able to manage itself for so many years without any capital only by the help and support of them. So this attack upon Krushak is a challenge to them. Can they not save Krushak from the attacks of the capitalists?

A help fund is opened in order to save Krushak from such attacks. It is happy to note that some of the lawyer friends have volunteered to fight the suit. Still then we require much money. The readers and well-wishers will bear that. I believe, the friends of Krushak will try their best. They will send help very soon. They will give themselves and will collect from others. Everybody will give as much as he can. It matters very little whether the help becomes very small. If the amount is so small that it cannot be sent by money order then postal tickets may be sent. But it should be done quickly. If delayed will not help us in the present affairs. The readers of Krushak should show that the support of the people that stands behind Krushak can smash the pride of all the injustices of the country."

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(7) The impugned articles in the 'MATRUBHUMI' (translated into English) are as follows:

(1). " 'MATRUBHUMI', DATED THE 17th AUGUST, 1952.

Terrific conspiracy against Matrubhumi. Many industrialists and black-marketeers combined and determined to make vigorous attempts in this direction.

(From our own correspondent)

Cuttack, 16-8-

News of the terrific conspiracy of a combination of many capitalists, industrialists, black-marketeers and profiteers of Orissa to wipe out 'Matrubhumi' of its existence are now available from many sources. A deep sense of fear and disappointment has been created amongst the businessmen and industrialists who were carrying a black-marketing, as this newspaper exposed the corruption and malpractices of some anti-social elements. As a result they are determined to offer a combined resistance to this paper. A few days back some distinguished black-marketeers and 'Dalalls' of Orissa met in a two storied building near Chandnichauk crossing and prepared various plans as to how Matrubhumi could be rooted out of its existence. Majority of the gentlemen who gathered there expressed the opinion that publication of the paper would be stopped if a number of suits are filed simultaneously against the paper. Hence it is understood that it has been decided to launch the attack like this at first."

(2). " 'MATRUBHUMI', DATED THE 20th AUGUST, 1952.

DANGEROUS IF TRUE

Mahatab's men took a cheque for Rs. 1,00,000/-.

The enquiry started by the Central C.I.D. against some big businessmen has almost come to an end. The name of the ex-Minister of Commerce and Industries, Government of India was connected with the allegations regarding which the enquiry was conducted. It has been published in the 'Indian Life', a weekly paper of Calcutta, that the Central Police has sought the permission of the Home Minister to arrest these persons. Those who offered bribe will be arrested at first. They will be detained till the Preventive Detention Act receives the assent of the President.

In the meantime, it is understood that Dr. Meghnad Saha and Sri A. K. Gopalan, the leader of the Communist Group will raise this question in the coming session of the Parliament.

A business organisation named Kisandas Purushottamdas, located at No. 2, Royal Exchange Place, Calcutta, handed over a cheque of Rs. 1,00,000/- to a man of the Minister of Commerce and Industries on 15-12-1951 as a bribe. This cheque was to be drawn in the United Commercial Bank."

(3). " 'MATRUBHUMI', DATED THE 23rd AUGUST, 1952.

DEFAMATION OF BIJAYANANDA AS A MEMBER OF THE TREASURY BENCH OF THE CONGRESS GOVERNMENT.

It is understood that the Editor and the Publisher of Matrubhumi have been summoned to be present in the Court on 10-9-1952 after the affidavit was sworn yesterday in the defamation suit filed by the Congress M.L.A. Sri Bijayananda Patnaik against the Editor and the Publisher of the paper.

Mr. Patnaik has said in his examination before the Court that the article published in the Matrubhumi not only defames him personally but also as a member of the Congress Treasury Bench."

(4). "'MATRUBHUMI', DATED THE 5th SEPTEMBER, 1952.

PEOPLE TO REPLY.

There was no necessity of another daily newspaper in view of the fact that there are many newspapers and periodicals being published in Orissa and that there are more than one daily paper in the town of Cuttack. But we announced at the time when Matrubhumi was started and also announce it now that people felt the necessity of an out-spoken newspaper like 'Matrubhumi' as it had become necessary to draw the attention of the public to all the drawbacks of the administration without any party affiliation. The readers of Matrubhumi in this State will bear testimony and the popularity that the paper has earned during the short period of its existence will bear proof of how the paper has progressed in its path of duty towards fulfilment of this purpose, without any sense of fear and perturbance. We have attributed many faults to different persons at the helm of the administration by repeatedly giving publication to the corrupt practices that entered into the fabrics of the administration and caused much harm rather than benefit to the administration. We will remain steadfast in this path as long as drawbacks and corruption have not disappeared from the country.

Matrubhumi has no necessity for its existence if it does not publish the gross misuse of power practised by the peope in authority. But Matrubhumi has now to face the wrath of people holding the destiny of Utkal in their hands. A leader of Orissa once out of anger towards Matrubhumi spoke out — "People to respond to this". If the Editor of Matrubhumi committed a sin by publishing without any hope of self-aggrandisement or any evil intention and with an intent to serve the motherland, the drawbacks and malpractices of people at the top of the machinery of administration who are engaged in activities prejudicial to the interest of the people, then the country will surely take it as its own sin and in the language of the said leader, the people will respond to that."

(5). "'MATRUBHUMI', DATED THE 7th SEPTEMBER, 1952.

VIGILANT POPULACE TO RESPOND.

Statement of the Secretary of the Orissa Socialist Party regarding the case against newspapers.

Sri Bankabehari Das, Secretary of the Orissa Socialist Party has issued the following statement regarding the suits filed against Matrubhumi and Krushak.

He writes — I am not at all surprised at the news that Sri Harekrushna Mahatab has filed a defamation suit against Matrubhumi. Capitalists and bankrupt politicians take recourse to this method without having courage to contradict the published news through newspaper. Now I have nothing to say regarding the nature and consequence of the suit after it has been filed in the Court. The Court will ascertain its veracity. But now it is a 'war cry' to newspapers and the public. The responsibility of placing all facts regarding a politician like Mahatab before the Court is now placed on the Public and newspapers. Krushak the weekly paper of our party has also been confronted with such a 'war cry' from a Congress industrialist.

The case is now under trial & therefore I have nothing to express my opinion on that. The awakened public of Orissa will surely give a suitable reply to this. The public and the newspapers of Orissa will surely render all possible help in presenting all facts before the Court."

(6). "'MATRUBHUMI', DATED THE 8th SEPTEMBER, 1952.

MATRUBHUMI WILL REMAIN UNPERTURBED.

Service of countrymen is its ultimate aim.

In the meantime more than one law suits have been filed against Matrubhumi in Courts. All are more or less aware of the history of simultaneous attacks on all sides launched against our Matrubhumi (motherland) and of how Matrubhumi (motherland) was torn to pieces by them. Even now after the independence of the country was achieved merciless attacks are going on all sides against the sentiments of Matrubhumi (motherland) and it is a matter of regret that some self-styled leaders who were brought up with the bread of our motherland and called themselves as her servants and devotees are helping like a handle to an axe. They are thinking of their personal interest of making their position higher and higher by hook or crook to be bigger than the national interest.

Singbhum has gone out of Orissa as a result of this sort of self-aggrandisement on their part. Basta, Jashpur and other territories in the west have been taken out. Similarly many places inhabited by Oriyas in the south have been captured by the province of Madras. Sareikela and Kharswan have escaped out of our clutches even though they were one day with us. Over and above that the political Orissa has raised its head as a separate State in independent India along with the ex-States. But within the State there is no limit to the oppression of the non-Oriyas on the Oriyas in broad day-light.

If we consider likewise, the prestige of our mother-land is being jeoparadised in broad daylight before everyobody and in every moment. Matrubhumi was started to expose those whitewashed people who while in the seat of the leaders are encouraging that, before everybody. Otherwise, there was no necessity of 'Matrubhumi' when there were more than one daily and weekly newspapers and periodicals. Numerous readers of Matrubhumi might have known how far 'Matrubhumi' has been successful in fulfilling that purpose with which it appeared before the public during the short period of its existence. Matrubhumi is determined to endure smilingly the thunderous attacks from any quarters while exposing those people who are polluting the limited present and the vast future of the country and the nation by their preference for their self-interest to the interest of the country. Its definite move towards its goal will by no means be affected nor can it ever be. It is not to her lot to retreat if somebody thinks that 'Matrubhumi' had defamed him while trying to preserve the honour of the country and the nation. Rather it will devote itself completely with redoubled vigour to the service of the dumb millions. This is the last and the greatest promise of Matrubhumi to her countrymen in these days of her distress."

(7). "MATRUBHUMI'. DATED THE 8th SEPTEMBER 1952.

GRAND-FATHER AND GRAND-SON FARCE.

Grandson — Who are, now-a-days, thinking defamed?

Grandfather — Those who had never, nor has any nor shall have any fame."

(8) "MATRUBHUMI'. DATED THE 11th SEPTEMBER, 1952.

APPEAL.

In an independent country the responsibilities of the newspapers are very great. The principal duty of a newspaper is to point out to the people of the country all the defects and flaws of the administrative machinery and to guide them on the right path by criticising the defects and drawbacks of the society. There is no necessity for a newspaper to continue its publication unless it serves this purpose. But while proceeding forward with such an aim it is but natural that anti-social forces must try their best to make an end of the newspaper.

Some of the newspapers, while discharging its duty today have become the object of annoyance of somebody and the others may be like that to-morrow. Under such circumstances the newspapers and the journalists should make a joint effort to fight against injustice ('anyaya').

Four cases have been instituted against Matrubhumi and Krushak. It is expected that some more may be instituted in future. All progressive newspapers and journalists should consider the case instituted against Krushak to be their own case and should make a joint attempt to see that the newspapers do not die out.

Hence we propose that the people of the country should constitute immediately a committee in order to resist such acts.

Signature: Sri Binod Kanungo, the Editor of Krushak.

Sri Nityananda Singh, the Editor of Janamata.

Sri Nityananda Mohapatra, the Editor of Dogor.

Sri K. N. Acharya, the Editor of Orissa First.

Sri Godabaris Mohapatra, the Editor of Niakhunta.

Sri Raghu Rout, the Editor of Sata Katha."

(9). "'MATRUBHUMI', DATED THE 13th SEPTEMBER, 1952.

A PROBLEM FOR ALL NEWSPAPERS.

A combined effort is necessary against the howling of Congress.

Mohan Das, the Editor of 'Nua Dunia' states:

Sri Mahatab has demanded a defamation worth one lakh of rupees against Matrubhumi and also had filed a similar suit against Krushak. At this, we presented our own views in a statement. But it was not published in apprehension that somebody may interprete as contempt of Court.

We do not mean to contempt the Court nor to any associated person. It is not fair to comment upon a suit under trial. But we do want that every truth should come out to light immediately. Let the real culprit be punished. Every newspaper as well as the public of Orissa must wish it. That is why everybody should be cooperative.

Because this is a new incident generally all sorts of news regarding the political persons come to light. Thereby their fame and influence either increases or decreases. For this, generally nobody goes to Court but enlighten the whole truth through newspapers. But the Congress leaders, failing therein, now run to the Court and establish a new precedent in politics.

Well, Court will clarify everything. Therefore the contesting parties, without feeling shy, should place all the true facts. But Congress thinks that by so threatening the newspapers will be subdued. By threatening one, the others will be suppressed, people will be frightened, would not come forward to speak the truth and they will be taking the bait. For that it is learnt, the Provincial Congress Secretary is trying his best on behalf of the Congress institution.

So it is not a question of a single individual newspaper. It is a problem to all the newspapers — a matter for the whole mass, a matter for all people who want the truth to come out. Because, truth alone can safeguard the public interest. Therefore, all the newspapers, the whole mass of people should unite. Let an immediate combined effort be made in that direction — this is our only appeal."

(10). "'MATRUBHUMI', DATED THE 16th SEPTEMBER, 1952.

APPEAL.

It is quite clear from those suits that have been filed against Matrubhumi and Krushak in the Criminal and Civil Courts along with the threats for such other suits to follow, that some persons and groups with vested interest who occupy the high offices of this State are trying their utmost to give such a kick on the heads of those newspapers and magazines that are slowly rising to the surface in order to safeguard the public interest that they will be crushed down to earth — not to speak of their upliftment. Therefore, it is the duty of the public to save these newspapers, and magazines who are serving the peoples' interest, from this immediate danger. For that our combined effort is necessary. There will be a meeting to discuss the extent of public duty towards it and to decide a combined line of action. So it is requested that you all should attend this meeting and oblige."

(8) Though the 'KRUSHAK' and the 'MATRUBHUMI' are two different papers it was considered convenient to hear the contempt proceedings against both of them jointly. They were both represented by one counsel and the offending articles all deal essentially with the same subject, namely, the defamation cases brought by Sri Bijayananda Patnaik against them and his activities as a Congressman and as an industrialist of Orissa.

(9) Mr. B. M. Patnaik who appeared on behalf of Sri Bijayananda Patnaik to support the rule argues that the aforesaid articles have a tendency to prejudice the fair trial of the two defamation cases in the following two ways:

(i) Some of them by asserting as true the allegations made in the original articles which were the subject-matter of the defamation cases prejudge the very points for decision by the Criminal Court;

(ii) All the articles have a tendency to prejudice the public of Orissa in general and the public of Cuttack in particular against Sri Bijayananda Patnaik and to mobilise opinion in favour of the aforesaid newspapers by making it appear as if they were the innocent victims of persecution from Sri Bijayananda Patnaik and other black-marketeers and swindlers of Orissa.

Mr. Patnaik urged that the contempt would come under the following two of the three classes of contempt defined in the oft-quoted saying of Lord

Hardwick — 'St. James's Evening Post case', (1742) 2 Atk 469 (A):

(i) abusing parties who were concerned in cases;

(ii) prejudicing mankind against persons before the cause is heard.

(10) Before discussing each of the aforesaid articles I may briefly refer to the law relating to this class of contempt. There is no doubt about the proposition that when a case is pending or imminent any matter published in a newspaper which has a tendency to prejudice one of the parties or to mobilise public opinion in favour of a rival party would amount to contempt. In the well known Tichborne case — 'Tichborne v. Tichborne', (1870) 39 L J Ch 398 (B), this class of contempt was emphasised as follows:

".....whatever tends to prejudice a cause, whatever matter is published to the world, referring to the parties to the litigation, and to the subject-matter of it, in such a way as to excite a prejudice against them, or their litigation, is a contempt of Court."

Again in — 'In re, Crown Bank', (1890) 44 Ch D 649 (C), a newspaper which deliberately took one side in a controversy in respect of a pending proceeding was punished for contempt of Court. Similarly, in — 'Russell v. Russell', (1894) 11 TLR 38 (D), an article in a newspaper which cast reflection on a party in a pending case..... "in a manner calculated to excite prejudice against her" was held to be contempt. In — 'William Thomas Shipping Co., In re', (1930) 99 L J Ch 560 at p. 564 (E), Lord Maugham summed up the law as follows:

"I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason."

(11) There are several Indian decisions which follow the aforesaid rule. I may refer to — 'Sathappa Chettiar v. Ramachandra', AIR 1932 Mad 26 (F); — 'Bibhabati Devi v. Ramendra', AIR 1939 Cal 672 (SB) (G); — 'Supdt. & Rembr. Legal Affairs Bihar v. Murli Manohar', AIR 1941 Pat 185 (H) and — 'Emperor v. Khushal Chand', AIR 1945 Lah 260 (I).

(12) But it should be observed that authorities have sounded a note of caution against undue straining of the law of contempt. As early as 1889 in — 'Hunt v. Clarke', (1889) 58 L J Q B 480 (J), it was pointed out that the Court would not exercise its extraordinary power of committal for contempt if the offence complained of is of a slight or trifling nature, but only if it is likely to cause 'substantial' prejudice to the parties to the action. This was followed in — 'Queen v. Payne and Cooper', (1896) 1 QBD 577 (K). In India also in — 'Anantalal Singh v. Alfred Henery Watson', AIR 1931 Cal 257 (L), the same view was held and in a recent decision of the Supreme Court reported in — 'Rizwan-Ul-Hasan v. State of Uttar Pradesh', AIR 1953 SC 185 (M), the same aspect was emphasised in the following words:

"The jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice."

(13) Where a pending case in respect of which contempt is alleged to have been committed is a case of defamation and the person alleged to have been defamed is a politician, other important questions also arise for consideration. Article 19(1)(a) of the Constitution guarantees freedom of speech and the Press should have freedom to criticise the activities of public men belonging to one party or the other. Not infrequently a politician who does not want his public activities to be exposed may institute a criminal case of defamation in respect of an article appearing against him in a newspaper and then resort to the law of contempt for the purpose of gagging all hostile comments on his other public activities, while keeping the defamation case pending as long as possible. Hence, though any attempt of trial by the Press of a pending case should be sternly put down by enforcing the law of contempt, in appropriate cases the said law should not be so strained as to materially affect the freedom of speech of newspapers. A line has to be drawn between the law of contempt on the one hand and the freedom of speech of the newspapers on the other. Where an article is published with the 'intention' of prejudicing the fair trial of a pending case, there can be no hesitation in applying the law of contempt against the offending newspaper. But where such intention is absent and the Court is asked to infer that the article has a 'tendency to prejudice the fair trial of a pending case many other considerations should also be carefully weighed.

This question came up for consideration in — 'Rex v. Blumenfeld', (1912) 28 T L R 308 at p. 310 (N). There one Captain Tupper who claimed to be a public worker brought a libellous action against the 'Daily Express' in respect of certain articles which appeared in the same and the editorial comments thereon. After the commencement of the action the 'Daily Express' published another article derogatory to his character and described him as a mere 'soldier of fortune'. The second article doubtless did not deal with the merits of the case but it had undoubtedly a tendency to affect the quantum of damages in the libellous action. Justice Phillimore observed:

"Of course, there were limits to the right of free speech, and no doubt articles or statements made near the time of the trial, especially on the eve of the trial or made at a place near in point of locality, were calculated to create an atmosphere unfavourable to one of the parties by deterring witnesses from coming forward and speaking their minds freely or by warning the minds of the jurymen, and these should be deemed an interference with the course of justice, and should be restrained by the wholesome exercise of the jurisdiction of the Court. But it was quite another thing to say that a man could procure himself protection for life from the exposure of his character by the issue of a writ."

His Lordship then stated:

"Where the defendant swore he was going to justify the words of the alleged libel the Court would not grant a rule in a case of this kind unless it saw that the justification was an idle one and not genuine. Here the defendants had averred that they were prepared to justify at the risk of the damages against them being thereby inflamed, and that they were solvent and able to pay damages. Of course, that did not necessarily touch upon the question of the interference with a fair trial. The Court had to reconcile two things — namely, the right of free speech and the public advantage that a knave should be exposed, and the right of an

individual suitor to have his case fairly tried. The only way in which the Court could save both was to refuse an unlimited extension of either right. It became, then, a question of degree."

His Lordship further stated while referring to the plaintiff:

"While he was a public man he was the subject of public comment; he must retire into private life; as long as he remained what he was he could not complain of comment which would be made at the risk of paying damages."

In — 'Rex v. Editor of the Daily Mail', (1928) 44 T L R 303 (O), the same subject was fully discussed and it was observed by the Lord Chief Justice:

"A publication made with the clear intention of prejudicing the fair trial of an issue pending before a Court was obviously a contempt of Court, and would be punished as such. But where the Court was satisfied that there was no such intention, and yet the publication was one which might conceivably prejudice a pending trial, the circumstances of the particular case must be taken into account. The nature of the proceedings which were pending, the conduct of the parties, the time, the manner, and the locality of the publication in relation to the time, the mode, and the locality of the trial had all to be considered and the Court must be satisfied that a case for its "arbitrary and summary interference" had been made out."

These observations apply with great force in the present case inasmuch as the political activities of Sri Bijayananda Patnaik are closely connected with his industrial ventures. In the articles alleged to be defamatory there is a clear suggestion that it was by virtue of his position as a Congress member of the Assembly and his friendship with Sri Harekrushna Mahatab that he was able to obtain permits for controlled commodities and make profits by selling the same and also to persuade the Government to finance several of his companies.

The 'KRUSHAK', in reply to the registered notice of Sri Bijayananda Patnaik, had stated that the publications were made in public interest and that it would be able to substantiate the same in Court. An anti-Congress paper is undoubtedly entitled, in exercise of the right of freedom of speech, to carry on its agitation against what it considers to be the undesirable activities of a Congress member subject of course to the right of the aggrieved person to seek redress against the paper in the Criminal Court or Civil Court if the articles offended the law of defamation. But where a paper asserts that what it has said in a previous publication is true and that it was made in public interest and is ready to justify its action in the Criminal Court it will not be proper to use the law of contempt to stifle all criticisms of the activities on the ground that the previous publication was intended to prejudice the fair trial of the case or else that it has substantially such a tendency.

In this connection the unexplained delay of nearly two months in bringing the Criminal case of defamation against 'MATRUBHUMI' cannot be wholly ignored. The defamatory article appeared on 17-6-1952 and Sri Bijayananda Patnaik's criminal complaint for defamation against the paper was made only on the 21st August. In the mean time, several other articles had appeared both in 'KRUSHAK' and 'MATRUBHUMI' not only against his activities but also against those of Sri Harekrushna Mahatab. It was strenuously contended by Mr. A. Das on behalf of the newspapers that the criminal cases of defamation were not bona fide but that they were instituted with a view to gag the mouth of the anti-Congress papers against exposure of activities of some of the Congressmen of Orissa by threat of initiating proceedings for contempt of Court when they found that their activities were likely to be fully exposed.

I do not wish to say anything definite in respect of this argument inasmuch as it might affect the fair trial of the defamation cases now pending in the Court of a Magistrate at Cuttack. But the absence of any explanation for the delay in instituting the defamation cases is a factor which cannot be ignored in considering whether one of the objects, if not the main object, of instituting the defamation cases, was to stifle hostile criticism in respect of the other public activities of Sri Bijayananda Patnaik under threat of contempt of Court.

(14) Bearing in mind the aforesaid principles the following two questions have to be considered while scrutinising the offending articles:

(i) Do they indicate a clear intention of prejudicing a fair trial of the defamation case?

or else,

(ii) Do they have a tendency to so prejudice that trial?

If there is no intention to prejudice a fair trial the various other circumstances fully dealt with in the judgment of Lord Chief Justice in — '(1928 44 T L R 303 (O)' have to be taken into account in deciding whether:

(a) there was, in fact, contempt and

(b) whether it was technical or real and substantial.

(15) I shall now discuss each of the offending articles in turn.

(16) 'KRUSHAK' 1st article. — This appeared on 15-8-1952 after the receipt of the notice from Sri Bijayananda Patnaik but prior to the filing of his complaint. It gives full information about various other permits said to have been given to Sri Bijayananda Patnaik by the Government of India and the investigation that was conducted by the Central Police Department. I do not think that there was any intention to prejudice the trial of the defamation case which was then imminent nor can it be reasonably held that there was such a tendency. The newspaper was entitled to expose what it considered to be the undesirable activities of Sri Bijayananda Patnaik subject of course to the penalties which it was willing to incur under the law of defamation if the allegations were found to be untrue.

(17) 'KRUSHAK' '2nd article' — This is a general article about the sacrifice of the interests of Orissa in Hirakund construction. There is also a reference to a company started by Sri Bijayananda Patnaik which managed to secure contracts for sixty or seventy lakhs of rupees at Hirakund for construction work and transferred them to a Madras firm. In the articles of 'Krushak' which were subject-matter of the defamation case there was no mention at all of the activities of Sri Bijayananda Patnaik in Hirakund construction. Consequently, this article of the 29th August could not, in any way, prejudice the trial of any fact in issue in the defamation case.

Doubtless, if the allegations in this case are false it may prejudice the activities of Sri Bijayananda Patnaik in the eyes of the public. But

as he is a public worker and a member of the Assembly, newspapers are entitled to criticise his other activities at the risk of paying damages if the articles were found to be defamatory. The observations of Justice Phillimore distinguished in — '(1912) 28 T L R 308 (N)' are quite apposite in this connection.

(18) 'KRUSHAK' '3rd article'. — This article contains the statement of Sri Sarangadhar Das, a member of Parliament from Orissa and leader of the Socialist-Praja Party in the Parliament. Any statement from him would necessarily carry great weight not only with the general public but also with the Court which may have to hear the defamation case. In his statement he clearly stated that the Government of Orissa gave large sums of money to Sri Bijayananda Patnaik for starting various industries in Orissa and he commended 'Krushak' for having brought to light all secret matters (bhitiri katha) relating to that subject. He also stated that the chief interest of 'Krushak' was the interest of public. He further added

> " 'Krushak' had done its duty by presenting the true facts (hak katha) before the public on minutely scrutinising the subject-matter and by sacrificing the wishes and interests of the favourites."

The other portions of the article contain a severe attack on the administration of the Congress Government in Orissa and are not very relevant for our purpose. The statement ends with a request for appointment of a Judicial Committee to enquire into the activities of some of the leading Congressmen of Orissa. One of the main points for consideration by the trying Magistrate in the defamation case is whether the facts stated in the articles in 'Krushak' dated 18-7-1952 and 25-7-1952 dealing with the allegations against Sri Bijayananda Patnaik are true or not. Thus when this question is subjudice a statement by such a responsible member of the Parliament as Sri Sarangadhar Das who is leader of the Socialist-Praja Party to the effect that 'Krushak' had rendered service to the public by bringing out to broad day light the most secret matters is bound to carry great weight with the public who read the statement. There is no indication that Sri Sarangadhar Das was aware of the fact that a defamation case had been instituted against 'Krushak' by Sri Bijayananda Patnaik. But the editor, printer and publisher of that paper were fully aware of the same. While publishing the statement of Sri Sarangadhar Das the editor stated that Sarangadhar Das was congratulating 'Krushak' for disclosing true facts (hak katha).

Doubtless the primary 'intention' in publishing this statement appears to be to agitate for appointment of a Judicial Committee to enquire into the activities of certain Congressmen including Sri Harekrushna Mahatab and Sri Bijayananda Patnaik and not to prejudice the fair trial of the defamation cases. But the 'tendency' to prejudice the trial is fairly inferable bearing in mind the political importance of Sri Sarangadhar Das & the assertion that 'Krushak' had published true facts. I would, therefore, hold that this article amounts to contempt of Court.

(19) 'Krushak'. '4th article'. — This article contains a statement from one Banka Beheri Das, Secretary of the Socialist Party of Orissa about the defamation cases filed against 'Matrubhumi' and 'Krushak'. There is nothing in it to which exception can be taken. The writer carefully avoided discussion of the merits of the case by saying that they were sub judice and that the Court would ascertain the truth. He just appealed to the public and the newspapers of Orissa to help in revealing all the facts before the Court. A general appeal of this type without in any way touching the merits of the case would not amount to contempt, see — 'In re, New Gold Coast Exploration, (1901) 1 Ch. 860 (P)', following — 'Plating Co. v. Farquharson', (1881) 17 Ch. D. 49 (Q).

(20) 'Krushak'. '6th article'. — This is an article about the defamation case filed against 'Krushak' by Sri Bijayananda Patnaik. The writer is careful enough not to say that the alleged defamatory article contained a true statement of facts, though he attempted to show that the 'Krushak' is being victimised by the people in charge of the administration of Orissa. There is a general appeal for funds for defending 'Krushak' in that litigation. This article also will not amount to contempt for the reasons given in para 19 dealing with the fourth article.

(22) 'Krushak'. '7th article'. — This is an appeal by Sri Surendranath Dwibedi, a member of Parliament and a prominent leader of the Socialist Party of Orissa. Though it is a general appeal for funds for defending 'Krushak' in the defamation case there are clear statements to the effect that the alleged defamatory article published by 'Krushak' contained a true statement of facts. The following passage is of special significance.

> "Krushak is the paper of the public. Its duty is to publish the public opinion strongly without any fear. Failing which there is no need of Krushak. Hence Krushak is publishing regularly all the flaws and injustices done in the Government sphere and general sphere. The capitalists and the party in power are trembling due to this. Their secret becomes out. Source of exploitation is being choked. They have not got the courage to say that the items published in the Krushak are false. XX XX XX XX the editor and publisher of Krushak will give its proper reply. It is not a big thing either to win or lose a case. 'They are ready to make any sacrifice for truth, X X X The readers of Krushak should show that the support of the people that stands behind Krushak can smash the pride of all the injustices of the country."

This statement seems to pre-judge one of the main points for decision by the trying Magistrate in the defamation case. It asserts vehemently that Krushak was ready to sacrifice anything for truth and that its accusers have not the courage to say that the items published in the Krushak were false and that it published the flaws and injustices not only of the Government but of the capitalists. The statement opens with a reference to the case against 'Krushak' and in the context the "capitalists" referred to can be none else but Sri Bijayananda Patnaik and his friends. The expression 'political life though vice and corruption' also in the context seems to refer to him and his group. Doubtless, in this article an 'intention' to pre-judge the trial cannot be fairly inferred because primarily it is an appeal for funds for 'Krushak' which was described as a martyr for a noble cause. But the 'tendency' to prejudice the fair trial of the pending case is apparent bearing in mind the important position of Sri Surendra Nath Dwibedi as a leader of the Socialist Party of Orissa. I would hold that this article amounts to contempt.

(23) 'Matrubhumi'. '1st article'. — This article is too general. It was published before the defamation case was instituted. It will be too far-fetched to say that the article refers to Sri Bijayananda Patnaik.

(24) 'Matrubhumi'. 2nd article'. — This article cannot amount to contempt. It refers merely to the enquiries made by the Central C. I. D. and what further action the Government of India was likely to take on the basis of those enquiries. There is nothing in it either about the impending case of defamation or about the truth or otherwise of the allegations made in the defamatory article dated 17-6-1952.

(25) 'Matrubhumi'. '3rd article'. — This article is only a summary of the affidavits sworn by Sri Bijayananda Patnaik in the defamation case. It has no tendency to prejudice the fair trial of that case.

(26) 'Matrubhumi'. '4th article'. — This article is under the caption 'People to reply'. It is of a general nature explaining the aims and objects of 'Matrubhumi' and how it was all along drawing the attention of the public to the drawbacks in the administration without any party affiliation. There is no reference to the defamation case brought by Sri Bijayananda Patnaik either expressly or by implication. In my opinion, this article would not amount to contempt.

(27) 'Matrubhumi'. '5th article'. — This article is under the caption 'Vigilant populace to respond'. It contains the statement of Sri Banka Behari Das, Secretary of the Orissa Socialist Party. I have discussed this statement while discussing the case against Krushak in which paper also the same article appeared. This article does not amount to contempt.

(28) 'Matrubhumi', '6th article'. — This article is under the heading 'Matrubhumi will remain unperturbed'. Service of countrymen is its ultimate aim'. The first sentence in the article refers to more than one law suits filed against Matrubhumi in law Courts. The editor has attempted to justify the publishing of the alleged defamatory articles by saying that he was exposing those who were defaming their mother land. He further states

> "Matrubhumi is determined to endure smilingly the thunderous attacks from any quarters while exposing those people who are polluting the limited present and the vast future of the country and the nation by their preference for their self-interest to the interest of the country".

There is a clear suggestion in this article with special reference to the case brought against 'Matrubhumi' that the paper was merely exposing the misdeeds of certain group of people who in the context would mean none else but the complainant of this case. There is thus an assertion of one of the main facts to be determined during the trial of the defamation case and consequently the article as a whole may amount to contempt.

(29) 'MATRUBHUMI'. '7th article'. — This is an imaginary conversation between a grandfather and his grandson. There is a reference to the fact that persons who have no fame now-a-days think themselves to be defamed. It was printed not in the ordinary columns of the newspaper but in the column headed 'wit and humour'. There may be doubtless difference of opinion as to whether such an imaginary conversation is really 'wit or humour'. But any reader with a sense of humour will not be prejudiced against Sri Bijayananda Patnaik in the defamation case merely by reading this article. In my opinion it does not amount to contempt.

(30) 'MATRUBHUMI'. '8th article'. — This is an article signed by several persons for financing 'Krushak' and 'Matrubhumi' in the litigation launched against them by anti-social forces. There is doubtless a reference to the necessity of newspapers and journalists making a common cause to fight against injustice. But the appeal is of a general nature and I think it will be too far-fetched to say that it asserts as true the very facts which have to be determined by the Court in the defamation case. The contempt, if any, is of extremely technical nature and I would not take any notice of it.

(31) 'MATRUBHUMI'. '9th article'. — This article is primarily directed against the defamation suit brought by Sri Harekrushna Mahatab in the Civil Court against 'Matrubhumi' claiming one lakh of rupees as damages and not against the criminal case of defamation brought by Sri Bijayananda Patnaik. I do not think it will amount to contempt in respect of the latter case.

(32) 'MATRUBHUMI'. '10th article'. — This is also a general appeal by three persons for funds for defending 'Matrubhumi' in civil and criminal cases that had been instituted against it. There is no suggestion in the appeal to the effect that the alleged defamatory articles which appeared in the aforesaid newspapers contained a true statement of facts. Hence this article will not prejudice the fair trial of the defamation cases and consequently will not constitute contempt.

(33) To sum up, therefore, two articles in the 'Krushak' dated 29-8-1952 and 12-9-1952 containing the statements of Sri Sarangadhar Das and Sri S. N. Dwibedi tend to prejudice the fair trial of the defamation case then pending against 'Krushak'. Of all the articles in the 'Matrubhumi' the only article that would constitute contempt is the article dated 8-9-1952. Doubtless, none of these articles either in the 'Krushak' or in the 'Matrubhumi' can be reasonably held to have been written with the intention of prejudicing the fair trial of the two defamation cases. But they undoubtedly have such a tendency. The contempt committed by 'Matrubhumi', however, is less grave than that committed by 'Krushak' inasmuch as the offending article did not purport to have been written by prominent Socialist leaders so as to carry any extra weight. I do not think that either the public or the law Courts will be materially influenced by the article dated 8-9-1952 which appeared in 'Matrubhumi'. But the two offending articles in 'Krushak' might have a serious effect in view of the fact that Sri Sarangadhar Das and Sri Surendra Nath Dwibedi being members of the Parliament, their statements suggesting that the defamatory articles contained a true statement of facts might affect the decision of the trying Magistrate.

But it should also be remembered that the contempt was committed at a time when the cases were in their initial stages. Processes had just been issued against the accused persons and nobody knew at that time when the cases would come up for trial.

We were informed at the Bar that though more than one year and four months have elapsed since the institution of the two defamation cases the trial is still in the initial stages in the Court of a Magistrate at Cuttack. The undue pendency of criminal cases in the files of Magistrates at Cuttack and the frequency of transfers of Magistrates are too notorious to be said that the Magistrate who may eventually try these cases would

have read the offending articles which appeared in August and September, 1952 and would approach the cases with a prejudiced mind. Doubtless, the tendency to deter witnesses from coming forward and speaking on behalf of the complainant is, to some extent, present. But considerable time must elapse before they give evidence and it is not probable that persons who might have read the offending articles would have clear recollection of them at the time of giving their evidence. On the whole, therefore, though I am loathe to characterise the contempt committed by 'Krushak' as very technical I would not take a very serious view of the offence.

(34) I would, therefore, while making the rule absolute against the editor, printer and publisher of 'Matrubhumi' direct that no punishment need be imposed on them but that they should jointly pay Rs. 50/- as costs to petitioner Sri Bijayananda Patnaik. Similarly, no punishment need be imposed on the editor, printer and publisher of 'Krushak' but they should jointly pay Rs. 100/- as costs to petitioner Sri Bijayananda Patnaik. In addition to the aforesaid costs we would further direct that the editor, printer and publisher of the 'Krushak' should jointly pay the costs incurred by Sri Bijayananda Patnaik in publishing the requisite notices in the Press regarding Sri Sarangadhar Das and Sri S. N. Dwibedi.

(35) MOHAPATRA, J.: I agree.

A/D.R.R. Order accordingly.

A.I.R. 1954 ORISSA 163 (Vol. 41, C.N. 48)

NARASIMHAM AND MOHANTY JJ.

State of Orissa v. Banshi Nayak, (Accused) Respondent.

Govt. Appeal No. 1 of 1953, D/- 20-1-1954, against judgment of Addl. Sessions J., Cuttack, D/- 22-8-1952.

Criminal P. C. (1898), S. 288 — Corroboration of evidence admitted under — Evidence Act (1872), Ss. 3 and 1 — AIR 1925 Pat 51, Dissented from.

Independent corroboration of evidence admitted under S. 288, Criminal P. C. is not always necessary. It should be treated as substantive evidence for all purposes without limitation. All that the trial court should see is what weight and credit should be given to that evidence when the witness has made various statements at different stages of the hearing. If the Court believes in view of the circumstances of the case that it is reliable and true, there is no bar to his acting upon that evidence and convicting the accused. Such an evidence is as much an evidence in the case as depositions of other witnesses in the trial Court. It is for the Court to accept it or not just as the depositions of other witnesses. Section 288, Criminal P. C. does not lay down that there should be an independent corroboration of that statement so that the Courts should act upon it.

The credit to be given to the statement of witnesses is a matter not regulated by the rules of procedure. When evidence is substantive evidence without limitation, the only test that has to be applied is that laid down by S. 3, Evidence Act.

No doubt, some amount of evidence either direct or circumstantial is necessary for the purpose of enabling the Court to determine what credit should be given to such evidence of an witness; for, as the witness makes different statements, the evidence should be taken with caution. But it should not always be independent. It should either be corroborated or there must be special reasons for believing it. (Para 9)

Per Narasimham J.: The position ot an accomplice differs fundamentally from that of a witness who contradicts himself on two different occasions. An accomplice's testimony suffers from the initial taint arising out of his participation in the crime; whereas the statement of an ordinary witness does not suffer from any such taint whatsoever. It is true that rule of prudence may require corroboration where a witness has proved himself to be unreliable by making two different statements on oath on two occasions. But the question as to which of the two statements should be preferred depends on other factors and the fact that at the earliest possible opportunity he made a statement which is substantially in agreement with one of his depositions in Court may amount to adequate corroboration of that deposition. (Para 14)

Held, in the circumstances of the case that the statement of P. W. 1 made under S. 164, Criminal P. C. should legally corroborate her subsequent statement recorded before the committing Magistrate. AIR 1925 Pat 51, Dissented from. AIR 1949 PC 257, Distinguished and explained. AIR 1934 Cal 124; AIR 1940 Nag 340; AIR 1946 Lah 380; AIR 1940 Pat 289, Foll.

Anno: Criminal P. C., S. 288 N. 7.

1949 Mitra: S. 288, P. 910, N. 899 "Subject .... Act" (4 Pts. extra in N. 7 to S. 288 in AIR Com.).

Criminal P. C., S. 288 N. 8.

1949 Mitra: S 288 (Topic discussed in N. 8 to S. 288 in AIR Com. extra).

Evidence Act, S. 3 N. 5, 6; S. 1 N. 9, 12.

Asst. Govt. Advocate, for the State; K. Y. Swain, for Respondent.

CASES REFERRED: Paras

(A) (V21) AIR 1934 Cal 124: 35 Cri LJ 567 — 9
(B) (V27) AIR 1940 Nag 340: 42 Cri LJ 17 — 9
(C) (V33) AIR 1946 Lah 380: 47 Cri LJ 980 — 9
(D) (V27) AIR 1940 Pat 289: 41 Cri LJ 910 — 9
(E) (V36) AIR 1949 PC 257: 50 Cri LJ 872 (PC) — 9, 13
(F) (V12) AIR 1925 Pat 51: 26 Cri LJ 270 — 9
(G) (V10) AIR 1923 Mad 20: 45 Mad 766: 24 Cri LJ 417 — 9
(H) (V39) AIR 1952 SC 52: 1952 SCJ 32: 1952 Cri LJ 331 (SC) — 13

MOHANTY J.:

This is an appeal by Government from the order of the Additional Sessions Judge, Cuttack, acquitting the accused Banshi Naik of the charge under Section 302, I. P. C.

(2) Banshi was a resident of Keonjhar State. The deceased (Tinka Dei) was a resident of Sukinda. She had a house belonging to her brother at Sukinda. Tinka was caste female of the accused. She went to Keonjhar and remained there for about three years as the concubine of the accused. About three years back both the accused and Tinka went away to Sukinda where they stayed in the house belonging to the brother of Tinka. Sometime thereafter the wife and children of the accused came away from Keonjhar and stayed in the same house at Sukinda.

Thereafter Tinka left the house at Sukinda for some unknown destination and stayed out for some six months. She then returned to Sukinda with an illicit pregnancy. However, in spite of the objection of the caste people, the accused took her back to the house; and it is why the accused was ex-communicated from the caste. However, both the accused and Tinka lived peacefully for about two months. But on 24-12-1951 Tinka was found dead in the room of the accused with fatal antemortem injuries on her head caused with a heavy blow.

The postmortem report (Ext. 1) and the evidence of the doctor (P. W. 2) show that there were six injuries on her head, one of which was that her skull-bone had been fractured into five pieces, with fragments of the bone pressing the brain substance and the brain substance coming out. According to the doctor this injury could have been caused with the blunt side of a Barsi and the injury so caused was, in the ordinary course, sufficient to cause death.

(3) It is alleged that on the date of her death, the accused and his two sons who are minors went out to the thrashing floor in the morning; but the accused came home at about noon and picked up quarrel with Tinka, because she did not obey him and refused to serve his meal. In the course of the quarrel, Tinka expressed some teasing words to the effect that though she had become illegally pregnant, she would put the child to be the issue of the accused. At this stage the accused gave a blow to Tinka on her head with a Barsi which partly smashed her head. She fell down dead.

(4) It is further alleged that the village Chowkidar (P. W. 3) on coming to know of the incident went to Thana and lodged the first information report in the Thana, situate in that very village. The accused himself was found at the Thana when the F. I. R. was being drawn up and was arrested there.

(5) The accused all along pleaded not guilty to the charge.

(6) The only witness against the accused was his wife Kali Dei (P. W. 1). About four days after the occurrence, she made a statement before a Magistrate (P. W. 10) under S. 164, Criminal P. C. implicating her husband to be the murderer of Tinka. She was examined in the committing Court where she has made a similar statement. In the trial Court she resiled from her former statements denying to have made any statement before the committing Magistrate, implicating her husband, but saying that she was compelled by threat of the Choukidar and the police to make a statement before the Magistrate under S. 164, Criminal P. C.

The learned Sessions Judge has admitted her statement before the Committing Magistrate as evidence under S. 288, Criminal P. C., and having considered all the circumstances as to why she has resiled from her former statement in the trial Court, has given a finding, to the following effect:

> "Apart from these considerations there is adequate room for a motive for her telling a lie in the trial stage. In such a position, I have no doubt to hold that her testimony in the trial stage is unreliable and that her testimony in the committing Court is prima facie of a better worth and more reliable."

(7) Despite this opinion, the trial Court has further proceeded to observe that:

> "Even though her testimony in the committing Court be treated as substantive evidence in law, it does not mean that the court is bound to accept one or other of the two stories advanced by her at different stages, unless there is 'independent corroboration' of her statement before the committing Court."

He has further held that as there is no independent corroboration in this case, so he does not think it proper to act upon her statement in the committing Court. It is on this reasoning that he has acquitted the accused of the charge of murder. It should further be noted that though there is no suggestion of any kind in evidence, he has made an observation to the effect that P. W. 1 might have committed the murder. Against this order of acquittal this appeal has been filed by the Government.

(8) The learned Assistant Government Advocate has urged vehemently that on the very finding of the learned Additional Sessions Judge to the effect that the testimony of P. W. 1 in the trial Court is unreliable and that her testimony in the committing Court is prima facie of better worth and more reliable, the accused should have been convicted by him.

The accused resides with his concubine (the deceased) at Sukinda in the house of her concubine's brother. His family consists of himself, his married wife (P. W. 1), the deceased concubine, two minor sons, one aged 16 or 17 and another aged 15 or 16 and a child daughter. It is in evidence that on the morning of the day of the occurrence, both the accused and his minor sons had gone out to the thrashing floor to work. The occurrence took place on 24-12-1951 a little before 1 P. M. At the time when the occurrence took place, the accused was not in the Khala (thrashing floor). It appears from the evidence of P. W. 1 who is the wife of the accused, that she called her sons on seeing the deceased lying dead in the house, she did not call her husband to come there. It therefore clearly shows that to her knowledge, her husband was not in the thrashing floor.

On hearing the cry of P. W. 1, the chowkidar (P. W. 3) who is their neighbour, and who was passing by that way from the hospital went to her house. Immediately thereafter, he proceeded to the Thana and lodged F. I. R. at about 1 P. M. saying that about 12 noon, there was a quarrel as between the deceased and the accused and that in the course of the quarrel, the accused killed Tinka Dei by striking her on her head with the blunt side of the Barsi. He has further stated therein that on hearing it being a neighbour, he has come to lodge F. I. R. in the police station. But he has not seen the occurrence himself.

P. W. 3 has stated that on being questioned by him inside the house, P. W. 1 narrated the incident in detail and named her husband as the murderer. P. W. 1 has stated in her evidence in the trial court that the Chowkidar (P. W. 3) had on hearing her cry gone to her house. If it is so, it does not seem likely that he being the Chowkidar & her neighbour, would not question her as to who has committed the murder. His evidence does not show from what other source, excepting what was narrated to him by P. W. 1, he has come to know the details about the occurrence. I see no reason why P. W. 3 should be disbelieved.

P. W. 1 named her husband as the culprit immediately after the occurrence. Her statement under S. 164, Criminal P. C. was recorded by a Magistrate (P. W. 10) about four days after the occurrence. Her evidence was taken by the committing Magistrate about four months after the occurrence. In her statement recorded under S. 164, Criminal P. C. and in her evidence before the

committing Magistrate she has named her husband as the culprit.

It is said, that, she, out of fear, when the Chowkidar challenged her to be the culprit, named her husband as the murderer. It is futile to accept it as believable. There is no motive as to why she would connect her husband with the murder immediately after the occurrence, and even before the committing Magistrate. She does not say that at the instance of the police or the Chowkidar she named her husband as the culprit. In such circumstances, I think her statement at the three different stages of the case cannot be ruled out as false, because in order to save herself and her husband, she could, in the ordinary course of events, have named some of his neighbours or some other outsider as the culprit.

The learned Sessions Judge has discussed this point in detail for coming to the conclusion that her statement before the committing Magistrate is prima facie of better worth and more reliable. Moreover, she has sufficient and convincing motive for resiling from her former statement in the trial court — her motive being to save her husband from punishment in the murder case.

There is no suggestion in evidence that she is herself the murderer. She has stated in the trial Court that there was good feeling as between herself and the deceased. We have it from her evidence and also from the evidence of P. W. 3 that she was crying on seeing Tinka dead, and was calling her sons but not her husband. It being so, and in absence of any suggestion that she is the murderer, it cannot be held that she is responsible for the death of the deceased.

Her evidence before the committing Magistrate shows that there was a quarrel between the accused and Tinka at the moment. She did not accompany him to work in the field; and though asked by the accused to follow him, she went out to the village, and ultimately came back to the house. Her 'husband' (the accused) came to the house in the afternoon and asked her why she did not come to work. She gave him a very insolent reply. Her husband asked her to serve him his meal, but she refused. In the course of the quarrel that ensued, he struck her on her head with a Barsi causing her immediate death. This fact has been deposed to by P. W. 1 in the committing court though she has resiled from that statement at the trial stage.

At the time when this occurrence took place, P. W. 1 was taking her meal on the eastern verandah of the house. I see no reason why she should be disbelieved when there is no sufficient reason why she would make a false statement incriminating her husband as the murderer. I entirely agree with the learned Sessions Judge that her statement before the committing Court is reliable and of better worth.

(9) The learned Additional Sessions Judge has not utilised that evidence though admitted under S. 288, Criminal P. C. for the reason that there is no independent corroboration of it. In my view, independent corroboration of it is not always necessary. The evidence admitted under S. 288, Criminal P. C. should be treated as substantive evidence for all purposes without limitation. All that the trial court should see is what weight and credit should be given to that evidence when the witness has made various statements at different stages of the hearing. If the Court believes in view of the circumstances of the case that it is reliable & true, certainly there is no bar to his acting upon that evidence and convicting the accused. Such an evidence is as much an evidence in the case as depositions of other witnesses in the trial court. It is for the Court to accept it or not just as the depositions of other witnesses. Section 288, Criminal P. C. does not lay down that there should be an independent corroboration of that statement so that the Courts should act upon it.

This view has been taken by the Calcutta High Court in the case in — 'Manor Ali v. Emperor', AIR 1934 Cal 124 (A); by the Nagpur High Court in the case in — 'Parmanand Ganga Prasad v. Emperor', AIR 1940 Nag 340 (B); by the Lahore High Court in the case in — 'Shamira Mandu v. Emperor', AIR 1946 Lah 380 (G) and by the Patna High Court in the case reported in — 'Nebti Mandal v. Emperor', AIR 1940 Pat 289 (D). I am in full agreement with the view taken in those cases. As a matter of law corroboration is not required. Such corroboration can be found in the circumstances surrounding the case. The credit to be given to the statement of witnesses is a matter not regulated by the rules of procedure. When evidence is substantive evidence without limitation, the only test that has to be applied is that laid down by S. 3, Evidence Act.

But the learned Sessions Judge relying on the ruling of the Privy Council reported in — 'Bhuboni Sahu v. The King', AIR 1949 PC 257 (E), and on certain observations of the Patna High Court in the case reported in — 'Jehal Teli v. Emperor' AIR 1925 Pat 51 (F), has observed that independent corroboration is absolutely necessary so as to utilise the evidence of witnesses taken in the committing court for the purpose of conviction.

But the observations of the Privy Council cannot apply to the facts of the present case. It is in that case that an approver resiled from his previous statement made by him in the committing court, and the evidence before the committing court was taken into record as substantive evidence under S. 288, Criminal P. C. There was no other evidence except the tainted evidence of the approver made under S. 164, Criminal P. C. to corroborate his statement before the committing Magistrate. Their Lordships have observed in that case that the approver being an accomplice, his evidence from the beginning is tainted one and as such one tainted evidence cannot corroborate another tainted evidence. It is, therefore, that the Privy Council in such cases has insisted that such evidence needs corroboration by independent evidence.

But that is not the case here. Nobody says that P. W. 1 is an accomplice. At least there is no evidence to that effect. Her evidence from the beginning cannot be said to be a tainted one. It being so, her statement before the committing Magistrate can be corroborated by her statement recorded under S. 164, Criminal P. C. and also by the evidence of P. W. 3 to the effect that just after the incident she told him that her husband was the culprit. In such a case her statement under S. 164, Criminal P. C. can legally corroborate her subsequent statements, and for that purpose it has been taken into evidence.

The Calcutta High Court as well as the Nagpur High Court and the Lahore High Court in the cases cited above have taken that view. The Calcutta High Court in the case in —'AIR 1934 Cal 124 (A)', relied upon the decision of the Madras High Court in the case of — 'Vellaiah Kone v. Emperor', AIR 1923 Mad 20 (G) in support of the view that a statement by a witness recorded by a Magistrate under S. 164, Criminal P. C. is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate and from which statement he resiled in the Sessions Court. I am in full agreement with that view.

As regards the subsequent view of the Patna High Court reported in —'AIR 1925 Pat 51 (F)', I would with great respect differ from it that independent corroboration is necessary in such cases as the present one. No doubt, some amount of evidence either direct or circumstantial is necessary for the purpose of enabling the Court to determine what credit should be given to such evidence of a witness. For as she has made different statements, her evidence should be taken with caution. It should not always be independent. It should either be corroborated or there must be special reasons for believing it.

However in the present case, there are reasons for believing the evidence of P. W. 1 made in the committing Court. It being so, and in view of the circumstances which I have already pointed out above, we accept her statement before the committing Court as true and reliable, especially when there is no cogent reason why she would lie against her husband and implicate him as a culprit not only immediately after the occurrence but also at the subsequent stages of the case. Accepting her statement as true and reliable, we hold without hesitation that in course of the quarrel, the accused killed the deceased with a Barsi which has been identified by P. W. 5 as belonging to him (accused) and which was seized on its production by the accused himself and has been proved by the opinion of the Serologist as stained with human blood.

(10) The question that would arise next is whether the accused deserves capital sentence. For about more than five years, the deceased was the concubine of the accused. But a few months before the murder she disappeared and remained untraced. The accused was anxious to get her back and made a search for her, but could not ascertain her whereabouts. About two months before the murder she suddenly appeared and was found to have been illegally pregnant. Notwithstanding it, the accused took her into his house and practically pardoned her for her fault; but on the day of the occurrence, the deceased was very impertinent and gave him a very insolent and insulting reply when he questioned her as to where she had gone out in the morning. Notwithstanding it, the accused wanted her to serve him with his meal, but she refused to do so. There arose a violent quarrel between them and in the course of that quarrel the accused was off his head & with his own Barsi struck her head with its blunt side causing her immediate death. In such circumstances, we consider it proper to award the accused the lesser punishment.

(11) We would, therefore, allow this appeal, set aside the order of acquittal, convict the accused under S. 302, I. P. C. and sentence him to transportation for life.

NARASIMHAM J. :

(12) I agree that the appeal should be allowed and the respondent sentenced to transportation for life.

(13) We are fully conscious of the fact that this is an appeal against acquittal and as emphasised in the recent decision of the Supreme Court in — 'Surajpal Singh v. The State', AIR 1952 SC 52 (H), the finding of a trial Court should not be set aside except for grave and compelling reasons. The case against the respondent rests on the sole testimony of his wife (P. W. 1). In her statement under S. 164, Criminal P. C. recorded four days after the commission of the crime she clearly implicated her husband. In her subsequent deposition before the committing Magistrate (admitted under S. 288, Criminal P. C.) she reiterated the same story. But in her deposition before the Court of Session she completely resiled from her previous statements and tried to exonerate the respondent.

The learned lower Court for good reasons held that her statement before the Court of Session was unreliable and her testimony before the committing Magistrate was prima facie 'of a better worth and more reliable'. Having thus appreciated the facts correctly the learned Sessions Judge thought that in view of the contradictory statements of P. W. 1 on different occasions her evidence was no better than that of an accomplice and that it required independent corroboration. He then relied on — 'AIR 1949 PC 257 (E)', in which their Lordships observed "an accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition". The learned Sessions Judge thought that this principle would apply to the deposition of an unreliable witness such as P. W. 1 and that her earliest statement under S. 164, Criminal P. C. would not amount to independent corroboration of her deposition before the committing Magistrate.

(14) This reasoning of the learned Sessions Judge is not tenable. The position of an accomplice differs fundamentally from that of a witness who contradicts himself on two different occasions. An accomplice's testimony suffers from the initial taint arising out of his participation in the crime; whereas the statement of an ordinary witness does not suffer from any such taint whatsoever. It is true that rule of prudence may require corroboration where a witness has proved himself to be unreliable by making two different statements on oath on two occasions. But the question as to which of the two statements should be preferred depends on other factors and the fact that at the earliest possible opportunity he made a statement which is substantially in agreement with one of his depositions in Court may amount to adequate corroboration of that deposition.

Moreover, the close relationship between P. W. 1 and the respondent and the probability that while deposing before the Court of Session P. W. 1 might have been induced to resile from her previous statements with a view to save her husband cannot be overlooked. On the other hand, when she first made the statement under S. 164, Criminal P. C. there was hardly any reason for her to falsely implicate her husband.

(15) Apart from the statement under S. 164, Criminal P. C. there is also the evidence of the Choukidar Kasi Naik (P. W. 3) to the effect that when he went to the spot on hearing the alarm P. W. 1 made a statement before him which clearly incriminated her husband. There was thus hardly any time for her for concocting a false case.

When the Choukidar at once ran to the police station to lodge information he saw the respondent also going that side. Thus the presence of the respondent near about the place of occurrence immediately after the commission of the crime is proved by the Choukidar and there is thus some corroboration of the evidence of P. W. 1. The respondent's conduct in going straightaway to the police station is also significant. If somebody else had committed the murder of his concubine, one would expect him to raise an alarm, inform the Choukidar about what had happened and then accompany him to the thana.

On the other hand, the Choukidar's evidence shows that when he went to the house of the respondent and learnt from the latter's wife (P. W. 1) about the circumstances under which the woman

was murdered the respondent did not meet him. But when the Choukidar proceeded to the thana the respondent also accompanied him to the place. Doubtless, the statement made by the respondent at the police station is inadmissible; but his conduct as deposed to by the Choukidar is inconsistent with his being innocent of the crime.

(16) The alternative theory that P. W. 1 herself might have murdered the woman is hardly believable. Even the learned Sessions Judge himself was constrained to say that "it is a very remote contingency". It will be fantastic to say that P. W. 1 who seems to be a simple village labourer would be so diabolical as to murder her husband's concubine and immediately afterwards raise an alarm falsely accusing her husband of having committed the crime.

(17) In the special circumstances of the case, therefore, we think that the grounds on which the learned Sessions Judge had rejected the statement of P. W. 1 before the committing Magistrate (though it was admitted as substantive evidence under S. 288, Criminal P. C.) are based on a misconception of law and that his view on facts that that deposition is prima facie "of a better worth and more reliable" should be preferred. This is one of those exceptional cases where we would be justified in interfering with the order of acquittal.

A/H.G.P. Appeal allowed.

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NARASIMHAM AND MOHANTY JJ.

The State v. V. Adilakshmi Amma and others, Opposite Party.

Original Criminal Misc. Case No. 7 of 1951, D/- 15-2-1954; on the report of Sub. J.; Berhampur; D/- 27-11-1951.

(a) Contempt of Courts Act (1926), S. 1 — Territorial jurisdiction of High Court — (Contempt of Courts Act (1952), S. 5) — (Government of India Act (1935), S. 220) — (Constitution of India, Art. 215).

Even prior to the passing of the Contempt of Courts Act 1952 every High Court had jurisdiction to commit a person for contempt even though the act alleged was committed outside its territorial jurisdiction. There was no express provision either in the Contempt of Courts Act, 1926 or in S. 220, Government of India Act, or in Art. 215 of the Constitution barring such ex-territorial jurisdiction. The Contempt of Courts Act, 1952, was enacted by way of clarification and not as creating a new type of jurisdiction which did not exist from before. 53 Cal W. N. 310, AIR 1934 Bom 452, AIR 1944 Bom 127 Rel. on; Observations in AIR 1934 Mad 423 held obiter. (Para 10)

Anno: C. C. Act, S. 1 N. 1, 2.

(b) Constitution of India, Art. 215 — Civil contempt and Criminal contempt — (Contempt of Courts Act (1952), S. 3.

Words or acts which obstruct or tend to obstruct administration of justice would always amount to criminal contempt inasmuch as they offend the majesty of law whereas contempt of procedure consisting of unintentional disobedience of Orders, processes of the Court and involving a private injury are classified as Civil contempts. Refusal by a party to deliver possession to a Receiver would also amount to criminal contempt provided that the party was aware of the appointment of the Receiver and after being called upon by him to deliver possession did not do so. AIR 1934 Bom 452 Rel. on. (Para 8)

(c) Constitution of India, Art. 215 — Contempt of Court — What amounts to — (Contempt of Courts Act (1952), S. 3).

It is true that under ordinary circumstances mere intention or preparation to resist taking of possession by the Receiver may not suffice for Contempt of Court. But in view of the facts and circumstances of the case a formal demand by the Receiver to the persons to give up possession of the property was not necessary and they by their conduct made it absolutely clear that he would be resisted by force if he made any attempt to take possession. AIR 1933 All 759 Rel. on. (Para 16)

(d) Constitution of India, Art. 215 — Apology — (Contempt of Courts Act (1952), S. 4).

Unconditional apology — Substantive sentence of imprisonment held not called for — Only fine imposed. (Para 17)

Asst. Govt. Advocate and P. V. B. Rao, for the State; H. Mohapatra and K. S. R. Murty, for Opposite Party.

CASES REFERRED: Paras

(A) (V21) AIR 1934 Bom 452: 59 Bom 10 — 7, 8
(B) ('49) 53 Cal W. N. 310 — 7, 10
(C) (V31) AIR 1944 Bom 127: 45 Cri LJ 647 — 7
(D) (V21) AIR 1934 Mad 423 :57 Mad 831: 35 Cri LJ 962 — 7
(E) ('37) ILR (1937) 1 Cal 345 — 9
(F) (V20) AIR 1933 All 759: 60 Cal 856 — 16

NARASIMHAM, J.:

This is a proceeding for contempt of Court initiated on the report of the Subordinate Judge of Berhampur who alleged that the three members of the opposite party committed contempt of his Court by resisting a Receiver appointed by him (Sri Dinabandhu Das) in Title Suit No. 29 of 1951 in taking possession and managing some of the property involved in that suit situated in Village Pundi and its vicinity.

(2) Opposite Party No. 1 V. Adilakshmi is the wife of opposite party No. 2 V. V. Rama Rao and opposite party No. 3 V. V. Venkateswara Rao is their second son. The father of V. V. Rama Rao was one V. Kameswar Rao who was a rich influential & highly respected man of his time. He died sometime in 1949 leaving considerable immovable property situate partly in Orissa State and partly in village Pundi and other villages in Vizagapatnam district of Madras State. He left a second son named V. B. Narayan Rao and a widow named V. Mahalakshmi Amma.

The said lady instituted Title Suit No. 29/51 in the Court of the Subordinate Judge, Berhampur, claiming recovery of possession of certain property inclusive of the residential house of the family situate at Pundi, two mills and other property there alleging that these were her exclusive properties having been bequeathed to her by a Will executed by her deceased husband Kameswar Rao. In that suit she impleaded as defendants her two sons, namely, V. V. Rama Rao (defendant no. 1) and V. B. Narayan Rao (defendant no. 4) and the two major sons of V. V. Rama Rao known as V. V. Kameswar Rao (defendant no. 2) and V. Venkateswara Rao (defendant no. 3).

On 9-5-1951 the learned Subordinate Judge appointed an Advocate of Berhampur named Sri Dinabandhu Das as interim Receiver in respect of the suit property and directed him to take pos-

session of all the property including the residential house of the family at Pundi which was then in the occupation of the plaintiff's two sons, namely, V. V. Rama Rao and V. B. Narayan Rao. In pursuance of this order the Receiver went to village Pundi on 11-5-1951 accompanied by another Advocate of Berhampur named C. V. Suryanarayana (who appeared for the plaintiff) and took possession of certain mango topes and some landed property. There were two mills, one of which was a big rice and groundnut mill which had been sealed by the Civil Supplies Department of Madras. The other mill was a small one known as Homehuller and Salt-crusher mill which was found to be locked up by V. V. Rama Rao.

Neither he nor his elder sons were in the village and consequently the Receiver was unable to take possession of this mill. The Receiver however put his own seal and lock on the door of the mill and left a notice with a younger son of V. V. Rama Rao not to interfere with the seal of that mill. The Receiver however apprehended that serious breach of peace might arise in his administering the property and in his first report dated 12-5-1951 (Ex. 5) he requested the Court (Subordinate Judge of Berhampur) to arrange for police help.

On 19-5-1951 V. V. Rama Rao filed a revision petition (C. R. no. 121/51) before this Court against the order of the Subordinate Judge appointing an interim Receiver. An interim order was issued by this Court staying the hands of the Receiver. But on 29-5-1951 the then Vacation Judge passed a consent order vacating the interim stay order and directing the Receiver to proceed with the administration of the suit property except the residential house at Pundi regarding which he directed that possession of defendants 1 and 4 should not be disturbed. This order was passed in the presence of the parties and also of the Receiver Sri Dinabandhu Das who was present at Puri on that date.

The Receiver again went to village Pundi on 2-6-1951 anticipating that in view of the consent order passed by the High Court there would be no difficulty in his taking possession of all the suit properties except of course the residential house at Pundi. He had also given intimation to the Taluk Supplies Officer at Tekkali to remove the seals from the rice and groundnut mill so as to enable him to take possession of the mill. On the 2nd June when he went to Pundi neither V. V. Rama Rao nor his two major sons V. Kameswar Rao and V. Venkateswar Rao appeared before him. But V. V. Rama Rao's wife V. Adilakshmi (Opposite party no. 1) handed over to him a petition written in Telugu and further stated that her minor son Govinda Rajulu had also a share in the ancestral property, that he had not been impleaded as a party and that she as his guardian would not allow him to take possession of the suit property.

She also stated to him that any attempt on his part to take possession would be resisted. The Receiver attempted to pacify the lady by saying that he was merely an officer of the Court and was bound to execute its order and that she should seek redress before the Court and not before him. At about 2 p. m. the Taluk Magistrate and the Taluk Supplies Officer of Tekkali also arrived there. In the meantime a mob began to collect near the ancestral house of the family and these officers as well as the Receiver apprehended that physical resistance may be offered if they attempted to take possession of the two mills. The Receiver thereupon sought the help of the Subdivisional Magistrate of Srikakulam who was then at Tekkali.

The latter passed an order (Ex. 12-b) directing the Station House Officer of Kasibugga to take action to prevent breach of peace. Armed with this order the Receiver approached the Police Circle Inspector at Palasa and the latter also promised to arrange for police help. On 3-6-1951 the Receiver again went to village Pundi at about 11.30 a. m. accompanied by Sri C. V. Suryanarayana, Advocate for the plaintiff. They found that a huge crowd had collected near the residential house of the family. At about 1 p. m. under some pretext Advocate Suryanarayana was roughly handled by the mob, thrown on the ground and mercilessly assaulted with fists and causing some bleeding injuries. His pair of spectacles was lost in the melee.

The Receiver was then sitting in another room of the house and therefore did not see the actual assault on Advocate Suryanarayana; but when an alarm was raised he deputed certain persons to rescue the Advocate and afterwards learnt from him the circumstances under which he was beaten by the mob. The ring-leader of the mob was said to be one Dokkari Baligadu a staunch partisan of defendant no. 1. It was also alleged that while Advocate C. V. Suryanarayana was being assaulted Adilakshmi and V. Venkateswar Rao were standing on the terrace of their house and watching the incident. The Receiver noticed a bundle of bamboo-sticks (about twenty or so in number) being removed from the northern wing of the house which was then in occupation of V. V. Rama Rao.

The Receiver was then staying in a room of the family house which was then in the occupation of defendant no. 4 Narayan Rao. The assault on the Advocate unnerved the Receiver and he did not venture to come out of the house to take possession of the two mills, though they were not far away from the residential house of the family. At about 5.30 p. m. some police force also arrived at Pundi. But it had no deterrent effect inasmuch as Adilakshmi, her minor son and daughters and V. Venkateswar Rao at once proceeded towards the precincts of the mills to offer resistance as they anticipated that the Receiver may then attempt to take possession of the mills relying on the help of the police.

A mob accompanied them towards the mills. The Receiver therefore thought that discretion was the better part of valour and did not come out of the house to take possession of the mills.

(3) On the next day (4-6-1951), the Receiver sent a frantic message to the Circle Inspector of Kasibugga for help. The latter arrived there soon afterwards, sent for Venkateswar Rao and had some conversation with him. Apparently, he was satisfied with the results of his talk with Venkateswar Rao and did not give further help to the Receiver to take possession of the mills. But Venkateswar Rao challenged the authority of the Receiver to take possession and stated that there would be loss of lives if he made any such attempt. The Circle Inspector refused to give any help to the Receiver and the latter had no other alternative but to return to Berhampur disappointed. He submitted a report dated 30-6-1951 to the Subordinate Judge complaining against the conduct of these persons in obstructing him from taking possession of the mills on the 2nd, 3rd and 4th June, 1951.

(4) For the purpose of this proceeding it is unnecessary to describe in detail the subsequent history of the litigation between the members of the family except to note that the plaintiff died subsequently and the suit is now being fought out between the two brothers, namely, V. V. Rama

Rao and V. B. Narayana Rao. The Receiver had submitted several subsequent reports complaining against defendant no. 1 and his partisans. The Subordinate Judge held a preliminary enquiry into the alleged incidents and after examining the witnesses submitted his report to this Court on 27-11-1951. Contempt proceedings were drawn up against defendant no. 1 V. V. Rama Rao also though he was not seen in the village by the Receiver either on the 2nd or on the 3rd or on the 4th June. His wife Adilakshmi and his younger son V. Venkateswar Rao were also made parties in the contempt proceedings.

The notice issued to them by this Court was as follows:

"Original Criminal Misc. Case no. 7 of 1951.
In the High Court of Judicature, Orissa Cuttack
(Criminal Original Jurisdiction)

Dated Cuttack, 7-12-53.

The State v. Varada Adilakshmi Amma and two others.

NOTICE

To

1. Varada Adilakshmi Amma, wife of Varada Vijaya Rama Rao.
2. Varda Vijaya Rama Rao.
3. Varada Venkateswara Rao.

All of village Pundi R. S., District Srikakulam, Madras.

Whereas on perusal of records and reports submitted by the Subordinate Judge of Berhampur, District — Ganjam, in connection with Civil Revision no. 121/51 of this Court arising out of Title Suit No. 29/51 of the Court of the said Subordinate Judge, it transpires that Sri Dinabandhu Das was appointed as Receiver on 9-5-1951 in Title Suit no. 29/51 between 'Varada Mahalakshmi Amma v. Varada Vijaya Rama Rao and others', and the defendant no. 1 in the said suit did not only represent his own interest but also that of his minor son whose name does not appear specifically on record; that the Receiver was directed by this Court to take possession of all properties in suit after the parties were fully heard in the matter; that in face of the aforesaid order, you resisted the Receiver on 2-6-1951, 3-6-1951 and 4-6-1951 from getting effective possession of the Mills at Pundi and during the course of the resistance, the advocate for the petitioner Mr. C. V. Suryanarayana was badly assaulted on 3-6-1951 and on 5-7-1951, 13-7-1951, 7-11-1951 and 9-11-1951 you also offered resistance to the said Receiver and his staff in due discharge of their duties in respect of the management of the properties specified below in Schedule 'A' which he had already taken possession of and that such actions on your part amount prima facie to contempt of court.

You (1) 'Varada Adilakshmi Amma
(2) Varada Vijaya Rama Rao
(3) Varada Venkateswara Rao

are accordingly called upon to show cause before this Court by appearing personally on 14-12-1953 at 10.30 a. m. why you should not be punished for such contempt of Court.

By order of the High Court
Sd/- A. Misra.
7-12-1953.
Deputy Registrar.

Schedule — A.

List of properties at Pundi R. S. (Govindam) which the Receiver had taken possession of:—

1. Mangom Sapeta, Cashewnut and cassurina topes.
2. Cultivated lands and houses occupied by tenants in the aforesaid village.
3. The Rice and Ground-nut Mill called Shri Kameswara Rice and Ground-nut Mill and another Mill called Salt Crusher and Home-huller Mill."

During the hearing of the contempt proceeding it was conceded by the learned Advocate Mr. P. V. Rao on behalf of the petitioner that the incidents of the 2nd, 3rd and 4th June, 1951 alone need be looked into and that the alleged incidents of July and November, 1951 mentioned in the notice may be ignored. Hence the limited questions for consideration now are:

(1) Whether the acts said to have been committed by the contemners on the 2nd, 3rd and 4th June, 1951 have been established;

and (2) whether they amount to contempt of Court.

These acts refer to the obstructions said to have been offered to the Receiver in taking effective possession of the mills at Pundi which have already been described in the preceding paragraphs of this judgment.

(5) The three members of the opposite party filed a petition tendering unqualified apology for the incidents. But they have not filed any petition giving their own version as to what happened on those dates. But they cross-examined the Receiver and some other witnesses examined on the side of the petitioner.

(6) Mr. H. Mohapatra on behalf of the opposite party raised a preliminary objection challenging the jurisdiction of this Court to commit the members of the opposite party for contempt. His contention was that the alleged acts of contempt were committed in June, 1951 at village Pundi which is situated in Madras State and is therefore outside the territorial jurisdiction of this Court. It is true that by the Contempt of Courts Act of 1952 (Act No. 32 of 1952) express jurisdiction was conferred on the High Court to commit persons for contempt even though the acts might have been committed by them outside the territorial jurisdiction of the High Court.

Mr. Mohapatra urged that under the law of contempt as it stood prior to the passing of the said Act the High Court had no ex-territorial jurisdiction and that it could punish for contempt only if the acts were committed within its jurisdiction. In reply to this argument Mr. P. V. B. Rao urged the following two grounds.

1. The High Court had always ex-territorial jurisdiction and Act 32 of 1952 merely clarified the existing law and did not confer new jurisdiction;
2. In any case, the provisions of Act 32 of 1952 conferring ex-territorial jurisdiction are of a procedural nature and consequently they would apply to all proceedings pending on the date of the commencement of the Act even though the acts might have been committed prior to that date.

(7) I think it unnecessary to discuss the second point raised by Mr. P. V. B. Rao inasmuch as I have no doubt about the correctness of the first point. A careful examination of the case law prior to 1952 fully supports Mr. Rao's argument that High Courts in India had jurisdiction to commit a person for contempt even though the acts amounting to contempt were committed by him outside their territorial jurisdiction. In —'Kilachand Devchand & Co. v. Adjodhyaprasad Sukhanand', AIR 1934 Bom 452 (A) it was held that the Bombay High Court could punish for contempt a

person who interfered with or obstructed a Receiver appointed by the Court even though the obstruction took place at a place known as Debai in the United Provinces (The Province where Debai is situated will be clear from — 'Onkermull v. Padanpat', 53 Cal WN 310 at p. 316 (B) where this case is discussed).

The learned Judges observed that resistance or obstruction to a Receiver appointed by the Court was criminal contempt and not civil contempt and that

> "the possession of this Court whether it is within the limits of its original civil jurisdiction or outside, continues to be the possession of the Court, and therefore any person who attempts to disturb that possession would be liable to account to this Court for his action".

He further observed:

> "In cases of criminal contempt I do not see any reason to refrain from holding that the Court has jurisdiction to call upon a defaulting respondent to account for his acts provided, on the facts, the Court considers that it is proper to do so."

In the well-known case of — 'In re Benjamin Guy Horniman', AIR 1944 Bom 127 (C), Beaumont C. J. observed:

> "I have no doubt that if the Allahabad High Court considers that Mr. Horniman has committed contempt of that Court, 'although the contempt may have been committed outside the jurisdiction of that Court' it could deal with Mr. Horniman if he were within its jurisdiction."

Doubtless the learned C. J.'s reliance on — 'H. D. Rajah v. C. H. Witherington', AIR 1934 Mad 423 (D) in support of this observation seems to be not correct; but that does not detract from the value to be attached to his observation as regards the ex-territorial jurisdiction of High Courts in cases of contempt.

In a recent decision of the Calcutta High Court reported in '53 Cal WN 310 (B)', it was held that

> "In matters of contempt the High Courts, which have inherited the powers of the Supreme Court, exercise somewhat extraordinary jurisdiction and the powers are arbitrary. Consequently, no territorial limitation should be put in cases of contempt which is really a contempt against the Sovereign, when neither any Statute nor the provisions of the Charters expressly put such limitation."

This case is thus a direct authority on the subject. No case expressing a contrary view has been cited before us except 'AIR 1934 Mad 423 (D)' in which there is an observation to the effect that contempt of Court conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed. But this observation was in the nature of an obiter and the point for decision by the learned Judges of the Madras High Court in that case was whether the Court had jurisdiction to commit a person who having committed contempt within its jurisdiction absconded to a place outside its jurisdiction when proceedings were initiated. The specific question at issue in the present case did not arise for decision there.

(8) Mr. Mohapatra however attempted to distinguish the aforesaid decisions on two grounds:

1. The contempt alleged against the members of the opposite party was civil contempt and not criminal contempt;
2. In any case, the position of Chartered High Courts like Bombay and Calcutta in respect of contempt would differ fundamentally from that of a newly constituted High Court like the Orissa High Court.

In my opinion neither of these contentions can prevail.

The distinction between civil contempt and criminal contempt has been indicated at pp. 2 and 24 of the Halsbury, 2nd edition, volume 7 and it has been also quoted in — 'AIR 1934 Bom 452 (A)'. Words or acts which obstruct or tend to obstruct administration of justice would always amount to criminal contempt inasmuch as they offend the Majesty of law. Whereas contempt of procedure consisting of unintentional disobedience of orders, processes of the Court and involving a private injury are classified as civil contempts.

Mr. Mohapatra attempted to make a distinction between resistance or obstruction to a Receiver after he had taken possession of the suit property which, according to him, may amount to criminal contempt, whereas resistance to his taking possession of the suit property would merely amount to contempt in procedure. This distinction is however without any authority. On the other hand in the Bombay case mentioned above — 'AIR 1934 Bom 452 (A)', at p. 456 it is expressly stated that refusal by a party to deliver possession to a Receiver would also amount to contempt of this type provided that the party was aware of the appointment of the Receiver and after being called upon by him to deliver possession did not do so.

(9) The Orissa High Court was constituted by an order made by the Governor-General under the provisions of the Government of India Act. Doubtless, to that extent it differs from Chartered High Courts like Calcutta and Bombay. But as regards its jurisdiction in respect of contempt I am unable to find any difference. Its power to punish for contempt is derived from S. 220. Government of India Act, 1935 which declared that every High Court shall be a Court of Record. There are innumerable decisions to show that High Courts are superior Courts of Record and they have inherent power to punish for contempt. This power was expressly recognised in Art. 215 of the Constitution. The power of the Chartered High Courts to punish for contempt appears to have been derived from a similar provision in the Charter of 1774 which is referred to at p. 348 of — 'Chandan Mall Karmani v. Sardarilal', ILR (1937) 1 Cal 345 (E).

1 may quote the passage;

> "The Charter establishing the Supreme Court in 1774 povided by Cl. 4 that the Judges should have the same jurisdiction and authority as the Judges of the Court of King's Bench in England and by Cl. 21 expressly provided that the Court is empowered to punish for contempt."

The Constitution also in Art. 215 expressly confers power on this Court to punish for contempt. Hence, whatever may be the historical origin of the Chartered High Courts, so far as the power to punish for contempt is concerned, the provisions in the Charter are also identical with the provisions in Art. 215 of the Constitution and there is no special reason as to why it should be assumed that this Court's power is not so wide as that of any Chartered High Court.

(10) I am therefore of the view that the reasonings adopted in — '53 Cal WN 310 (B)', would apply with full force and that even prior to the passing of the Contempt of Courts Act 1952 every High Court had jurisdiction to commit a person

for contempt even though the act alleged was committed outside its territorial jurisdiction. There was no express provision either in the Contempt of Courts Act, 1926 or in S. 220, Government of India Act, or in Art. 215 of the Constitution barring such ex-territorial jurisdiction. The Contempt of Courts Act, 1952 was enacted by way of clarification and not as creating a new type of jurisdiction which did not exist from before.

(11) I now take up the merits of the case. The evidence is practically one-sided. The receiver has examined himself, proved his two reports (Exts. 5 and 5-a) and stood the test of cross-examination. He is an Advocate of Berhampur Bar and his respectability and disinterestedness are beyond question. The then Deputy Tahsildar of Tekkali has also deposed on behalf of the petitioner and stated that on 2-6-1951 when he went to Pundi with the Receiver Venkateswar Rao told him that he would offer resistance if the mill was handed over to the Receiver. This witness then found about hundred persons with sticks near the mill. He also anticipated trouble and did not venture to open the mill and to hand it over to the Receiver.

Sri C. V. Suryanarayana, an Advocate of Berhampur Bar, who accompanied the Receiver to Pundi and who was an Advocate employed by Narayan Rao has also deposed and spoken about the circumstances leading to the assault on him by some members of the mob. Another witness named K. Venkateswarulu (P. W. 4) has proved the participation of Rama Rao in the whole affair. Doubtless, this witness's evidence is open to grave suspicion inasmuch as he is a close relation of Narayan Rao between whom and Rama Rao bitter litigation is now going on. This witness stated that it was Rama Rao who went to Pundi during the night of the 2nd, 3rd June, 1951 and made all arrangements to resist the Receiver on the next day and very cleverly went away from the village so as to save himself.

But neither the Receiver nor Advocate Suryanarayana saw Rama Rao on 2nd, 3rd or 4th June, 1951, and though there may be a strong suspicion that the resistance offered by Adilakshmi and her younger son was inspired by him I would not, on the uncorroborated testimony of P. W. 4 hold him guilty of such instigation. At any rate, he is entitled to the benefit of doubt.

(12) So far as Adilakshmi and Venkateswar Rao are concerned the following specific overt acts have been proved to have been committed by them.

(13) 2-6-1951. Adilakshmi appeared before the Receiver, handed over a petition written in Telugu and stated definitely that as the guardian of her minor son Govinda Rajulu she would not permit him to take possession of the suit property and that any attempt on his part would be resisted. She left in him no doubt about her intention. On the same day Venkateswar Rao told B. Appa Rao, Deputy Tahsildar of Tekkali and the Taluq Supplies Officer that he had no objection if the stocks were verified in the rice mill but he would offer resistance if the mill was handed over to the Receiver.

(14) 3-6-1951. At 1 p.m. Advocate Suryanarayana was roughly handled by a mob led by one Dokkari Baligadu who according to this Advocate was doing services for Rama Rao and giving instructions to the other servants. At the time of the assault, Adilakshmi and Venkateswara Rao were standing on the terrace of their house. Some lathies were collected in a portion of the house under their occupation and a mob also had collected there. The Receiver was so much terror-stricken by this incident that he did not venture to come out of the room in the house where he was staying, to take possession of the mills.

But at 5-30 p.m. when the police force arrived and he plucked up some courage he was again frightened because Adilakshmi, Venkataswara Rao and some other family members proceeded towards the mills to offer resistance. He also saw a mob accompanying them. He rightly apprehended that if he went to the mills to take possession he may share the same fate as Advocate Suryanarayana and therefore retracted to avoid further trouble.

(15) 4-6-1951. In the presence of the Circle Inspector, Venkataswar Rao threatened the Receiver that lives would be lost if he attempted to take possession of the mills. The Receiver requested the Circle Inspector to help him; but as the latter seemed to take the side of Venkateswar Rao the Receiver could do nothing. The net result of the acts of Adilakshmi and Venkataswar Rao was that the Receiver could not take possession of the mills on the 2nd, 3rd or 4th June, and with a view to avoid breach of peace he had to come away disappointed.

(16) It was urged that though the acts proved against these two members of the opposite party may show an intention or preparation to offer resistance to taking possession of the mills they do not indicate that actual resistance was offered inasmuch as the Receiver did not go near the mills and demand possession from either Adilakshmi or Venkateswar Rao. It is true that under ordinary circumstances mere intention or preparation to resist may not suffice. But in the present case the acts proved against these two persons should be viewed in the proper perspective. Venkateswar Rao was a party in the Title Suit being defendant No. 3 and on 12-5-1951 the Subordinate Judge had directed the defendants to hand over the keys of the mills at Pundi to the Receiver and had also authorised the Receiver to break open the locks of the mills for the purpose of taking possession.

On the 16th May, Venkateswar Rao met the Receiver at Pundi and told him that the keys of the mills would be handed over to him on the return of his father. He was therefore fully aware that when the Receiver went to Pundi on 2-6-1951 he had come there for the express purpose of taking possession of the two mills. In fact, his statement to P. W. 2 on that date to the effect that he would offer resistance if the mills were handed over to the Receiver makes it absolutely clear that he was fully aware of the purpose of Receiver's visit to Pundi on that date.

It is true that Adilakshmi was not a party in the suit and knowledge about the orders passed by the High Court in the suit may not be fairly attributed to her. But her conduct in appearing before the Receiver on the 2nd June, handing over a petition on behalf of her minor son Govinda Rajulu and saying that she would not permit him to take possession of the suit property indicates unmistakably that she was also fully aware of the purpose of the visit of the Receiver to Pundi on that date. Again on the 3rd she, her son Venkateswar Rao and other females went from their residential house to the mills in a bullock cart accompanied by a huge mob armed with lathis, at a time when after the arrival of the police force the Receiver was thinking of going and taking possession of the mills.

On the next day (4-6-1951) Venkateswar Rao had no hesitation in threatening that lives would be lost if the Receiver made any attempt to take possession of the mills. In view of these facts and circumstances I think that a formal demand by the

Receiver to these persons to give up possession of the mills was not necessary and they by their conduct made it absolutely clear that he would be resisted by force if he made any attempt to take possession. It would have been too risky on his part to have gone to the precincts of the mills on the 3rd evening and attempted to take possession.

As pointed out in — 'Karuna Kumar v. Lankaran', AIR 1933 All 759 (F), even threats of violence coupled with an aggressive or menacing attitude on the part of the person uttering the threat and by other gestures may easily amount to obstruction, if they cause a reasonable apprehension in the mind of a public servant that resistance would be offered if he attempted to discharge his duty. The present case is of a similar type and I think on the proved facts and circumstances it must be held that Adilakshmi and Venkateswar Rao did resist the Receiver from getting effective possession of the mills at Pundi on the three dates. The rough handling of C. V. Suryanarayana by some of their supporters was only by way of warning the Receiver about the fate that would happen to him if he ventured to take possession of the mills. It would have been therefore foolhardy on his part to ignore the warning and approach the mill premises.

(17) In view of the unconditional apology tendered by the members of the opposite party I do not think that any substantive sentence of imprisonment is called for though otherwise I would have been inclined to take a very serious view of the acts committed by Venkateswar Rao. While therefore holding him guilty of contempt of Court I would direct that he should pay a fine of Rs. 100/- in default of which he should undergo simple imprisonment for one month.

Adilakshmi is also held guilty of contempt of Court. But as she appears to have acted under the instigation of her son Venkateswar Rao and presumably of her husband V. Rama Rao who very cleverly kept himself in the background, I do not think it necessary to impose any sentence on her, especially in view of her unconditional apology. She is let off with a severe warning. V. Rama Rao is not held guilty of contempt and the rule against him is discharged.

(18) MOHANTY, J.: I agree.

A/D.H.Z. Order accordingly.

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PANIGRAHI C. J. AND MOHAPATRA J. (27-1-1954)

Hira Dei, Defendant-Appellant v. Bodhi Sahu and others, Plaintiffs-Respondents.

Second Appeal No. 16 of 1951, from order of Sub-J., Keonjhar, D/- 18-9-1950.

(a) Hindu Law — Widow — Re-marriage — Forfeiture of interest in first husband's property. 11 All 330 and AIR 1932 All 617 (FB), dissented from.

A Hindu widow re-married according to caste custom forfeits her interest in the estate of her deceased husband and the onus is on her to establish a custom to the contrary. Her rights to the estate of the deceased husband are taken away by the same custom which allows her to remarry. (Para 13)

By remarriage the widow loses the Gotra of her deceased husband and ceases to be his 'Patni'. Consequently, it seems to follow that she is not entitled to retain the property of her first husband. Case law fully discussed; Allahabad view expressed in 11 All 330 and AIR 1932 All 617 (FB), dissented from. (Para 13)

(b) Hindu Law — Widow — Unchastity — Unchastity and degradation — Effect.

There is a distinction between mere unchastity and degradation. Hindu law does not tolerate unchastity and if the unchastity be such that it results in degradation she will equally forfeit her right to her deceased husband's property. It is, therefore, fallacious to think that an unchaste widow can retain the property while if she remarries she forfeits. 7 Ind App 115 (PC) Expl. (Para 14)

CASES REFERRED: Paras

(A) (V19) AIR 1932 All 617: 55 All 24 (FB) 3, 4
(B) ('89) 11 All 330: 1889 All WN 77 4, 5, 13
(C) ('76-78) 1 Mad 226 5, 6
(D) (V9) AIR 1922 PC 2: 48 Ind App 405 (PC) 5
(E) ('92) 19 Cal 289 (FB) 5
(F) ('95) 22 Cal 589 5, 7
(G) ('98) 22 Bom 321 (FB) 5, 8
(H) ('84) 7 Mad 321 6
(I) (V7) AIR 1920 Mad 224(1): 59 Ind Cas 91 6
(J) (V19) AIR 1932 Mad 120: 62 Mad LJ 131 6
(K) (V6) AIR 1919 Mad 854: 41 Mad 1078 (FB) 6
(L) ('03) 26 Mad 143: 12 Mad LJ 197 6
(M) (V16) AIR 1929 Mad 765: 57 Mad LJ 253 6
(N) ('11) 38 Cal 862: 10 Ind Cas 69 7
(O) ('08) 8 Cal LJ 542 7
(P) ('10) 14 Cal WN 346: 5 Ind Cas 710 7
(Q) (V11) AIR 1924 Cal 98: 50 Cal 727 7
(R) (1900) 24 Bom 89: 1 Bom LR 543 8
(S) (V8)AIR 1921 Bom 1: 62 Ind Cas 318 (FB) 8
(T) (V8) AIR 1921 Bom 57: 45 Bom 1247 8
(U) ('90) 17 Ind Cas 133: 8 Nag LR 128 9
(V) (V12) AIR 1925 Nag 1 : 20 Nag LR 57 (FB) 9
(W) ('10) 7 Ind Cas 543: 6 Nag LR 103 9
(X) (V39) AIR 1952 Hyd 99: ILR (1952) Hyd 245 (FB) 10
(Y) (V17) AIR 1930 Lah 1023: 129 Ind Cas 767 11
(Z) (V9) AIR 1922 Pat 378: 1 Pat 706 12
(Z1) (V5) AIR 1918 Pat 590(1): 3 Pat LJ 639 12
(Z2) ('09) 31 All 161: 1 Ind Cas 761 13
(Z3) (V14) AIR 1927 All 523: 49 All 203 13
(Z4) (V40) AIR 1953 Ajmer 45 13
(Z5) ('80) 7 Ind App 115: 5 Cal 776 (PC) 13

A. B. Roy and S. C. Palit, for Appellant; G. K. Misra, for Respondents.

PANIGRAHI, C. J.:

This is a second appeal by the unsuccessful defendant, Hira Bewa, the widow of one Ainthu Sahu, and raises an interesting question of Hindu law. Ainthu died issueless sometime before the settlement of V S 1322 (1915) leaving him surviving his widow Hira Bewa and her name was recorded in the Settlement papers of the year 1915. Soon afterwards she remarried one Gadadhar Sahu and has been living with him for the last 35 years. The plaintiffs are the agnates of the deceased Ainthu Sahu and claim to have been in possession of the disputed lands ever since Hira's remarriage. As the widow was trying to alienate the same the plaintiffs raised this suit for a declaration of their title and confirmation of possession with a prayer for a permanent injunction against the defendant.

(2) Both the Courts below have concurrently found that the plaintiffs have been in possession of the disputed lands ever since the re-marriage of the defendant with Gadadhar Sahu. The substantial contention urged on behalf of the defendant-appellant in the Courts below, and repeated before us, is that the defendant is entitled to the property of her deceased first husband, which vest-

ed in her on his death, as the caste to which she belongs permits re-marriage of widows. It is urged that the plaintiffs should be non-suited in the absence of proof that re-marriage entails forfeiture of the estate of her deceased husband which she had inherited on his death. Neither party adduced evidence on the question of any custom regarding the forfeiture of property consequent upon the re-marriage of a widow. Both the courts below, however, have proceeded on the footing that under the Hindu law a widow works out her civil death on her re-marriage and loses all right to the estate of her deceased husband.

(3) The defendant's contention is supported by the view taken by the Allahabad High Court in the Full Bench decision in — 'Bhola Umar v. Mt. Kausilla', AIR 1932 All 617 (FB) (A), where it has been held that a custom of re-marriage does not carry with it as a legal incident thereto, a further custom of forfeiture upon such re-marriage and that it would be necessary for the party claiming that the widow's estate has been forfeited on account of re-marriage, to prove that there is a custom of forfeiture in such a contingency. This view, however, has not found favour in any other High Court. But learned counsel for the appellant urged that there is no reported decision of this High Court covering the point and therefore it needs consideration at our hands. The point has accordingly been argued at great length and learned counsel for the appellant has, after painful research, placed a mass of case law for our consideration.

(4) It may be pointed out at the very outset that the parties in this case belong to the Teli caste in which re-marriage of widows is permitted; and it appears to have been assumed that such re-marriage also entails forfeiture. Exhibit 5, the certified copy of the order passed by the Superintendent, Keonjhar State on 8-2-1948 in Mis. Case No. 50 of 1917-18, says:

> "The wife has lost all claim to this property, and Tunai and Shankar, the first cousins of Ainthu, are declared heirs to his property."

It is not clear whether the Hindu Widows Re-marriage Act (Act 15 of 1856) was extended to Keonjhar State where the parties reside and the applicability of that Act, which was enacted with a view to remove all legal obstacles to the re-marriage of Hindu widows does not directly arise. Section 2 of the Act says that when a widow contracts a second marriage she would forfeit all rights to maintenance or inheritance from, or in, her late husband's property.

Ever since the year 1889 the Allahabad High Court has held as would appear from the case of — 'Har Saran Das v. Nandy, 11 All 330 (B), that S. 2 of the Act did not apply to the case of a widow whose re-marriage was permitted by her caste. In that case the parties belonged to the sweeper class and there was no legal obstacle or hindrance either by law or custom against re-marriage. Straight J. who delivered the judgment of the Bench held that

> "as there was no hindrance to a second marriage it must be taken that this condition of things has been existing in the year 1856 (when Act 15 of 1856 was passed)."

As the Act was an enabling Act intended to remove obstacles in the case of persons who could not re-marry, it was held that the Legislature did not intend that this Act should be applied to persons who could marry a second time before the Act was passed. There was no proof or discussion as to whether there was any custom regarding forfeiture of the first husband's property on the re-marriage of the widow. This case has been followed though not without dissent occasionally, in later decisions of that High Court. But all the other High Courts have expressly dissented from it and taken a contrary view. It should, however, be noticed from the judgment of Sulaiman C. J. who was a party to the Full Bench decision in — 'AIR 1932 All 617 (A)' that such a custom is prevalent in that area. His Lordship observed:

> "In most cases where a custom of re-marriage was established, the right to retain the estate was also put forward and upheld. Indeed, no case has been brought to our notice where a custom of re-marriage was established and yet the widow was held not to be entitled to retain the estate of her deceased husband."

(5) So far as the other States in India are concerned the point has never been disputed that such re-marriage entails forfeiture of all interest in the deceased husband's estate. The earliest record of such a custom is to be found in Sir Thomas Strange's Hindu Law of 1830 where it is pointed out that in all cases where re-marriage was permitted by usage or otherwise, the second marriage entailed the forfeiture or divesting of the widow's estate. The earliest reported decision of the Madras High Court on the subject is — 'Murgayi v. Verramkali', 1 Mad 226 (C), a decision of the year 1877, where their Lordships proceeded on the principle enunciated in Smriti Chandrika, Ch. 11, S. 1, paragraph 4 that a widow takes a life interest of her deceased husband's estate as she is a surviving portion of her husband. When a widow re-marries the fiction upon which the right to enjoyment is founded ceases and their Lordships observed:

> "So far as the enquiries extended which are embodied in Steele's 'Hindu Castes' it appears that it is the practice of a widow among the Sudra castes of Deccan, on re-marriage, to give up all property to her former husband's relation except what had been given to her by her own parents and we have little doubt that the law in this Presidency will not permit the widow who is re-married and who must be regarded as no longer surviving in her late husband, to lay claim to the property left by him, now in the possession of the daughter who, in default of the widow is the right heir."

Steele's Law of Castes and Tribes in the Deccan has been accepted for over a century as an authority containing useful information on the usages and customs of the different castes in the Deccan as Risley's Tribes and Castes in Bengal, Croke's Tribes and Castes of the North Western Province and Oudh, and Rattigan's Customary Law of the Punjab.

It is also well-recognised, as was observed by the Judicial Committee in — 'Ramkishore v. Jainarayan', AIR 1922 PC 2 (D), that in some parts of northern India and in the Punjab the strict rules of the Mitakshara have not been followed by several castes and families of Hindus and that customs at variance with the strict law of Mitakshara have been consistently followed and acted upon. Such customs relate to a variety of subjects for instance, widows, adoptions, descent of lands and interests in land. It is curious that this Madras decision was not brought to the notice of their Lordships of the Allahabad High Court who were parties to the decision in — 'Har Saran Das's case (B)' of the year 1889.

The point again came up for consideration before a Full Bench of the Calcutta High Court in — 'Matungini Gupta v. Ram Rutton', 19 Cal 289 (E), where it was held by a majority of the Full

Bench that by her second marriage the widow forfeited her interest in her first husband's estate in favour of the next heir, and reliance was placed upon S. 2, Hindu Widows Remarriage Act of 1856.

In another case of that Court reported in — 'Rasul Jehana Begum v. Ramuarun Singh', 22 Cal 589 (F), the Allahabad view was expressly dissented from and the Madras view was followed and it was pointed out that the true position of a Hindu widow inheriting the estate of her husband was not considered in the Allahabad case.

This case was followed by a Full Bench decision of the Bombay High Court in — 'Vithu v. Govinda', 22 Bom 321 (G). Farran C. J. in referring the question to a Full Bench pointed out that the Court assumed in —'Har Saran's case (B)', that the Legislature did not intend to extend the operation of Act 15 of 1856 to widows who could remarry by custom and that assumption was without basis. His Lordship further observed that it is equally probable that the Legislature intended to assimilate the Hindu Law in this particular in all cases and to make the law as administered accord with the true principles of Hindu law, and that it is not allowable to cut down the express provisions of the law by a consideration of the supposed intention of the Legislature in passing it. Ranade J., in delivering the judgment of the Full Bench pointed out that S. 2 of the Act deliberately used more general words, in order to remove any divergence between the status of a woman who contracted a second marriage according to the custom of her caste, and a widow who took advantage of the Act.

(6) The course of decisions in these High Courts has been uniformly in favour of the view first propounded in — 'Murugayi v. Veramkal (C)'. See — 'Koduthi v. Madu', 7 Mad 321 (H), a case of Lingait Goundans. In — 'Venkatachalam Chetty v. Rama Mudali', AIR 1920 Mad 224(1) (I), it was held that a re-married Hindu widow was incompetent to enter into a consent decree so as to bind her former husband's estate as she represents that estate only so long as it is vested in her and ceases to represent it when she has divested herself of it.

In — Vijayaraghava Pillai v. Ponnammal', AIR 1932 Mad 120 (J), widow alienated her husband's estate and subsequently got re-married. It was held that the estate of the alienee terminated on such re-marriage and did not enure for the lifetime of the re-marrying widow.

The dissenting judgment of Seshagiri Iyer J., in — 'Tayaramma v. Sivayya', AIR 1919 Mad 854 (FB) (K) has, however, been relied on by the learned Judges of the Allahabad High Court as supporting their view, but that case is clearly distinguishable as the point that arose for decision there was whether a Hindu widow who subsequently became a Mohammedan and married a Mohammedan, forfeited her interest in her first husband's estate. That case arose under Act 21 of 1850, and Seshagiri Iyer J. differing from the majority view held that the forfeiture of an estate under the Hindu Law did not extend to the case of a widow who renounced Hinduism. There is, however, no decision by the learned Judge on the proposition that a Hindu widow forfeits her estate on re-marriage with a Hindu.

Wallis C. J. in expressing his approval of the previous decisions observed (at page 860 of the report) that

> "the retention by a widow of her deceased husband's estate is altogether incompatible with her renunciation of her status as his widow."

See also — 'Sreeramulu v. Krishnamma', 26 Mad 143 (L) and — 'Gajapati Naidu v. Jeevammal', AIR 1929 Mad 765 (M).

(7) The Calcutta High Court has similarly adopted the view expressed in — 'Rasul Jehana Begum's case (F)' in a number of subsequent decisions. In — 'Ganga Prasad v. Ramasrey Sahu', 38 Cal 862 (N), the question was whether a Hindu widow, if re-married, loses her right to act as guardian of her infant son by her first husband. Section 3, Hindu Widows Remarriage Act came up for interpretation and their Lordships held that the Court had a discretion to remove a Hindu mother from the office of guardian of the children of her first marriage after she was married. But the view that she forfeits her interest in the estate of her husband was approved, and — 'Murugayi's case (C)' was followed.

In — 'Nityamadhab Das v. Sreenath Chandra', 8 Cal L J 542 (O), it was held that the alienation by a widow ceased to have effect after her re-marriage as she had forfeited her estate. To the same effect are the cases of — 'Gouri Churn v. Sita Patni', 14 Cal W N 346 (P) and — 'Santala Bewa v. Badaswari Dasi', AIR 1924 Cal 98 (Q), where the entire case-law has been reviewed. Their Lordships recognised the well-established custom of forfeiture when they observed:

> "Much support is lent to this view by the fact that in almost all castes in which re-marriage is allowed by custom such marriages are followed by forfeiture of the first husband's estate."

(8) The Full Bench decision in — '22 Bom 321 (G)' has been followed in another decision of that Court reported in — 'Panchappa v. Sengam Basawa', 24 Bom 89 (R), where it was held that a widow after re-marriage cannot give in adoption her son by her first husband. In — 'Fakirappa v. 'Savitrewa Sangappa', AIR 1921 Bom 1 (FB) (S), it was held that apart from the Hindu Widows Re-marriage Act of 1856 a Hindu widow loses all power of giving her first husband's son in adoption because her connection with the family of the husband which is necessary for the act of giving in adoption ceases on re-marriage.

In — 'Pranjivan v. Bai Bhikhi', AIR 1921 Bom 57 (T), it was held that such a woman was not entitled to succeed as a Gotraja as the relation of Sapindaship was in the family of her first husband. Macleod C. J. observed that on her re-marriage she was dead so far as her first husband is concerned and

> "she could not be resuscitated so as to be considered as his Gotraja Sapinda."

(9) The Nagpur High Court also has taken the same view. In — 'Sitaram v. Laxman', 17 Ind Cas 133 (Nag) (U), it was held that a widow who contracts a valid re-marriage in accordance with a custom of her caste is transferred from the gotra of her deceased husband to that of her second husband by re-marriage, & 'ipso facto' forfeits all interest in any estate which she may have inherited from the former in favour of the next heir or reversioner of the deceased. In — 'Mt. Sheokabai v. Ganpat', AIR 1925 Nag 1 (FB) (V), the question was whether a Hindu after re-marriage could take part in an act of adoption & it was held that on re-marriage her connection with the family of her first husband ceased and she was incompetent to make an adoption of her son through the first husband as it was opposed to the fundamental principles of Hindu Law. See also — 'Laxman v. Gundaji', 7 Ind Cas 543 (Nag) (W).

(10) The Hyderabad High Court also has, in a very recent case, — 'Basappa v. Parwatamma', AIR 1952 Hyd 99 (FB) (X), held that a second marri-

age though allowed by custom involved a forfeiture of the widow's rights in the property of her deceased husband, unless a custom to the contrary was proved.

(11) In — 'Mst. Parji v. Mangta', AIR 1930 Lah 1023 (Y), it was held by Jai Lal, J. that Act 15 of 1856 had no application to the case of a re-marriage according to caste custom and that the widow who contracted such a marriage lost her right according to the general custom of the province, which conclusion appears to be supported by the customary law of Ambala District. It was also held that it was for the widow to prove a special custom that she did not lose her title to succeed to the property of her first husband.

(12) The Patna High Court has consistently adopted the view of the other High Courts discussed above. The earliest case reported is that of — 'Suraj Jhot v. Attar Kumari', AIR 1922 Pat 378 (Z), where it was held that though re-marriage was permitted by caste custom she forfeited her estate which she had inherited from her deceased husband and that S. 2, Hindu Widows Re-marriage Act applied to all persons who, being Hindus, became widows. See also — 'Sheo Bharan v. Mst. Bhogea', AIR 1918 Pat 590(1) (Z1).

(13) It would appear therefore on a review of these decisions that in all States except Allahabad the view that a Hindu widow re-married according to caste custom forfeits her interest in the estate of her deceased husband has been adopted, and that the onus is on her to establish a custom to the contrary. Even in the Allahabad High Court where the contrary view has gained ground dissent has been expressed against the soundness of the view propounded in — 'Har Saran Das's case (B)'. See for instance — 'Gajadhar v. Kaunsilla', 31 All 161 (Z2), where Banerji J. observed:

> "Had the question not been concluded by this Court I should be inclined to accede to the contentions of Pandit Sunderlal. But, as the course of the rulings of this High Court has been uniform, I feel myself bound by these rulings whatever my personal opinion may be."

The same doubt was expressed in — 'Mangat v. Bharto', AIR 1927 All 523 (Z3). Our attention was also drawn to the case of — 'Roopa v. Ladu', AIR 1953 Ajmer 45 (Z4), where it was specifically found that the custom of forfeiture had not been made out and that the onus was upon the party asserting the existence of such a custom. But as I have already pointed out we see no reason to depart from the current of decisions which apply to this State as we are satisfied that wherever re-marriage of widow is allowed by custom their rights to the estate of the deceased husband are taken away by the same custom — See 'Banerji's Tagore Law Lectures, p. 313'.

As Mitra in his treatise on the Hindu widow points out, at p. 214, the correct rule is that the incidents connected with re-marriage according to custom must be governed by the same custom; and the custom recognised by all High Courts except that of Allahabad is that the widow on her re-marriage forfeits the estate of her former husband. By re-marriage the widow loses the Gotra of her deceased husband and ceases to be his 'Patni'. Consequently it seems to follow that she is not entitled to retain the property of her first husband. I have been unable to find any case in the Allahabad series where such a custom has been proved. It seems to have been assumed that a custom against forfeiture prevails in that area but we see no reason to hold that that principle should be extended to other areas.

(14) It was then urged by Mr. Roy that under the Hindu law unchastity of a widow does not lead to her being divested of her first husband's estate. Can it be supposed that when she re-marries she would forfeit the estate of her husband? Great reliance was placed on the decision of the Judicial Committee in — 'Moniram Kolita v. Kerry Kolitany', 7 Ind App 115 (PC) (Z5). All that was decided in that case was that an estate once vested by succession or inheritance is not divested by any act which before succession, or incapacity would have formed a ground for exclusion from inheritance. It was further held that the Hindu law texts neither expressly, nor by necessary implication, supported the doctrine that the estate of a widow once vested is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

Their Lordships of the Judicial Committee were careful to point out that the result might have been different if the widow had been degraded or deprived of her caste, for degradation implies that a Hindu, whether male or female, is considered as dead so much so that libations are to be offered to his manes as though he were naturally dead, and such degradation would cause an extinction of all interest in his property. There is a distinction between mere unchastity and degradation. It is thus clear that the Hindu law does not tolerate unchastity and if the unchastity be such that it results in degradation she will equally forfeit her right to her deceased husband's property. It is, therefore, fallacious to think that an unchaste widow can retain the property while if she re-marries she forfeits.

(14a) We find that there is no custom proved in this case one way or the other and that the Mitakshara rule regarding forfeiture of a widow's estate, on her re-marriage, obtaining in the territories subject to the jurisdiction of this Court is the same as that prevailing in Madras, Bengal, Bihar and Bombay areas. We do not see any reason to depart from this rule and would accordingly affirm the judgment of the Court below and direct that this appeal should be dismissed.

(15) Before parting with the case we should like to record our appreciation of the fairness with which learned counsel for the appellant has argued the points and placed all the decisions bearing on the subject. The appeal is dismissed, but we make no order as to costs.

(16) MOHAPATRA J.: I agree.

A/D.R.R. Appeal dismissed.

A.I.R. 1954 ORISSA 175 (Vol. 41, C.N. 51)

PANIGRAHI C. J. (11-12-1953)

Makaradhwaj Sahu and another, Accused-Petitioners v. The State.

Criminal Revn. No. 279 of 1953, against order of Sessions J., Cuttack, D/- 4-8-1953.

(a) Criminal P. C. (1898), S. 195 — Non-compliance — Effect of — (Penal Code (1860), S. 186).

Where the Forester reported the incident to the Divisional Forest Officer who, in his turn, reported to the Police and the Police in their turn, after investigation charge-sheeted the accused persons under S. 186, I. P. C. the cognisance without complaint in writing of the Officer concerned was without compliance with the provisions of S. 195 and was fatal to the prosecution. (Para 2)

Anno: Criminal P. C., S. 195 N. 4.

1953 Mitra: S. 195, P. 752 N. 615A "Clause (a) .....concerned".

Penal Code, S. 186 N. 5.

(b) Criminal P. C. (1898), S. 195 — Non-compliance — Effect of — (Penal Code (1860), Ss. 353, 186).

Where the accused was prosecuted under Ss. 186 and 353, I. P. C. and the prosecution under S. 186, I. P. C. failed for non-compliance with S. 195, Criminal P. C.

Held that the offence under S. 353, Penal Code was so connected with the primary offence under S. 186 that it could not be said to have constituted a separate and individual offence; that consequently prosecution under S. 353 also failed. (Para 3)

Anno: Penal Code, S. 353 N. 6; S. 186 N. 5.

Criminal P. C., S. 195 N. 3.

1953 Mulla: S. 195 P. 738 N. 612 "Object of section", P. 739 N. 613 "Duty of Court" "Compliance" (various conflicts noticed in N. 3 to S. 195 in AIR Com. not noted in Mitra — AIR Com. note exhaustive).

D. N. Sahu, for Petitioners; C. S. Misra, for Govt. Advocate, for the State.

ORDER: The two petitioners have been convicted under S. 188, I. P. C. Petitioner No. 1, Makardhwaj has, in addition, been convicted under S. 353, I. P. C. The prosecution case is that P. W. 1 the Forester along with P. W. 2 and P. W. 3 two Forest Guards, went to the house of one Kalandi for making a search of his house, armed with a search warrant from the Divisional Forest Officer, on 4-3-1953. It is said that the two petitioners did not allow them to enter into the courtyard saying that they would not allow any search. Petitioner Makardhwaj is alleged to have asked them to get away and pushed back the two forest guards. On these facts the petitioners were charged and convicted of having committed an offence under Ss. 186 and 353, I.P.C.

(2) In revision Mr. Sahu raised a very interesting point of law and urged that the prosecution has not been validly instituted. It appears that the Forester reported to the Divisional Forest Officer who, in his turn, reported to the Police, and the Police, in their turn, after investigation charge-sheeted the accused persons. Reliance is placed on S. 195 of the Criminal Procedure Code which lays down that no Court shall take any cognisance of an offence under S. 186, I. P. C. except on the complaint in writing of the Officer concerned or of some one to whom he is subordinate. Admittedly, this provision has not been followed in this case. This Court has held in more than one case that non-compliance with the strict provisions of S. 195 is fatal to the prosecution and it cannot be said in this case that cognisance of the offence has been taken in accordance with law. I have therefore no doubt in my mind that the conviction of the petitioner under S. 186, I. P. C. is not sustainable and must be set aside.

(3) So far as the offence under S. 353, I. P. C. is concerned, I am inclined to accept the contention of learned counsel that this offence is so connected with the primary offence of offering resistance to a public servant that it cannot, in the circumstances, be said to have constituted a separate and individual offence. It is said that in offering resistance one of the petitioners pushed the forest guards and that there was no intention to commit assault; what the two petitioners did was merely to cause obstruction to the search.

(4) The convictions of the petitioners as well as the sentences are set aside, the revision is allowed and the fines, if paid, shall be refunded to them.

B/H.G.P. Revision allowed.

A.I.R. 1954 ORISSA 176 (Vol. 41, C.N. 52)

PANIGRAHI C. J. AND MOHAPATRA J. (23-1-1954)

Fakirnath, Defendant-Appellant v. Krushnachandra Nath, Plaintiff and others, Defendants-Respondents.

Second Appeal No. 5 of 1951, from order of Sub. J. Keonjhar, D/- 20-9-50.

(a) Evidence Act (1872), Ss. 32, 33 — Deposition in previous suit.

A certified copy of a deposition of one of the brothers, regarding separation of some of them, as a witness in a previous mutation case where all the present defendants were also parties, though inadmissible on account of the non-fulfilment of the conditions of S. 32, may be admissible under S. 33. The deponent having died and the other conditions under the section having been fulfilled, the document cannot be taken to be inadmissible simply because the deponent and the present defendants were not arrayed as parties opposed to each other. In such a case, the conditions of S. 33 will be deemed to have been fulfilled when all the present parties were also parties in the previous case and further the self same question of jointness and separation was required to be determined in the previous case where the deposition was taken and the witness was also cross examined. (Para 6)

Anno: Evi. Act, S. 32, N. 29; S. 33, N. 1, 10, 11.

(b) Hindu Law — Adoption — Eligibility.

In the texts of Manu and Yajnyavalkya the word 'blind' is always qualified by the term 'born'. Therefore, a subsequent blindness will not disentitle a person to take any boy in adoption. (Para 7)

(c) Hindu Law — Succession — Disqualification — Blindness.

Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance. AIR 1917 PC 146, Relied on; AIR 1920 Mad 652(2); AIR 1934 Pat 373, Distinguished. (Para 8)

CASES REFERRED: Para

(A) (V4) AIR 1917 PC 146: 44 Ind App 229 (PC) 8
(B) ('75) 14 Beng LR 273: 23 WR 78 8
(C) ('75-77) 1 Bom 177 8
(D) (V7) AIR 1920 Mad 652(2): 43 Mad 464 9
(E) (V21) AIR 1934 Pat 373: 13 Pat 712 10

M. S. Rao, for Appellant; G. K. Misra, for P. C. Chatterji, for Respondents.

MOHAPATRA J.: This appeal has been filed by defendant No. 1 against the judgment dated 20-9-1950 of Sri A. Misra, Subordinate Judge of Keonjhar confirming the decision of the trial Court. The plaintiff's suit is one for declaration of his title on the basis that he is the adopted son of Gopi and for confirmation of possession or in the alternative for recovery of possession.

One Bauri Nath had four sons, Ainthu, Chaitan, Gopi and Fakir. After the death of Bauri, Ainthu separated from the other three brothers and enjoyed his four annas share separately. Thereafter, Fakir (defendant No. 1) separated and possessed his four annas interest separately since 1335. Chaitan and Gopi remained joint. Chaitan died leaving his two daughters Naba and Lata. Natabar first married Naba and after the death of Naba he also married Lata. The plaintiff is the natural born son of Natabar and Lata. According to the plaintiff, he was adopted by Gopi in the year 1945. Defendants 2 and 3 are the sons of Ainthu (deceased). Chaitan died in 1354 and Gopi died only a year after. The defendants having got their names mutated in respect of the disputed properties threatened to dispossess the plaintiff. So the present suit has been brought.

(2) The defence is that in fact the plaintiff was never adopted by Gopi who died issueless and unmarried and Chaitan died leaving no male-issue nor any widow. As all the four brothers, that is, the sons of Bauri, were joint, the interests of Chaitan and Gopi have passed unto defendants 1, 2 and 3 by way of survivorship.

(3) The two questions that require determination in the present case are whether the plaintiff was duly adopted by Gopi, and, secondly, if really Ainthu and Fair separated, and Chaitan and Gopi remained joint.

(4) On the question of adoption, on a thorough examination of oral and documentary evidence adduced on behalf of both parties and taking into consideration a few circumstances the learned lower appellate Court has held, in confirming the finding of the trial Court, that (His Lordship after referring to the evidence stated:) The factum of adoption therefore having been concurrently found to be true by the Courts below on an elaborate discussion of both oral and documentary evidence, there is no point of law on which the findings can be challenged.

(5) On the second question, as to whether Ainthu and Fakir separated leaving Chaitan and Gopi to continue their joint family, both the Courts below have concurrently found in favour of the plaintiff's allegation. All the witnesses examined on behalf of the plaintiff have deposed in support of the aforesaid allegation of the plaintiff and the Courts below have accepted their evidence in preference to the oral evidence adduced on behalf of the defendants. The Courts below have also relied upon Exts. 4, 4(a) and 7 showing that Chaitan was having independent transactions in support of their finding. Ext. 5 is a rent-receipt showing that Natabar had paid rent for the lands which were in possession of Chaitan and Gopi.

The Courts below have particularly relied upon another piece of document (Ext. 10) as being very material. This is a certified copy of deposition of Gopi in the previous mutation case filed by Lata where these defendants and Gopi were parties. He had stated there that they were separate for the last 20 years and that he himself and Chaitan were joint and since the death of Chaitan the properties belonging to himself and Chaitan were in possession of their son-in-law Natabar.

(6) Mr. Rao, appearing on behalf of the defendant-appellants, contends that the findings regarding separation has been vitiated in law as being based upon an inadmissible piece of document (Ext. 10) which has been particularly characterised by the lower appellate Court as very material. Mr. Rao's contention is that the conditions of the provisions of S. 32, Evidence Act have not been satisfied, and, as such, the document is not admissible even though Gopi is dead.

But in our view, the document is admissible under the provisions of S. 33 of the Act as it is the deposition of a witness in a previous case where all the defendants were also parties. The previous proceeding was started at the instance of Lata and Gopi who was representing the interest of the present plaintiff was one of the opposite parties. The present defendants 1, 2 and 3 were also arrayed as opposite parties.

Gopi having died, the other conditions under the section having been fulfilled, the document cannot be taken to be inadmissible simply because Gopi and the present defendants were not arrayed as parties opposed to each other. In our opinion, the conditions of S. 33 will be deemed to have been fulfilled when all the present parties were also parties in the previous case and further the self-same question of jointness and separation was required to be determined in the previous case where the deposition was taken and the witness was also cross-examined. In our view, therefore, the finding on the point of separation of the Courts below is correct.

(7) Mr. Rao, however, has taken up a point of law on the question of adoption that as Gopi was blind at the time, the adoption was invalid. Indeed, it was one of the allegations made by the defendants that Gopi was born blind which was controverted by the plaintiff's side to the effect that in fact Gopi became blind on account of smallpox after his 16th year of age. The controversy has been settled at rest by the finding of the Courts below that Gopi was not born blind but became blind subsequently when he was of tender age.

Mr. Rao does not challenge this finding but contends that even a subsequent disqualification of blindness will disentitle Gopi to take any boy in adoption. The question, therefore, that arises for determination is whether a man afflicted with blindness subsequent to his birth can adopt. That again depends upon the question whether blindness, even though not congenital, is a disqualification for inheritance.

Before referring to the three important decisions on the subject, we should place a few texts on the question. Manu, the Chief of the Rishis, with very high authority, in Chap. 9, pl. 201, of Sir W. Jone's Translation by Haughton says:

> "Eunuchs, and outcastes, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."

Jagannath, as translated by celebrated Colebrooke, gives the following texts of Yajnyavalkya, another of the Rishis of great authority:

> "An outcaste and his son, an eunuch, one lame, a madman an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares."

Vachaspati Misra, in the Vivad Chintamani, as translated by Prosonno Coomar Tagore, gives the text exactly in the same language. It is significant to mark that in these texts 'blind' is always qualified by the term 'born'. In Chapter 2, Sloka 10, pl. 3, Vignyaneshvara quotes without a word of disapprobation or dissent the text of Manu already mentioned. So also Nilakantha in Mayukha, Chapter 4, Sloka 11, reproduces the text of Manu without any contradiction or qualification so far as blindness is concerned.

(8) The matter came for the first time before their Lordships of the Privy Council in the case of — 'Mt. Gunjeshwar Kunwar v. Durgaprashad Singh', AIR 1917 PC 146 (A). The question that came directly before their Lordships was :

"Is a man who is a member of a joint Hindu family, which is governed by the law of Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital?"

Their Lordships quoted with approval a passage from Rajkumar Sarvadhikari, in his Hindu Law of Inheritance, at p. 956, which runs as follows :

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance."

After the quotation, their Lordships observed :

"The above is, their Lordships hold, the true rule." In our opinion, this decision of their Lordships has settled the matter at rest. Before this case of the Privy Council, there were two cases of Indian High Courts, the decisions of which were referred to and approved by their Lordships. The first is — 'Mohesh Chunder v. Chunder Mohun Roy', 14 Beng LR 273 (B), of the Calcutta High Court, and the second is — 'Murarji v. Parvatibai', 1 Bom 177 (C). The leading judgment on the question of law in the Bombay case of Westropp, C. J. is elaborate, thorough and very learned discussion of all the texts on the subject. Their Lordships of the Privy Council without repeating the elaborate discussion of Westropp, C. J. have simply agreed with the view.

(9) Mr. Rao, however, has relied upon a decision of the Madras High Court reported in — 'Muthusami v. Meenammal', AIR 1920 Mad 652(2) (D), in submitting his proposition that the right of a member of a Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but only in abeyance by reason of a disqualification and it subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. This was a case of insanity which was not congenital.

Mr. Rao contends that even if a disqualification comes at a subsequent stage, the person is time that disqualification exists. In our opinion, to be deemed as a disqualified heir during the this case has absolutely no bearing upon the question before us, because it was a case of insanity which was found after a thorough discussion in the judgment of Seshagiri Ayyar, J. that it need not be congenital to serve as a ground of disqualification for inheritance under Hindu Law.

Furthermore, their Lordships also propound the proposition in their decision that if on the death of all other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by surivivorship; thus finding that such a disqualification does not disentitle the disqualified man to take by way of survivorship. As in the present case Gopi will be getting the properties by way of survivorship after the death of Chaitan, being the sole survivor between the two brothers who, as we have found, remained joint, and further that the adoption took place after the death of Chaitan when the entire property had vested in Gopi as the sole survivor.

(10) Mr. Rao has further relied upon a decision of the Patna High Court, reported in — 'Mst. Dilraj Kuar v. Rikheswar Ram', AIR 1934 Pat 373 (E). There also it was a case of supervening insanity and their Lordships laid down the proposition that where therefore the disqualification supervenes later and the disqualified person is the sole survivor, he takes the whole estate by survivorship. Our remarks in respect of the Madras decision are equally applicable to this Patna decision. We will make it clear that our above discussions apply to the position of law as it was existing prior to the coming into force of the Hindu Inheritance (Removal of Disabilities) Act as the case is coming from Keonjhar area where the Act was not in force.

(11) In conclusion, the appeal fails and is dismissed with costs.

(12) PANIGRAHI C. J. : I agree.

B/H.G.P. Appeal dismissed.

A. I. R. 1954 ORISSA 178 (Vol. 41, C. N. 53)

NARASIMHAM AND MOHAPATRA JJ.

(12-1-1954)

Bhagban Sahu and another, Petitioners v. Dasarathi Sahu and others, Opposite Party.

Civil Revn. Nos. 118 and 133 of 1952, from order of Sub. J. of Berhampur, D/- 5-5-1952.

Civil P. C. (1908), O. 40, R. 1 — Partition suit — Appointment of receiver — Sale of property — Negotiations conducted through Court — Vendee submitting to jurisdiction — Balance of purchase money can be realised by summary procedure — Separate suit is not necessary — (Civil P. C. (1908), O. 34, R. 15).

Long before the partition suit. the parties were negotiating for the sale of properties. During the pendency of the suit the defendant was appointed receiver. During the negotiations the receiver had to be consulted from time to time and as the properties were custodia legis, the permission of the Court had to be taken at each important stage and for completion of the transaction. Some consideration had been paid by the vendees who had submitted to the jurisdiction of the court and had made themselves bound to deposit the balance consideration money in court. The order directing the deposit of the balance in court, was thus binding on the vendees. The question arose whether in a summary procedure the Court could enforce the unexecuted part of the contract entered under its direction, or whether the unpaid balance money could be realised by summary procedure instead of filing a suit when the sale had taken place at the intervention of the Court at each and every step.

Held that the Court could in the exercise of its summary powers, take proper steps for realisation of the unpaid purchase money from the purchasers who had definitely submitted to the jurisdiction of the Court by their consistent conduct all throughout and made themselves bound by the order directing the purchasers to deposit balance consideration in Court. The sales in question were sales by the Court even though they were not sales in execution of decree or compulsory sales. 6 Ind Cas 300 (Cal); 40 Cal 140; 27 All 670 and 36 Cal 52, Distinguished. 15 Cal 253; 21 Cal 479; AIR 1949 Pat 496; (1848) 60 ER 654; (1823) 57 ER 152 and AIR 1953 Trav-C 205, Relied on. (Paras 15, 16)

Held further that in order that the case might come under the provisions of Order 34, Rule 15, it was essential that it must be a charge under the provisions of S. 100, Transfer of Property Act. Section 100 contemplates of only two of the charges, that is, either by act of parties, or by operation of law. In the present case, the sales being sales by the Court, the charge, in respect of the unpaid purchase-money contained in the terms of the sale-deeds, was not one either by act of parties or by operation of law. The present case therefore, was not covered by the provisions of order 34 rule 15. (Para 17)

Anno: C. P. C., O. 40 R. 1 N. 50.

1953 Mulla: O. 40 R. 1, P. 1176 N. "Summary jurisdiction" (3 Pts. extra in N. 50 to O. 40 R. 1 in AIR Com.).

C. P. C., O. 34 R. 15 N. 10a.

1953 Mulla: O. 34 R. 15 P. 1129 N. "Charge" (5 Pts. extra in N. 10a to O. 34 R. 15 in AIR Com.).

CASES REFERRED : Paras

(A) ('70) 6 Beng LR 492n 5, 15
(B) ('70) 6 Beng LR 486 5
(C) ('12) 16 Cal WN 394: 6 Ind Cas 300 8
(D) ('13) 40 Cal 140: 18 Ind Cas 954 9
(E) ('05) 27 All 670: 2 All LJ 390 10
(F) ('88) 15 Cal 253 11, 13
(G) ('94) 21 Cal 479 12, 13
(H) (V36) AIR 1949 Pat 496: 27 Pat 263 13
(I) (1848) 60 ER 654: 15 Sim 352 13
(J) (1823) 57 ER 152: 1 Sim & St. 381 13
(K) (V40) AIR 1953 Trav-Co 205: ILR (1953) Trav-C 30 14
(L) ('09) 36 Cal 52: 1 Ind Cas 470 16

G. C. Das, H. Sen and P. V. B. Rao, for Petitioners; D. V. N. Rao, B. K. Pal, P. C. Chatterjee, J. Brahma and J. L. Narasimham, for Opposite Party.

MOHAPATRA J. :

These Civil Revisions are against the order dated 5-5-1952 of Sri P. C. De, Subordinate Judge of Berhampur, in O. S. No. 23 of 1943, directing the receivers to realise, by summary procedure, the unpaid balance consideration of Rs. 3,75,000/- in respect of sale-deeds dated 14-11-1947 in favour of the petitioners (National Agencies at Cuttack and Berhampur) for a consideration of Rs. 6,00,000/-. The subject matters of the aforesaid conveyances dated 14-11-1947 are Aska Sugar Works and Distillery at Aska and Paramananda Saw Mills at Russelkonda.

(2) The parties to the Partition Suit No. 23/1943 are the members of the Berhampur Sahu family well known in the locality as an aristocratic and rich family. It is to be mentioned that the family are involved in heavy debts and there are quite a number of creditors including judgment-creditors. On the basis of a petition for appointment of receiver in respect of the properties involved in the partition suit, by the order of the High Court dated 21-12-1944, the two defendants (defendant No. 1 Damodar Sahu and defendant No. 19 Dasarathi Sahu) were appointed as receivers.

Defendant No. 1 was placed in charge of the management of the aforesaid two important items of properties, that is, the Sugar Distillery at Aska and Paramananda Saw Mills at Russelkonda. The receivers, during the course of their management of the properties of the Sahu family, were earnestly attempting to discover ways and means for discharging the outstanding debts of the members of the family and the debts binding on the family, as a whole. Defendant No. 1 was carrying on negotiations for selling of the aforesaid two mills in his charge and the negotiations advanced a good deal with the present petitioners, National Agencies of Cuttack, the consideration money having been fixed for a sum of Rs. 6,00,000/-, that is to say, Rs. 4,00,000/- for the Aska Sugar Distillery and Rs. 2,00,000/- for the Saw Mills at Russelkonda.

As a result of these negotiations, on 17-5-1947, 3 draft agreements were filed for approval of the Court in the partition suit between the National Agencies on the one side and the plaintiff and defendants 19 to 22 in respect of one agreement, and defendants 12 to 14 in respect of another and other defendants in respect of the third on the other. On that very day, the Court accorded permission for sale on the terms embodied in the aforesaid draft agreements and approved the terms. The fair copies of agreements were filed on 7-8-1947, and the agreements were approved. The Court, however, ordered :

> "It appears that a sum of Rs. 1,00,000/- has already been deposited by the purchasers but no intimation from the treasury has been received. Call on 23/8."

The purchasers (the National Agencies, Cuttack) had taken time to make deposit in accordance with the terms of the agreements and by 1-10-1947, a sum of Rs. 2,00,000/- had been deposited in Court. It is to be noted here that another sum of Rs. 25,000/- had been paid in cash to some of the parties, that is, Iswarachandra Sahu and Dasarathi Sahu, personally which brings the total amount paid by the purchasers (National Agencies) to Rs. 2,25,000/- leaving a balance of Rs. 3,75,000/-. Six draft sale-deeds were approved by the Court on 6-11-1947, and 6 sale-deeds were executed and registered on 14-11-1947. Two sale-deeds were executed by defendant No. 1 in respect of twelve annas share, in his capacity as a receiver, of the two aforesaid mills — one sale-deed in respect of each; two other sale-deeds were executed by Dasarathi Sahu (defendant No. 19) in respect of two annas interest in the said two mills; — one Kabala in respect of the aforesaid mills; and similarly two other Kabalas were executed in respect of the balance two annas interest in the said mills.

On the petition filed by the plaintiff, the Court ordered the receiver, to deliver possession on 17-11-1947. The receiver, in accordance with the order passed by the Court, actually delivered possession of the Sugar Mills at Aska on 20-12-1947 and obtained receipt of such delivery of possession from the purchasers. The receiver also delivered possession of the Saw Mills to the purchasers on 26-6-1948 and obtained receipt therefor. Ever since the actual delivery of possession in December 1947 and June 1948, the purchasers are all along in possession of the aforesaid two mills but have not deposited the balance amount of Rs. 3,75,000/-.

(3) A preliminary decree in the partition suit having been passed in terms of the compromise between the parties on 23-4-1951, the Court subsequently appointed 5 receivers to take charge of the management of the assets of the family. These five receivers have filed the present petition out of which these Civil Revisions arise for realisation of the balance consideration money by summary procedure. There is no dispute that the outstanding balance of the consideration in respect of the six sale-deeds is Rs. 3,75,000/-. The purchasers have not put forth any substantial plea in respect of their aforesaid liability. The only plea, put forth and seriously contended

before the Court below and before us, is that the liability cannot be enforced by means of summary procedure, but is enforceable only by virtue of a separate suit to be brought by the receivers.

The main question to be determined, therefore, is whether it is competent for the Subordinate Judge of Berhampur to take summary proceedings in O. S. No. 23/43 for realisation of the aforesaid balance consideration, or that the Court has got to direct the receivers to file a separate suit on the termination of which alone the money is realisable.

(4) Mr. G. C. Das, appearing on behalf of the petitioners, has strongly argued that the sales, in questions, are private sales and, at best, they can be termed as sales under the Court and not sales by the Court. It is permissible to realise the consideration money by summary procedure if the sales were Court sales, or, in other words, sales by the Court. His main argument is that, in the present case, the negotiations were being carried on by the parties to the suit; but in view of the peculiar feature in the case that a receiver was appointed to manage the two aforesaid mills the receiver had to be consulted from time to time and as the properties were costodia legis the permission of the Court had to be taken at each important stage and for the completion of the transaction; but nevertheless the transactions are, in substance, private transactions to which the Court had given its permission simply as they were custodia legis, but the real vendors were members of the Sahu family. According to Mr. Das, such transactions can at best be termed as sales under the Court, that is, with the permission or orders of the Court and not by the Court. The proper remedy, therefore, for realisation of the amount is by a separate suit.

(5) The first decision on which Mr. Das relies upon is a decision of Mr. Justice Macpherson in the case of — 'Chandranath Biswas v. Biswanath Biswas', 6 Beng LR 492n (A) of the year 1870, the full report of which appears in the case of — 'Wilkinson v. Gangadhar', 6 Beng LR 486 (B). In that case Mr. Hogg, the Court receiver, made an application for an order that the purchaser of certain property sold by the receiver under the orders of the Court to complete the purchase according to the condition of sale; and that, in default, the property may be attached, or a resale of the property at his risk may be ordered. The application was opposed mainly on the ground that the sale not being by the Court the receiver had no right to make a summary application of this description but must enforce his right by bringing a suit against the purchaser.

His Lordship, dismissing the application as not maintainable, made the following observations :

> "In no book of practice can I find any authority for saying that a sale of property by a receiver is, in any sense, a sale by the Court; and nowhere do I find that a sale by a receiver has been treated as a sale by the Court."

But nevertheless just subsequent to these observations he finds :

> "But it is true that, in some cases, sales by a receiver have been confirmed by this Court, preparatory to possession being ordered to be delivered to the purchaser — the receiver not being at liberty to give possession without an order. An instance of this occurred on the 21st day of December last, when an order was made in the suit of — 'Monmothonath Dey v. Ashutosh Dey', confirming a sale by the receiver, and ordering the purchaser to be put in possession."

Further on his Lordship remarks :

> "In saying this, I do not mean to say that sales by the Court do not often, under special circumstances, take place under conditions similar to those under which the sale which, is the subject of this application was made."

But the most important part of the judgment, which really distinguishes the present case from the one which was before his Lordship, is contained in the observations as follows :

> "It is clear that the Court cannot act against a person who is not a party on the record unless he has come in and done some act which subjects him to the jurisdiction of the Court in this suit."

Without discussing any further as to whether the reasons given by Macpherson J. were sound and acceptable, we will rest content after observing that the present case is clearly and entirely distinguishable on account of the special feature that the purchasers have definitely subjected themselves to the jurisdiction of the Court having seisin over the partition suit which will appear on a consideration of the following circumstances.

(6) As it appears from the order dated 17-5-1947, Bhagaban Sahu, representative of the National Agencies, had deposited a cheque for Rs. 10,000/- of Comilla Banking Corporation and undertook to deposit the amount in cash and take back the said cheque. Bhagaban Sahu of M/s National Agencies had also appeared in the suit through their advocate Sri K. Patnaik. It is necessary to quote the order dated 23-6-1947 :

> "Sri K. Patnaik, Advocate of Sri Bhagaban Sahu of Messrs National Agencies files a petition praying that on deposit of Rs. 10,000/- the cheque deposited on 17-5-1947 may be returned to him and he may be also granted two chalans for depositing sum of Rs. 10,000/- and Rs. 90,000/- in pursuance of the order dated 17-5-1947 and the agreements filed."

The order dated 20-8-1947 is also relevant to be noted in this connection which runs as follows :

> "Bhagaban Sahu partner of the National Agencies, Cuttack files a petition today in person praying to extend time till 5-9-1947 to deposit into Court the second deposit of Rupees one lakh on the ground that his father suddenly expired on 18-8-1947 and could not deposit today. Put up on the date fixed."

The National Agencies had further taken adjournments from time to time to make the aforesaid deposits and on 8-10-1947 they filed a memo reporting that the second one lakh rupees had been deposited into treasury on 1-10-1947.

(7) But the most important feature to show that in fact the National Agencies had submitted to the jurisdiction of the Court appears from the petition filed by the National Agencies on 18-10-1947. The contents of the petition run to the effect that the draft sale-deeds had been completed and approved by the parties and the National Agencies also had made deposits of two lakhs rupees or so; but it transpires that the two mills had been attached by some of the decree-holders against the members of the Sahu family. The petition further recites that under the terms of the agreements, as approved by the Hon'ble Court, the vendors are required to execute the sale-deeds free from all incumbrances. So it is necessary that the vendors be ordered to free the property from incumbrances, otherwise the National Agencies may be allowed to get re-

fund of the amount deposited in Court with such compensation as the Court will deem proper.

On this petition, six other petitions in six execution cases brought by the decree-holders, were filed under the provisions of O. 21, R. 83, Civil P. C., for the purpose of lifting the attachments. In the present partition suit, the Court passed an order on 6-11-1947 on the basis of the petition filed by the National Agencies :

> "Let necessary certificate be issued under O. 21. R. 83, Civil P. C. with following reservations that the amounts of the consideration should be deposited in Court by the purchasers, and no further payment made to the parties directly without the leave of the Court."

We are definitely of the view, on a consideration of the above circumstances, that the National Agencies had submitted to the jurisdiction of the Court and made themselves bound to deposit the balance consideration money in Court. It is to be noted here that by the time this order dated 6-11-1947 was passed the balance consideration money which was outstanding was Rs. 3,75,000/- which was ordered by the Court to be deposited in Court and the order was binding upon the purchasers.

(8) Mr. Das has drawn our attention to a decision of Mr. Justice Fletcher, sitting singly in the original side of the Calcutta High Court, in the case of — 'Golam Hossein v. Fatima Begum', 16 Cal WN 394 (C). Fletcher J. observed :

> "A sale by a Receiver under direction of Court is not a sale by Court and in such a sale the Court does not grant a sale certificate nor does it confirm the sale."

Fletcher J. draws a distinction between two classes of sales, "sales by the Court and sales under the Court." According to him, sales by the Court are cases in which the Court makes a title to the purchaser and the Court confirms the sale and issues a sale certificate. The second class is where the Court authorises a trustee, receiver or other person holding property to sell the property and the sale is made out of Court, the Court, while authorising or directing the sale, does not make any title to the purchaser and, in such a sale, the Court does not grant a sale certificate nor does it confirm the sale.

In our opinion, this case is absolutely of no assistance to us. The only point involved in that case is to determine whether a sale by a receiver under the direction of the Court is such a sale as to enable or require the purchaser to obtain 'a sale certificate'. The pertinent question, with which we are confronted, that is to say, whether in a summary procedure the Court can enforce the unexecuted part of the contract entered under its direction, or that the unpaid balance money can be realised by summary procedure instead of filing a suit when the sale had taken place at the intervention of the Court at each and every step, was not before his Lordship.

(9) Our attention has also been drawn to another decision of the same Judge (Fletcher J. sitting singly in the original side of the Calcutta High Court in the case of — 'Jogemaya v. Akhoy Coomar', 40 Cal 140 (D). In that case also this pertinent question does not seem to have been decided even though a similar question was raised by Mr. B. C. Mitter, appearing on behalf of the defendant-petitioner, in the case.

The matter arose by way of a review in respect of a sale held by the Commissioner of Partition under the provisions of an order passed by the Court to sell the property. The sale, in that case, was held under the condition that the purchaser was bound to accept whatever title the vendor might have in the property and will not be entitled to question on the point of title. This condition was laid as No. 9 in the sale proclamation. The question, therefore, arose whether the purchaser could agitate the point of title of the vendor before the same Court and his Lordship found that the point could be agitated. Here also Fletcher J. makes observation distinguishing the two classes of sale, that is, sales by the Court and under the Court as in the previous case.

(10) We will now refer to a decision of Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt in the case of — 'Kanhai Lal v. Kalka Prasad', 27 All 670 (E), relied upon by the petitioners. There in pursuance of orders passed by Court in the exercise of insolvency jurisdiction, certain revenue paying property of the insolvent was sold by the Collector by private contract and not at public auction. It was held that such a sale did not oust the pre-emptive rights of such persons as were otherwise entitled to claim pre-emption.

The point that arose for determination in that case was whether such a sale held by the Collector not at public auction but by private contract, even though made by the orders of the Court, is a compulsory sale in which case alone the rights of pre-emption of co-sharers cannot be enforced. The undisputed position in that case is that the right of pre-emption cannot be enforced only in the cases of compulsory sales and not otherwise, as in the case of compulsory sale in execution of a decree the sale takes place after the issue of a sale proclamation which, it is not unreasonable to assume, becomes known to all persons having pre-emptive rights.

Their Lordships rightly found that such a sale could not be deemed to be a case of compulsory sale and, as such, the pre-emptor could exercise his right of pre-emption. It is not a case where the powers of the Court, by way of a summary procedure, were invoked to enforce the unperformed part of the particular transaction.

(11) But, on behalf of the opposite parties, that is, the receivers, our attention has been drawn to a few decisions which seem to be exactly to the point.

We will first deal with an old decision of Mr. Justice Trevelyan in the case of — 'Surendro v. Doorgasoondery', 15 Cal 253 (F). In that suit a Court receiver was appointed to manage the suit properties and during the course of management, by the order of the Court, the receiver leased out certain properties in favour of one Sarodapersaud Soor, a stranger to the suit. Although the present lessee obtained possession and the receiver obtained rent from him, no lease had yet been executed. After the suit was dismissed in appeal, the lessee made an application to the Court, under whose orders the receiver had leased out the properties to him, to execute a leasedeed in his favour. The two questions that arose for determination in the case were :

(i) Will the Court entertain an application by the proposed lessee with whom a contract for lease has been made for the execution of the lease, or is it necessary that in order to enforce his right he should bring a suit for specific performance? and

(ii) Supposing such application to be possible when a suit is pending, does the dismissal of the suit prevent such an application?

His Lordship observed :

"A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court had ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit under an order in which the Court had derived its power of management."

His Lordship, therefore, passed a final order on the application of the lessee in the exercise of the summary power for the execution of a lease in his favour. The case before Mr. Justice Trevelyan was even the worse, because the suit, by the time of the application invoking the summary powers of thè Court, had been dismissed and further that the lessee was a stranger to the suit.

(12) We should like to refer next to another decision of Mr. Justice Sale, sitting singly in the original side of the Calcutta High Court, in the case of — 'Minatoonnessa Bibee v. Khatoonnessa Bibee', 21 Cal 479 (G). There was a sale by a receiver appointed by the Court under the orders of the Court, the purchaser had not obtained possession and made an application to the Court who delivered possession to him in the exercise of its summary powers and the Court ordered possession to be delivered to the purchaser without directing him to bring a fresh suit for possession. Sale J. observed :

"But there are cases in this Court in which sales by a Receiver have been regarded as 'sales by the Court', and orders for possession have been obtained by the purchasers under the Code."

His Lordship then refers to several unreported cases wherein the summary power was exercised on the position that the sales were by the Court. He, therefore, concludes on the authority of the number of unreported cases of the Calcutta High Court, discussed before him, that the sales by the receiver under the orders of the Court have been treated as sales by the Court.

(13) Mr. D. V. N. Rao, appearing on behalf of the opposite parties, has drawn our attention to a recent decision of the Patna High Court in the case of — 'Nasir Ahmed v. Lutf Ahmed', AIR 1949 Pat 496 (H), where in a pending suit for dissolution of the partnership firm owning a sugar factory a receiver was appointed to deal with the cash. The firm had leased out the factory to a stranger for two seasons at a certain yearly rent. The lessee did not pay the rent in full and therefore on application of the receiver the Court ordered that a letter be sent to the Manager of the Bank with whom the lessee had mortgaged the entire sugar factory in his possession directing the Manager not to pay any money of the sale proceeds of the sugar without the permission of the Court.

The Court further ordered the lessee preventing him from making withdrawals from the Bank. It was strongly contended on behalf of the lessee that the orders upon the Bank and on himself were without jurisdiction. Particular reliance was placed upon the feature that by the time the orders were passed the lease had terminated by efflux of time.

It was held by their Lordships (Agarwalla C. J. and Narayana J. — the leading judgment being of Narayana J.) that there was no substance in the contention that the orders were without jurisdiction, relying upon the position that the lessee in entering into an agreement with the Court through the receiver submitted himself to the jurisdiction of Court and an injunction could be granted against him even though he was not a party to the suit. Narayana J. in the course of his judgment, relied upon two English decisions reported in — 'Walton v. Johnson', (1848) 60 ER 654 (I) and — 'Casamajor v. Strode', (1823) 57 ER 152 (J).

In the case reported in (1823) 57 ER 152 (J), the judgment of Vice-Chancellor (Sir John Leach) is only in one sentence running to the effect :

"The purchaser under a decree does, by the act of purchase, submit himself to the jurisdiction of the Court as to all matters connected with that character. Take the injunction as prayed."

Similarly in the case reported in — '(1848) 60 E R 654 (I)', the judgment of Vice-Chancellor (Sir L. Shadwell) is also very short running to the effect:

"The tenant having entered into an agreement with the Court itself by means of the receiver: I do not think it necessary that a bill should be filed against him. Take an order for an injunction in the terms of the motion."

These two decisions, even though they were not noticed by the eminent English Judges deciding the cases reported in — '15 Cal 253 (F)'; — '21 Cal 479 (G)', as discussed above, are helpful for the proposition that the purchaser or the lessee, as the case may be, having entered into a contract for sale or lease with the Court has submitted to the jurisdiction of the Court and the Court can enforce any unperformed part of the undertaking by a summary procedure without driving the parties to a fresh suit.

(14) Mr. Rao has drawn our attention to a very recent decision, on the point, of the Travancore-Cochin High Court reported in — 'T. K. Sivarajan v Official Receiver', AIR 1953 Trav-Co. 205 (K). There a lease was granted by the receiver appointed under the orders of the Court in favour of a stranger and one of the terms of the lease was that he would surrender possession in favour of the lessor on the expiry of the term of the lease. The question that arose before their Lordships was whether possession could be recovered by an application to the Court in a summary procedure or that a separate suit had got to be brought for the purpose of recovery of possession from the lessee. On a discussion of some of the decisions, discussed above, their Lordships concluded that the lessee having expressly undertaken to surrender possession on the expiry of the lease the Court had jurisdiction to enforce this undertaking by summary procedure to recover possession.

Their Lordships held:

"The summary enforcement of the undertaking thus taken by the Court is only a step towards the discharge of the duties of the Court in the management of the estate and it cannot be said that the Court had lost its jurisdiction in that direction merely because the property has been put in the possession of a lessee."

(15) On a review of the above decisions, we are definitely of the view that, as in the present suit for partition the receiver was appointed for the purpose of proper management of the estate of the family during the pendency of the suit and the receiver in due course of his management was negotiating for the purpose of discharge of outstanding decretal dues against the family & further as the transactions in dispute were entered into and completed with the approval and permission of the Court at each stage of their development for the purpose of discharging the debts of

the family, the Court can, in the exercise of its summary powers, take proper steps for realisation of the unpaid purchase-money from the purchasers who have definitely submitted to the jurisdiction of the Court by their consistent conduct all throughout and made themselves bound by the order dated 6-11-1947 directing the purchasers to deposit balance consideration in Court as we have indicated above while distinguishing the judgment of Macpherson J. in the case of — 'Chandranath v. Biswanath', (A).

(16) Mr. Das, however, at last, placed strong reliance upon a decision of the Calcutta High Court reported in — 'Kristachandra v. Kristasakha', 36 Cal 52 (L), the judgment being of Woodroffe J. in the original side. In that case, the lease had been granted by the receiver under the orders of the Court to one of the parties to the suit. After the transaction was completely effected and the lessee was in possession of the leasehold, an application was filed to set aside the lease on the ground of collusion, fraud &c, Woodroffe J. refused to exercise summary powers to set aside the lease on investigation of the grounds for impeaching the transaction and observed that the proper remedy was by way of a suit.

The case is clearly distinguishable on account of the reason that the transaction of lease had already been completed and nothing remained to be done in respect thereof. The lease itself was being impeached on grounds of fraud and collusion and the Court was asked to set aside the lease. But in our case the purchasers have not deposited the balance consideration of Rs. 3,75,000/- as ordered by the Court, by its order dated 6-11-1947, and as we have observed earlier the purchasers, being parties to the order itself, and as the order was passed on their application for lifting of the attachment, are bound by the same order.

Now, therefore, when the purchasers have left unperformed a major part of their duty in respect of the transactions, the Court can enforce its own order by way of a summary procedure in ordering for realisation of the unpaid purchase-money. The sale-deeds in respect of twelve annas interest of the Aska Sugar Distillery and the Paramananda Saw Mills have been executed by the receiver in his capacity as receiver; but the other sale-deeds in respect of balance of four annas interest have been executed by the four annas cosharers, but nevertheless the latter set of sale-deeds has been executed with the permission, approval, sanction and orders of the Court. We are of the view that the sales in question are sales by the Court even though they are not sales in execution of decrees or compulsory sales.

(17) Mr. Das has taken up another ground relying upon certain terms of the sale-deeds which amount to creation of a charge on the properties sold for the balance of the unpaid consideration money. His contention is that the charge cannot be enforced in a summary manner but preliminary and final decrees are essential for the purpose of enforcing the charge under the provisions of O. 34, Civil P. C. He particularly relies upon O. 34, R. 15 which runs as follows:

> "All the provisions contained in the Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of S. 58, and to a charge within the meaning of S. 100, Transfer of Property Act, 1882."

In order that the present case may come under the provisions of O. 34, R. 15, it is essential that it must be a charge under the provisions of S. 100, Transfer of Property Act. Section 100 contemplates of only two of the charges, that is, either by act of parties, or by operation of law. In the present case, as we have already held, the sales being sales by the Court, the charge, in respect of the unpaid purchase-money contained in the terms of the sale-deeds, is not one either by act of parties or by operation of law. It is a well recognised principle that the Court is not a juridical person who can sue or be sued against. The present case, therefore, is not covered by the provisions of O. 34, R. 15.

(18) The last point urged on behalf of the petitioners is that the Court ought not to take steps for realisation of the unpaid consideration money by a summary procedure as the property conveyed has now vested in the third party. According to the petitioners, the Orissa Sugar Distillery and Timber Mills Limited is a juridical person being a Company duly incorporated under the provisions of the Indian Companies Act (Act 7 of 1913). The petitioner have produced the certificate incorporating the said Company under the provisions of the Indian Companies Act, dated 14-11-1950, granted by the Assistant Registrar, Joint Stock Companies, Orissa.

It is to be noted here that on the previous occasion, when this objection was taken on behalf of the petitioners, an order was passed by this Court making the said Company as a party to these proceedings. Notice was eventually taken to the Company and the services were found sufficient. But inspite of the services being sufficient no one appeared on behalf of the said Company before us raising any objection against the order passed by the trial Court to take steps for realisation of the money by a summary procedure.

Furthermore, there is no evidence placed before us to show that, in fact, the present assets, that is, the two mills at Aska and Russelkonda, have been transferred in favour of the said Company. It is also clear to us that even if the said Company is the transferee, as alleged, it is in the position of a pendente lite transferee, and, as such, is hit by the principle of lis pendens. It is, therefore, bound by any order passed by the Court to which its transferers were parties and the transferors were bound by the same order. As we have already made it clear, the National Agencies are bound by the order dated 6-11-1947 passed by the Court directing the National Agencies to make a deposit of the consideration money in Court. As such, the Court is perfectly entitled to enforce its own order in a summary manner against the National Agencies and their pendente lite transferees also.

(19) In conclusion, therefore, we find no substance in these Civil Revisions which are accordingly dismissed with costs. Hearing fee is assessed at two hundred rupees (Rs. 200/-).

(20) NARASIMHAM, J. I agree.

B/R.G.D. Revisions dismissed.

A. I. R. 1954 ORISSA 183 (Vol. 41, C. N. 54)

PANIGRAHI C. J. (9-3-1954)

Smt. Subarna Sunami and others-Petitioners **v.** Kartika Kudei and others Opposite Party.

Criminal Revn. No. 298 of 1953; from order of Sessions J., Sambalpur, D/- 30-7-1953.

(a) Criminal P. C. (1898), S. 145 (4) — Forcible and wrongful dispossession within two months before the date of order.

A fugitive act of trespass or interference with possession does not amount to dispossession. The dispossession referred to in S. 145 must be one that amounts to a completed act of forcible driving out of a party in possession.

On 18-6-1952 the second party laid a report with the police that they had cultivated the disputed fields on 27-4-1952 and that the first party damaged the seedlings on 18-6-1952. On the same day, the first party reported that the second party went armed with lathis and axes & ploughed the disputed lands & sowed paddy that very morning. On 28-6-1952, the police sent a report recommending immediate action under S. 145, Criminal P. C. and the Magistrate drew up a preliminary order on 2-7-1952. On these facts, it was argued that the dispossession of the first party took place on 27-4-1952, that is, more than two months prior to the date of the preliminary order, and that therefore the Magistrate had no jurisdiction to declare the possession of the first party:

Held, that it may well be that by sowing paddy, the second party made a sporadic attempt to take the possession of the lands by force on 27-4-1952. But the first party neither admitted, nor made any complaint about it. Therefore, what the petitioners did on 27-4-1952 did not amount to dispossession of the first party, and the first apprehension of a breach of the peace arose only on 18-6-1952 when both parties reported to the police against each other about a possible clash. (Para 3)

Anno: Criminal P. C., S. 145 N. 46, 47.

(b) Criminal P. C. (1898), S. 145 (4) — "At the date of the order", interpretation of — AIR 1952 Orissa 26, dissented from.

The words "at the date of the order" occurring in Cl. (4) of S. 145 should not be interpreted too literally, since it may often be found that in actual experience neither party would be in possession on that date, for it frequently happens that the police prevent both parties from going upon the land pending enquiry. Further it may well be that an order under S. 144, Criminal P. C. is passed by a Magistrate prohibiting either party from entering upon the land. Therefore, a proceeding under S. 144, Criminal P. C. followed by a proceeding under S. 145 cannot be allowed to operate in such a way as to disturb lawful possession and the point of time with reference to which the possession of either party is to be shown is the date when the proceeding under S. 144 had been started. This reasoning can be justified on the principle that an act of Court cannot prejudice a party '(actus curiae neminem gravabit)' which maxim is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law. (Para 4)

The language of the first proviso to Cl. 4 of S. 145 indicates that it is in the nature of a rule of evidence and vests the discretion on the Magistrate to treat a dispossessed party as if he had been in possession. In other words, a legal fiction is created in favour of the party dispossessed. To put a too literal construction on the language of the proviso would be to put a premium on dishonest and cantankerous parties who can always see to it that the enquiry is delayed and that the party dispossessed is ultimately deprived of the benefit of the legal fiction created by the proviso. Further, the use of the proposition "at" in the expression "at the date of the order" shows the series of proceedings culminating in the order, rather than the exact date on which the order is passed. It indicates more the proximity of events than the exact point of time when the order is passed.

Section 145 thus contemplates that the Magistrate should pass the preliminary order without any delay, after the receipt of the police report or the information, and S. 145(1) does not contemplate any prolonged enquiry, before the making of the preliminary order. If, however, the Magistrate sends it to the police for enquiry before passing of the preliminary order, he must be deemed to have taken cognizance of the matter and the two months period should be calculated from that date and not from the date when he makes up his mind and draws up the preliminary order. AIR 1952 Orissa 26, Dissented from. Case law referred. (Paras 4, 5)

Anno: Criminal P. C., S. 145 N. 46.

CASES REFERRED: Paras

(A) (V17) AIR 1930 Pat 556: 32 Cri LJ 208 4
(B) (1900) 27 Cal 785: 4 Cal WN 562 4
(C) ('31) 4 Mad Cri C 168 4
(D) (V32) AIR 1945 Mad 216: 1945-1 Mad LJ 210: 46 Cri LJ 767 4
(E) (V26) AIR 1929 Oudh 526: 5 Luck 440: 31 Cri LJ 678 4
(F) (V22) AIR 1935 All 35: 57 All 488: 36 Cri LJ 102 4
(G) (V18) AIR 1931 Nag 38: 32 Cri LJ 476 4
(H) (V14) AIR 1927 Mad 816 (1): 28 Cri LJ 782 4
(I) (V16) AIR 1929 Mad 198: 52 Mad 66: 30 Cri LJ 144 4
(J) (V38) AIR 1951 Mad 500:1951-1 Mad LJ 102: 1952 Cri LJ 126 4
(K) (V39) AIR 1952 Orissa 26: 17 Cut LT 270: 1952 Cri LJ 148 4
(L) ('98) 25 Cal 346 5

N. K. Das, for Petitioners; B. Mohapatra and S. N. Dasgupta, for Opposite Party.

ORDER: By an order dated 31-3-1953, the Magistrate, First Class, Bargarh, declared the possession of the disputed lands measuring 51.052 acres in favour of the first party (opposite paties herein) in M. C. No. 65/314 of 1952 — a proceeding under S. 145, Criminal P. C. The Sessions Judge, Sambalpur, affirmed this order by his judgment dated 30-7-1953, in criminal revision Case No. 6 of 1953. It is against this order that the members of the second party have come up in revision to this Court.

(2) The facts leading to the dispute lie within a short compass. Akula, the father of the first party was admittedly the Thikadar — Gaontia, & after his death Kartick the first party, is the Thikadar. The disputed lands are the sir lands of the village enjoyed by the gaontias in lieu of maintenance. The members of the second party claim to be the daughters of one Bhagat who was the cousin of Akula and was the previous gaontia and who, it is said, died issueless over 20 years ago. It has been found by both the Courts below that the petitioners are, in fact, not the daughters of Bhagat. It is contended that they are the daughters of one Jagat belonging to a junior branch. In view of the findings of the Court below and the overwhelming documentary evidence, learned counsel for the petitioners did not reagitate this point before me, and it must be taken

as established that the petitioners are not the daughters of Bhagat as alleged by them.

(3) But apart from that, the main contention raised is that the order of the Magistrate violates the provisions S. 145 (4) as the first party had been dispossessed more than two months prior to the passing of the preliminary order. The admitted facts are that on 18-6-1952 the members of the second party laid a report with the Police that they had cultivated the disputed fields on Akhayatruthiya day, corresponding to 27-4-1952 and that the members of the first party damaged the seedlings on 18-6-1952.

It appears that on the same day, viz., 18-6-1952. the first party reported that the petitioners went armed with lathis and axes and ploughed the disputed lands and sowed paddy that very morning. On 28-6-1952, the Police sent a report recommending immediate action under S. 145, Criminal P. C. and the Magistrate drew up a preliminary order on 2-7-1952. On these facts, it is argued that the dispossession of the first party took place on 27-4-1952, that is, more than two months prior to the date of the preliminary order, and that therefore the Magistrate had no jurisdiction to declare the possession of the first party. It will be noticed that the petitioners themselves alleged that they had sown paddy on 27-4-1952, but the members of the first party did not admit that they had been dispossessed on that date. It may well be that by sowing paddy, the petitioners made a sporadic attempt to take the possession of the lands by force on 27-4-1952. But the first party neither admitted, nor made any complaint about it.

It must therefore be held that what the petitioners did on 27-4-1952 did not amount to dispossession of the first party, and that the first apprehension of a breach of the peace arose only on 18-6-1952 when both parties reported to the Police against each other about a possible clash. It is well settled that a fugitive act of trespass or interference with possession does not amount to dispossession. The dispossession referred to in S. 145, Criminal P. C. must be one that amounts to a completed act of forcible driving out of a party in possession.

(4) Learned counsel for the petitioners has referred me to several cases where the first proviso to sub-sec. (4) of S. 145, Criminal P. C. has been considered. There is apparently a divergence of opinion as to whether the two months' period fixed in that proviso should be literally interpreted. If the party approaches the Police or the Magistrate complaining of interference with his possession, and if the enquiry lasts for more than two months before the preliminary order is passed by the Magistrate, the question would then arise as to what should be the date of commencement of the two months period prescribed in that proviso. Sub-section (1) of S. 145, Criminal P. C. lays down that if a Magistrate is satisfied from the Police report, or other information, that dispute likely to cause a breach of the peace exists, he shall make an order in writing requiring the parties to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Sub-section (4) provides that he shall here the parties, receive all such evidence as may be produced, and, if possible, decide whether any and which of the parties was 'at the date of the order' before mentioned, in such possession of the said subject. The first proviso of this clause reads as follows:

> "Provided that if it appears to the Magistrate that any party has, within two months before the date of such order, been forcibly and wrong fully dispossessed, he may treat the parties so dispossessed as if he had been in possession at such date."

If we interpret the words "at the date of the order" occurring in cl. (4) too literally, it may often be found that in actual experience neither party would be in possession on that date, for it frequently happens that the Police prevent both parties from going upon the land pending enquiry. It may well be that an order under S. 144, Criminal P. C. is passed by a Magistrate prohibiting either party from entering upon the land. It would be unreasonable to so interpret the expression "at the date of the order" literally, that the Magistrate may say that on that date neither party was in possession.

It has therefore been held in several cases that a proceeding under S. 144, Criminal P. C. followed by a proceeding under S. 145 cannot be allowed to operate in such a way as to disturb lawful possession and that the point of time with reference to which the possession of either party was to be shown was the date when the proceeding under S. 144 had been started — See — 'Saddique v Sheikh Mohid', AIR 1930 Pat 556 (A); 'Joyantikumar v. Middleton', 27 Cal 785 (B).

This reasoning can only be justified on the principle that an act of Court cannot prejudice a party '(actus curiae neminem gravabit)' — See Broom's Legal Maxims. This maxim is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law. The delay in deciding the dispute is the act of the Court for which neither party should suffer.

The Legislature must have been conscious of the well known maxim — 'nunc pro tunc' (now for then) when it enacted that the Magistrate should decide which of the parties was at the date of the order in possession although the order is preceded by a Police report and no such time-limit is laid down for the Police to make their report — I am inclined to adopt much the same line of reasoning in interpreting the first proviso which says that if any party has, within two months next before the date of such order, been forcibly dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

The language would indicate that the proviso is in the nature of a rule of evidence and vests the discretion on the Magistrate to treat a dispossessed party as if he had been in possession. In other words, a legal fiction is created in favour of the party dispossessed. If I am right in holding that any delay on the part of the Court or of the Police will not be taken into account in determining the possession of the disputed property "at the date of the order" it follows that the period of two months next before the date of such order should also be so construed as to exclude the time occupied by the Court or the Police before the passing of the preliminary order.

As I have already stated above there has been some conflict of views as to whether the expression "two months next before the date of such order" should be literally construed or whether a more liberal interpretation should be adopted. The cases reported in — 'Pitchai Moopan v. Narayanaswamy Moopan', 4 Mad Cri C 168 (C); — 'Arunachala v. Chinna Durai', AIR 1945 Mad 216 (D); — 'Emperor v. Baijnath', AIR 1929 Oudh 526 (E); — 'Meharban Singh v. Bhola Singh', AIR 1935 All 35 (F) and — 'Emperor v. Parash-

ram', AIR 1931 Nag 38 (G), take the extreme view that the period of two months from the date of the order would mean two months from the date of the preliminary order and not two months from the date of the complaint.

On the other side of the line are the cases reported in — 'Krishnam Raju v. Chintala Swami Naidu', AIR 1927 Mad 816 (1) (H); — 'Srinivasa Reddy v. Dasaratha Rama Reddy', AIR 1929 Mad 198 (I) where it has been held that an aggrieved party shall not be made to suffer because the Court, for some reason or other, delayed the passing of the preliminary order referred to in sub-s. (1) of S. 145, Criminal P. C. The latest case of the Madras High Court favouring this view is that of — 'Chunchu Narayana v. Karrapati Kesappa', AIR 1951 Mad 500 (J).

As has been pointed out in that case, S. 145 contemplates that the Magistrate should pass the preliminary order without any delay, 'after' the receipt of the Police report or the information; and S. 145 (1) does not contemplate any prolonged enquiry, before the making of the preliminary order. If, however, the Magistrate sends it to the Police for enquiry before passing of the preliminary order, he must be deemed to have taken cognizance of the matter and the two months period should be calculated from that date and not from the date when he makes up his mind and draws up the preliminary order.

I am unable to subscribe to the view taken by Ray C. J. in — 'Janama Bhoi v. Draupadi', AIR 1952 Orissa 26 (K) as laying down good law. To me it appears that to put a too literal construction on the language of the proviso would be to put a premium on dishonest and cantankerous parties who can always see to it that the enquiry is delayed and that the party dispossessed is ultimately deprived of the benefit of the legal fiction created by the proviso. If the party complaining comes to Court more than two months after his dispossession, it is manifest that the legal fiction cannot be invoked in his favour. But if the period of two months expires owing to the time occupied by the enquiry either by the Police or by the Magistrate before the preliminary order is passed, neither the intention nor the language adopted by the Legislature would justify the contrary view taken in some of the reported cases.

(5) The use of the preposition "at" in the expression "at the date of the order" inclines me to the view that what is meant is the series of proceedings culminating in the order, rather than the exact date on which the order is passed. It indicates more the proximity of events than the exact point of time when the order is passed. For instance, in S. 23(1), Land Acquisition Act, the expression "at the time of the Collector's taking possession of the land" is used in the fourth clause. These words do not mean that compensation can only be given for the damage which had actually at that time been sustained, without reference to the continuing damage caused by the acquisition. It has been held in — 'Collector of Dinajepur v. G. N. Roy', 25 Cal 346 (L) that the words must be taken to mean the time when the damage took place and the right to compensation arises. In the previous Act of 1870, the words used were "at the time of awarding compensation." That was open to abuse as the award might have been, and frequently was, made long after possession had been taken. The word 'at' should, therefore, be understood as "near to the date", rather than a fixed date.

(6) I would accordingly direct that the rule should be discharged and that the possession of the disputed lands be declared in favour of the first party. The revision is dismissed.

B/H.G.P. Rule discharged.

A. I. R. 1954 ORISSA 186 (Vol. 41, C. N. 55)

NARASIMHAM J. (29-3-1954).

H. Naik, Official Liquidator, Puri Bank Ltd., Petitioner v. Kanhu Charan Das, Opposite Party.

Execution Case No. 51 of 1953.

(a) Banking Companies Act (1949), (as amended in 1953), Ss. 45A, 45B — Ss. 18, 19, 33 and 37(3) of the Orissa Act 1 of 1952 — Inconsistency between — Effect — (Constitution of India, Art. 254(1) — (Civil P. C. (1908), Pre.) — (Tenancy Laws — Orissa Estates Abolition Act (1 of 1952), Ss. 18, 19, 33, 37(3)).

The Banking Companies (Amendment) Act, 1953, which amends the Banking Companies Act, 1949, is a later special enactment made by the Parliament for simplyfying and expediting the procedure for winding up of banking companies. The Orissa Estates Abolition Act (1 of 1952) is a general earlier Act dealing with acquisition of all estates within the State, the determination of compensation payable to the persons whose interests were so acquired and the manner of payment of such compensation. Where there is inconsistency between the two, the special later Act would prevail, especially when S. 45A, Banking Companies Act expressly declares that the provisions of part IIIA of that Act shall have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The Orissa Act is a "law for the time being in force", within the meaning of S. 45A, Banking Companies Act. (Para 6)

Clause (1) of Art. 254 of the Constitution also leads to the same conclusion. Sections 18, 19 and 33 of the Orissa Act being repugnant to Ss. 45A and 45B, Banking Companies Act would be void to the extent of the repugnancy. That is to say, though they may be valid in respect of claims of other persons, they will not be valid as regards the claim of a banking company under liquidation. (Para 7)

The result is that the exclusive jurisdiction conferred on the claims officer by the Orissa Act must give way in face of the provisions of Ss. 45A and 45B, Banking Companies Act by which the High Court alone has exclusive jurisdiction to determine the claim of a banking company under liquidation for payment out of the compensation money. (Para 8)

The conflict between the two Acts is essentially in respect of the exclusive jurisdiction of the High Court to determine the amount payable to a banking company. There is no conflict as regards the estimation of the amount so payable and hence the provisions of S. 20(2) of the Orissa Act regarding scaling down of interest and the provisions of S. 28(3) of that Act would continue to apply. (Para 9)

The question as to whether the amount due to the banking company should be realised in one lump sum or by instalments is a 'question

of fact relating to the winding up of the banking company' within the meaning of S. 45B and would thus be within the exclusive jurisdiction of the High Court. But this jurisdiction would be seriously curtailed if by virtue of S. 37(3) of the Orissa Act the State Government claim unfettered discretion to pay the sum either in one instalment or in thirty annual equated instalments. Section 37(3) of the Orissa Act must, therefore, give way before S. 45B, Banking Companies Act. (Para 10)

Anno: C. P. C., Pre. N. 7.

(b) Constitution of India, Art. 254(2) — Repugnancy between T. P. Act and Orissa Act (1 of 1952) — Effect — (Tenancy Laws — Orissa Estates Abolition Act (1 of 1952), Ss. 20(2) and 28(3)) — (T. P. Act (1882), S. 67).

Sections 20(2) and 28(3), Orissa Estates Abolition Act, 1952 may offend some of the provisions of the Transfer of Property Act regarding the rights of a mortgagee. But the Orissa Act has been assented to by the President and hence would prevail over any provision of the Transfer of Property Act inconsistent with it by virtue of Art. 254(2) of the Constitution. (Para 9)

U. N. Rath and G. Jena, for Petitioner; Advocate General, for Opposite Party.

ORDER : This is a reference by the Official Liquidator of Puri Bank (under liquidation) for a direction from this Court as to whether under Ss. 18 and 19, Orissa Estates Abolition Act (Orissa Act 1 of 1952) he should file a claim on behalf of the Bank before the claims Officer for determination of the amount payable to the Bank out of the total compensation money due to the judgment-debtor whose estate has already vested in the State Government in accordance with the provisions of the said Act. The Advocate General appeared on behalf of the Government to oppose the reference. But none appeared on behalf of the judgment-debtor though notice was served on him.

(2) The Puri Bank (which is now under liquidation) was the mortgagee of the proprietary interest of the judgment-debtor in village Barhat Trilochanpur. In M. S. No. 19 of 1951 filed by the Official Liquidator, this Court passed a preliminary mortgage decree on 8-2-1952 and made it final on the 20th January, 1953 and directed that the mortgaged property should be sold. The Official Liquidator then filed an execution proceeding on 5-11-1953. Before further action could be taken by this Court in the execution proceeding, the mortgaged property vested in the State Government on 22-1-1954 by virtue of a notification issued under S. 3 of the O. E. A. Act Doubtless, by virtue of sub-s. (2) of S. 73, T. P. Act the decree-holder would be entitled to claim payment of the mortgaged money out of the total amount due to the mortgagor as compensation. The main question for consideration is whether this Court exercising its jurisdiction over the liquidation proceedings of the bank by virtue of the powers conferred by Part IIIA of the Banking Companies Act, 1949 (as amended) has exclusive jurisdiction to determine and take steps for the realisation of the mortgage money or else whether the provisions of the O. E. A. Act would oust the jurisdiction of this Court.

(3) At this stage I may briefly recapitulate the relevant provisions of the O. E. A. Act, 1951. As soon as a notification is issued under S. 3(1) of that Act the proprietary interest of an intermediary in an estate vests in the State Government and the only right that subsists in the property is the right to receive compensation as determined and apportioned under the provisions of that Act. A suit in a Civil Court is expressly barred by Ss. 5(e) and 39 of that Act. Section 18 says that within six months from the date of vesting every creditor of the proprietor whose debt is secured by a mortgage may apply to a Claims Officer appointed under the Act for the purpose of determining the amount of debt legally and justly payable to him. Sections 19 and 20 contain procedural provisions in respect of the claim cases filed before that officer.

Chapter V contains detailed provisions for the assessment of total compensation payable to the proprietor whose estate has been taken over under the Act; first by an officer known as the Compensation Officer and later on by a Tribunal constituted under the Act. It is unnecessary to describe in detail most of the provisions in that Chapter. But I may refer to sub-section (3) of S. 28 in which it is specified that where the interest of a proprietor in an estate is subject to a mortgage the compensation payable to the mortgagee in satisfaction of his debt should not exceed a certain specified percentage of the total compensation as assessed under the provisions of that Chapter.

Chapter VI deals with the manner of payment of compensation and sub-s. (3) of S. 37 says that the total compensation is payable in thirty annual equated instalments from the date of vesting; but the proviso to that sub-section confers discretion on the Government to pay the compensation in one lump sum.

(4) I may now quote Ss. 45A and 45B of the Banking Companies Act, 1949 (as amending Act of 1953.

"45A. Part IIIA to override other laws : The provisions of this Part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Indian Companies Act, 1913 (7 of 1913) or the Code of Civil Procedure, 1908 (Act 5 of 1908) or the Code of Criminal Procedure, 1898 (Act 5 of 1898) or any other law for the time being in force or any instrument having effect by virtue of any such law but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with, the provisions of this Part or rules made thereunder shall apply to all proceedings under this Part.

45B. Power of High Court to decide all claims in respect of banking companies : The High Court shall, save as otherwise expressly provided in S. 45C have exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made under S. 153, Indian Companies Act, 1913 (7 of 1913) by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order of the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953."

The Banking Companies (Amendment) Act of 1953 was passed mainly because liquidation pro-

ceedings in respect of a large number of banks that had failed had proved unsatisfactory due to the procedure for winding up of such banking companies being cumbersome, prolonged and expensive. On the report of the Banks' Liquidation Proceedings Committee, 1952, the Parliament passed the amending Act with a view to simplify the procedure and expedite the proceedings. By S. 45A the provisions of Part IIIA were expressly declared to override the provisions of all other laws in force if there is any inconsistency between those laws and the provisions of the Act. But the provisions of those laws which are not inconsistent with that Act were declared to apply to all winding up proceedings.

Section 45B conferred exclusive jurisdiction on the High Court to entertain and decide any claim made by or against a banking company under liquidation including any question of priority or any other question whatsoever whether of law or fact which may relate to or arise in the course of winding up of such a company. The use of the words 'any other question whatsoever' makes it abundantly clear that the narrow ejusdem generis construction should not be applied and the widest possible construction should be put regarding the exclusive jurisdiction of the High Court to deal with all matters relating to or arising out of the winding up of a banking company.

(5) The inconsistency between sections 45A and 45B of the Banking Companies Act and Ss. 18, 19, 37(3) and 39, Orissa Estates Abolition Act will now be clear. Where the mortgagee of the proprietor of an estate is a banking company under liquidation and the estate is taken over by the Government under the provisions of the Orissa Act, two important questions arise :

(i) Who is the proper authority to investigate and determine the sum payable out of the total compensation to the mortgagee banking company?

(ii) Is the Government entitled to spread over the payment of such compensation to the banking company for a period of thirty years under S. 37(3) of the O. E. A. Act subject of course to their discretion to pay the entire compensation as a lump sum as permitted by the proviso to that sub-section?

(6) The Banking Companies (Amendment) Act, 1953 was passed by the Parliament in exercise of the powers conferred by Art. 246(1) of the Constitution read with entry 43 of List I of the seventh Schedule which confers on the Parliament exclusive jurisdiction to make laws regarding the winding up of banking companies. The use of the non-obstante clause in cl. (1) of Art. 246 further indicates the predominance or supremacy of the Union Parliament in making laws with respect to that subject. The O. E. A. Act was made by the Orissa Legislature in exercise of the powers conferred by cls. (2) and (3) of Art. 246 of the Constitution read with entry 36 of List II and entry 42 of List III of the Seventh Schedule. Following the well-known 'pith and substance' doctrine there seems no doubt that both the Acts have been validly passed by competent Legislatures and Mr. Rath on behalf of the Official Liquidator rightly did not urge that any provisions of the O. E. A. Act was ultra vires.

His contention however is that on a matter of mere construction, when there is any inconsistency between any provision of the Banking Companies Act (as amended) and the Orissa Estates Abolition Act the former should prevail. I am inclined to accept this argument. The Banking Companies (Amendment) Act, 1953 is a later special enactment made by the Parliament for simplifying and expediting the procedure for winding up of banking companies. The Orissa Estates Abolition Act is a general earlier Act dealing with acquisition of all estates within the State; the determination of compensation payable to the persons whose interests were so acquired and the manner of payment of such compensation. Where there is inconsistency between the two, the special later Act should prevail, especially when S. 45A, Banking Companies Act expressly declares that the provisions of Part IIIA of that Act shall have effect notwithstanding anything inconsistent therewith contained in 'any other law for the time being in force'. The O. E. A. Act is a 'law for the time being in force' within the meaning of S. 45A, Banking Companies Act.

(7) Clause (1) of Art. 254 of the Constitution also leads to the same conclusion. That clause says that when any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, then the law made by Parliament whether passed before or after the law made by the Legislature of the State, shall prevail and the law made by the Legislature of the State shall 'to the extent of' the repugnancy be void. Sections 18, 19 and 33 of the O. E. A. Act being repugnant to Ss. 45A and 45B, Banking Companies Act would, therefore, be void to the extent of the repugnancy. That is to say, though they may be valid in respect of claims of other persons they will not be valid as regards the claim of a banking company under liquidation.

(8) Hence, the exclusive jurisdiction conferred on the Claims Officer by the O. E. A. Act must give way in face of the provisions of sections 45A and 45B of the Banking Companies Act by which the High Court alone has exclusive jurisdiction to determine the claim of a banking company under liquidation for payment out of the compensation money.

(9) Doubtless, where there is no conflict between the two Acts the High Court will be bound to follow the provisions of the O. E. A. Act in estimating the amount of compensation payable. The conflict between the two Acts is essentially in respect of the exclusive jurisdiction of the High Court to determine the amount payable to a Banking Company. There is no conflict as regards the estimation of the amount so payable. Thus, the provisions of S. 20(2) of the O. E. A. Act regarding scaling down of interest and the provisions of S. 28(3) of that Act (already referred to) would continue to apply. Those provisions may offend some of the provisions of the Transfer of Property Act regarding the rights of a mortgagee. But the O. E. A. Act has been assented to by the President and hence would prevail over any provision of the Transfer of Property Act inconsistent with it by virtue of Article 254(2) of the Constitution.

(10) The construction of S. 37(3) of the O. E. A. Act, however, presents some difficulty. Under S. 45B, Banking Companies Act the High Court alone has exclusive jurisdiction to determine any question of law or fact relating to the winding up of a banking company. The question as to whether the amount due to the banking company should be realised in one lump sum or by instalments is a 'question of fact relating to the winding up of the banking company' and would thus be within the exclusive jurisdiction of the High Court. But this jurisdiction would be seriously curtailed if by virtue of S. 37(3) of

the O. E. A. Act the State Government claim unfettered discretion to pay the sum either in one instalment or in thirty annual equated instalments. If S. 37(3) were to prevail the result would be that the winding up proceedings of banking companies which have advanced loans to proprietors of estates and other 'intermediaries' as defined in the O. E. A. Act would be protected for a period of thirty years and the essential purpose for which the Banking Companies (Amendment) Act, 1953 was passed would be frustrated. I would therefore take the view that S. 37(3) of the O. E. A. Act must give way before S. 45B, Banking Companies Act.

(11) In the result the Official Liquidator is directed to apply to this Court and not before the Claims Officer for determination of the amount payable to the banking company out of the total compensation payable for the acquisition of the estate of the judgment-debtor. This Court after determining the sum in the light of the provisions of Ss. 20(2) and 28(3) of the Orissa Estates Abolition Act would then take further steps to recover the sum from the compensation money in the hands of the Government.

(12) Let a copy of this order be given to the Advocate General and also to the Official Liquidator of the Puri Bank Ltd.

A/D.R.R. Order accordingly.

A. I. R. 1954 ORISSA 189 (Vol. 41, C. N. 56)

NARASIMHAM J. (11-11-1953)

Gumani Puntia, Appellant v. Khetrabasi Puntia and others, Respondents.

Second Appeal No. 77 of 1949, from decision of Dist. J., Keonjhar, Balasore, D/- 2-12-1948.

Limitation Act (1908), Arts. 142, 144 — Onus of proof.

In a suit for ejectment, the plaintiff's suit must fail even though he might have established his title, if the evidence of possession adduced by both parties is found to be unworthy of credit. The primary burden of showing that the plaintiff was in possession of the property within twelve years of the commencement of the suit is on the plaintiff and hence if the evidence of possession is rejected as unworthy of credit the party upon whom the burden lies can be in no better position than if he had called no evidence at all. The position would doubtless differ if the evidence on the question of possession led by both parties, though not unworthy of credit was evenly balanced and the Court finds it difficult to prefer one and reject the other. In such instances, the presumption that possession follows title may be applied as a presumption of fact. But where, the evidence of possession is held to be unworthy of credit no such presumption can be made. AIR 1921 Pat 237, Foll.; Case law ref. (Para 10)

Anno: Lim. Act, Arts. 142-144 N. 87.

CASES REFERRED: Paras

(A) ('73) 14 Moo Ind App 203: 20 WR 25 (PC) 3
(B) (V8) AIR 1921 Pat 237: 6 Pat LJ 478 (FB) 10
(C) (V35) AIR 1948 Pat 391 10
(D) (V9) AIR 1922 Cal 557: 67 Ind Cas 673 10
(E) (V18) AIR 1931 Mad 282: 130 Ind Cas 845 10
(F) (V27) AIR 1940 Mad 798: ILR (1940) Mad 953 (FB) 10

B. N. Das, S. C. Das, G. K. Misra and B. Dube, for Appellant; M. S. Rao, for Respondents (Nos. 1 to 4).

JUDGMENT: This appeal is by defendant No. 1 against the appellate judgment of the District Judge of Balasore reversing the judgment of the Munsif of Bhadrak and decreeing the plaintiffs' suit for declaration of title and confirmation of possession in respect of about 2.294 acres of raiyati lands situate in villages Ajmatpur and Bargade in Bhadrak sub-division.

(2) The disputed properties appertain to khata No. 41 of Ajmatpur and khata No. 119 of Bargada and originally belonged to one Nalu Puntia after whose death in 1924 his widow Mauli Bewa became the limited owner. The total properties which devolved on Mauli Bewa after her husband's death consisted of 3.66 acres of which .01 cent. was homestead in which her residential house was situated. On 21-5-27 Mauli Bewa executed a sale deed (Ext. 6) conveying 3.65 acres of her properties in favour of defendants 3 to 5 who are the sons of her maternal uncle for a sum of Rs. 250/-. By this sale deed, she practically transferred all her properties except .01 cent. containing her residential house.

On 13-5-41 she executed another sale deed (Ext. D) conveying 3.52 acres of her properties to defendant No. 1. This slight difference in area was due to the Current Settlement which took place in 1924-28. The case of defendant No. 1 was that the first sale deed of Mauli Bewa (Ext. 6) in favour of defendants 3 to 5 was a bogus deed by which no title passed, that Mauli Bewa continued to remain in possession of all the properties of her husband till she transferred them to defendant No. 1 by the sale deed (Ext. D) dated 13-5-1941; but by way of abundant caution defendants 1 and 2 thought it prudent to take two other sale deeds (Exts. 4 and 5) from defendant No. 3 on 13-10-41 conveying the same properties to them. At this stage it may be noted that defendants 3, 4 and 5 are own brothers who were living jointly; defendant No. 3 being the karta of the family residing in the village. Defendants 4 and 5 were taking out their livelihood in Calcutta.

On 24-4-44 the plaintiffs managed to secure another sale deed (Ext. 3) from defendants 4 and 5 by which they conveyed their two-thirds share of the properties to the plaintiffs for a sum of Rs. 250/-. The plaintiffs alleged that by virtue of the sale deed of 1944 from defendants 4 and 5 they were entitled to two-thirds share of the properties and as defendant No. 1 interfered with their possession of the same they filed the suit for declaration of title and confirmation of possession. The cause of action is alleged to have taken place on 22-6-45 and the suit was instituted on 4-12-45.

The learned Munsif held that Mauli Bewa's first sale deed dated 21-5-27 was a bogus sale deed by which no title passed and that she continued to remain in possession of the disputed properties till the execution of her second sale deed dated 13-5-41 (Ext. D) in favour of defendant No. 1. The motive for the execution of such a bogus deed was alleged to be her attachment for the family of defendants 3 to 5 whose father (her maternal uncle) had brought her up from her infancy and given her in marriage. It was suggested that she was anxious that after her death the properties should devolve on her maternal cousins (defendants 3 to 5) and with a view to avoid litigation with her husband's reversioners she executed that sale deed making it appear as if it was executed for legal necessity by a limited owner for consideration. In view of this finding of the learned Munsif, he held that defendants 3, 4 and 5 did

not acquire any title to the properties by virtue of Mauli's first sale deed (Ext. 6) and consequently defendants 4 and 5 could not convey any title to the plaintiffs by their sale deed (Ext. 3) dated 24-4-44. Hence, he dismissed the suit.

(3) The lower appellate Court, however, held that the first sale deed of Mauli Bewa was a valid sale deed for consideration by virtue of which title to the properties passed to defendants 3 to 5. On the question of possession, it held that the evidence placed by both parties was unworthy of credit. Then relying on the well-known decision of the Privy Council reported in — 'Runjeet Ram Pandey v. Goburdhun Ram Pandey', 14 Moo Ind App 203 (PC) (A), it thought that presumption of possession should follow title and inasmuch as defendants 3, 4 and 5 were held by it to have acquired valid title to the properties by the first sale deed of Mauli Bewa (Ext. 6) they must be deemed to have been in possession till the execution of the sale deed (Ext. 3) by defendants 4 and 5 in favour of the plaintiffs. Hence it decreed the suit with costs.

(4) Though the suit was brought for the purpose of confirmation of possession it is, in essence, a suit for recovery of possession. The lower appellate Court completely overlooked this aspect of the case chiefly because it failed to read the evidence of plaintiff No. 2 (P. W. 1) carefully. This witness admitted in cross-examination that defendant No. 1 possessed all the lands of Mauli after he obtained the second kabala from her on 13-5-41. He further admitted that defendants 3 to 5 gave up possession of the suit lands at about that time. The plaintiffs' kabala was executed only in 1944 (Ext. 3). When one of the plaintiffs' himself admitted frankly that from 1941 the disputed properties passed into the possession of defendant No. 1 the suit becomes merely a suit for recovery of possession by a person who claims a superior title to the same. The plaintiffs' vendor defendant No. 4 (P. W. 3) was living in Calcutta at all relevant times and he frankly admitted in cross-examination that he could say nothing about possession of the disputed properties inasmuch as he was not living in the village.

Doubtless, defendant No. 3 who was the karta of the family consisting of himself and defendants 4 and 5 was competent to give evidence on the question of possession. But he was not examined as a witness by either party. But in view of the frank admission of plaintiff No. 2 that defendant No. 1 obtained possession of the disputed properties in 1941 and the further admission by his vendor (p. w. 3) that he has no knowledge of possession of the disputed properties the plaintiffs' claim that they obtained possession by virtue of the kabala (Ext. 3) could hardly stand. As a matter of fact, by virtue of that kabala they would have got only two-thirds of the undivided share of the three brothers (defendants 3, 4 and 5). But if, as admitted by plaintiff No. 2, their vendors had lost possession as early as 1941 the suit becomes clearly a suit for declaration of title and recovery of possession and not a suit for confirmation of possession.

(5) Hence, even if it is accepted for the sake of argument that Mauli Bewa conveyed valid title to defendants 3, 4 and 5 by her sale deed dated 21-5-27 the question arises as to whether the plaintiffs and their predecessors-in-title (defendants 4 and 5) were in possession within twelve years of the institution of the suit.

(6) The lower appellate court's analysis of the evidence adduced by the parties on the question of possession is very unsatisfactory. He has completely overlooked the fact that, as already pointed out, plaintiff no. 2 himself admitted that defendant no. 1 somehow obtained possession when he took the second kabala from Mauli Bewa on 13-5-41. If defendants 3, 4 and 5 were really in possession on that day it is inexplicable as to how defendant no. 1 could obtain possession by virtue of the second kabala from Mauli.

The lower appellate court also failed to give due importance to the series of rent-receipts which show unmistakably that Mauli paid rent for the disputed properties till 1941 (Exts. B series, C series, E series and L series). Some of these rent-receipts (Exts. E, E-1, E-2 and E-3) were of the years 1934 and 1935. If the first kabala was a genuine document and possession had passed to the vendees (defendants 3 to 5) by virtue of that kabala as early as 1927, it is not likely that rent-receipts would continue to be granted in the name of Mauli and the vendees would not take prompt steps to get their names mutated in the landlord's sheresta. As a matter of fact, mutation was made only as late as 1939. The learned lower appellate court brushed aside all the rent-receipts by saying that most of them appeared to have been written in the same ink, at the same time and by the same person. This sweeping observation only shows that it has not cared to see the rent-receipts. Some of these rent-receipts (Ext. L series and Ext. E series) which have been proved by the plaintiffs themselves appear to be very old, even to the naked eye, and they could not have been written by the same person who wrote the other rent-receipts.

(7) The lower appellate court further completely failed to attach proper significance to Exts. G and H. The first plaintiff obtained a S. C. C. decree in suit no. 19931 of 1937 in Calcutta (see Ext. G) against Mauli Bewa in respect of a money claim. After getting the decree transferred to the court of the Munsif of Bhadrak for execution, he applied on 4-7-38 (see Ext. A) for attaching the disputed properties representing to the court that they were the properties of Mauli Bewa. Thereupon Mauli Bewa got the ex parte decree set aside taking the help of the father of defendant no. 1. If as now stated by the plaintiffs, Mauli Bewa lost all interest in the properties as early as 1927 and plaintiff no. 1 was fully aware of the sale he would not have applied to the executing court for attachment of the very same properties representing that they continued to remain with Mauli as late as 1937.

His explanation is that as the settlement khatian stood in the name of Mauli Bewa he thought that he could proceed against Mauli's properties for the execution of the decree. This explanation can hardly stand scrutiny. As stated by him, he knew that Mauli had sold away her lands. He was anxious to realise his decretal money by attaching her properties. He is also a man of Ajmatpur village. He would not be such a simpleton as to apply to the executing court for attachment of the properties she had sold away to a third party long before he obtained a decree against Mauli Bewa. On the other hand, this circumstance itself shows that plaintiff no. 1 knew fully that notwithstanding the sale-deed of 1927 Mauli Bewa continued to remain in possession and was believed by all the people of the village to be the owner of the properties.

(8) It was, however, urged that the finding about possession by the lower appellate court was a finding of fact even though it might have failed to give due importance to certain essential fea-

tures in the evidence and that this court could not set aside such a finding. But the lower appellate court's finding on the question of possession is not in favour of the plaintiffs' side. After a cursory discussion of the oral and documentary evidence it has observed :

"The oral evidence, as I have observed, is highly unsatisfactory and therefore, the evidence adduced by both parties with regard to possession is unworthy of credit."

Even if this finding be taken as binding on this court, from the discussion of the evidence as given by the lower appellate court itself it is clear that it was referring to the evidence regarding possession of the disputed properties from 1927 till 1941. This inference arises from the admission made by plaintiff no. 2 (p. w. 1) in his cross-examination to the effect that from 1941 defendant no. 1 obtained possession of the disputed properties. The lower appellate court has not noticed this admission of p. w. 1; but the evidence of possession which it discussed related to a period prior to 1941. Hence, the finding of the lower appellate court as far as I could make out is as follows :

Defendants 3 to 5 obtained valid title to the properties by virtue of the first kabala (Ext. 6) dated 21-5-27 executed by Mauli Bewa in their favour. The evidence, oral and documentary, as to whether Mauli continued to remain in possession after that date or else whether her vendees obtained possession was highly unsatisfactory. The admitted position is, however, that from 1941 when Mauli executed the second sale deed in favour of defendant no. 1 the latter obtained possession. The plaintiffs never obtained possession of the disputed properties by virtue of her kabala (Ext. 3) inasmuch as they purchased an undivided share in the joint family property and being unable to obtain possession they had to bring the present suit. The lower appellate court clearly refers to the struggle for possession between the plaintiffs and defendants 1 and 2 which indicates that the plaintiffs did not obtain even joint possession after 1944.

(9) Hence, even if it be assumed that the plaintiffs acquired good title to the properties inasmuch as their vendors (defendants 4 and 5) validly purchased the same from Mauli Bewa in 1927 a question arises as to whether in view of the unsatisfactory nature of the evidence which has been held to be 'unworthy of credit' by the lower appellate court regarding possession of the disputed properties by the plaintiffs' vendors from 1927 till 1941 and the admitted possession that from 1941 till 1944 at any rate, defendant no. 1 was in possession the lower appellate court was justified in applying the presumption that possession follows title.

(10) The law on the subject has been clearly laid down in a Full Bench decision of the Patna High Court in — 'Shiva Prasad Singh v. Hira Singh', AIR 1921 Pat 237 (B), where it was held that in a suit for ejectment the plaintiff's suit must fail even though he might have established his title if the evidence of possession adduced by both parties is found to be unworthy of credit. It was pointed out that in such cases the primary burden of showing that the plaintiff was in possession of the property within twelve years of the commencement of the suit was on the plaintiff and hence if the evidence of possession was rejected as unworthy of credit 'the party upon whom the burden lies can be in no better position than if he had called no evidence at all'. The position would have doubtless differed if the evidence on the question of possession led by both parties, though not unworthy of credit was evenly balanced and the court finds it difficult to prefer one and reject the other. In such instances the presumption that possession follows title may be applied as a presumption of fact. But where, as in the present case, the evidence of possession is held to be unworthy of credit no such presumption can be made.

This decision was followed in a recent decision of the Patna High Court in — 'Harnandan Singh v. Ramanandi Kuer', AIR 1943 Pat 391 (C), which has been followed by some other High Courts (see — 'Rakhal Chandra Ghose v. Durgadas Samanta', AIR 1922 Cal 557 (D) & — 'Sevugan v. Kannappa', AIR 1931 Mad 282 (E). In a Full Bench decision of the Madras High Court reported in — 'Official Receiver v. Govindaraju', AIR 1940 Mad 798 (F), the same principle was followed. Therefore, on the finding of the lower appellate court the plaintiff's suit must fail.

(11) Mr. M. S. Rao however urged that the aforesaid principle should not be applied to the present case inasmuch as the plaintiffs did not, in express terms, pray for recovery of possession and moreover, the lower appellate court has not come to a finding that defendant no. 1 obtained possession of the disputed properties in 1941. This argument has been already met. No express finding is required in respect of a fact admitted by one of the plaintiffs himself (p. w. 1) in his cross-examination. It is true that the lower appellate court has not expressly referred to this admission; but I have already shown that its entire discussion (oral and documentary) on the question of possession related to a period prior to 1941. In essence, the suit is one for recovery of possession and the principles laid down in the aforesaid Full Bench decision of the Patna High Court would apply with equal force.

(12) I would, therefore, allow the appeal, set aside the judgment of the lower appellate court and restore the judgment of the learned Munsif with costs throughout.

B/H.G.P. Appeal allowed.

A. I. R. 1954 ORISSA 191 (Vol. 41, C. N. 57)

PANIGRAHI C. J. & MOHAPATRA J. (9-2-1954)

Balakrishna Kar and another, Petitioners v. H. K. Mahatab, Opposite-Party.

Civil Revn. No. 19 of 1954, from order of Sub-J., Cuttack, D/- 7-1-1954.

(a) Civil P. C. (1908), O. 18, Rr. 1 and 2 and S. 115 — Right to begin — (Evidence Act (1872), Ss. 101-103).

The allegations essential for the support of a party's case may be negative in form but affirmative in essence. The plaintiff who complains of an attack upon his character or reputation has, in the first place, however cleverly he may frame his allegations in the plaint, to make out that he had a reputation which had been damaged by the writing complained against. That he has a reputation which could be damaged by the alleged libellous writing or that it has been so damaged as to justify the claim is a matter peculiarly within the knowledge of the plaintiff and has to be established by him. Where the defence is that the publications do not constitute libel and in the alternative fair comment, privilege and justification by truth and is in substance an argumentative traverse of the plaintiff's story it may be that the defendant has admit-

ted the publication of the articles but it cannot be stated that he admitted that the articles constituted a libel on the character of the plaintiff. The onus in such circumstances lies on the plaintiff affirmatively to establish his case and otherwise he must fail and in that event it is open to the defendant to say that he need not prove the truth of his defence. Therefore, the Court if in that case accepts the contention that the words used are per se defamatory and the question whether they amount to libel or not is one for the Court to decide and not for the plaintiff to prove by adducing evidence and that in view of the admissions made by the defendants in written statement regarding the position held by the plaintiff and the publication of the impugned articles, the onus had shifted to the defendants to prove the truth of the articles and the privileged occasion in which they were published and calls upon the defendants to begin in the first instance that order is erroneous and liable to be set aside.

(Paras 2, 3, 4, 5)

Such an order involves a clear breach of the provisions of Rr. 1 and 2 of Order 18, Civil P. C., as well as of the rules of evidence and if not interfered with at the stage of revision, where one is preferred, may result in the same point being again agitated at a later stage necessitating an order for re-trial involving the parties in considerable expense and also delay which could be avoided by the interference. Hence the point against the maintainability of the revision on the ground that however erroneous the view taken by the Court below may be, it did not affect its jurisdiction or constituted a material irregularity in procedure must be overruled. (Paras 6, 7)

Anno: Civil P. C., O. 18, R. 1 N. 1.

1953 Mulla: O. 18, R. 1 P. 716 N. "Right to begin" (9 Pts. extra in N. 1 to O. 18, R. 1 in AIR Com.).

Civil P. C., O. 18, R. 2 N. 1.

1953 Mulla: O. 18, R. 2 (Topic discussed in N. 1 to O. 18, R. 2 in AIR Com. extra).

Civil P. C., S. 115 N. 13.

1953 Mulla: S. 115 (Topic discussed in N. 13 to S. 115 in AIR Com. scattered in various notes in Mulla).

Evidence Act, Ss. 101-103 N. 6, 5, 2.

(b) Civil P. C. (1908), O. 18, Rr. 1 and 2 — Right to begin.

The right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two. It is open to the plaintiff to say that although he has the right to begin he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence, but the plaintiff should make this statement before the defendant is called upon to adduce evidence. (Para 5)

Anno: Civil P. C., O. 18, R. 1 N. 1; O. 18, R. 2 N. 1.

A. Das, for Petitioners; B. M. Patnaik, for Opposite Party.

PANIGRAHI C. J.:

This is an application under S. 115, Civil P. C., against an order of the Subordinate Judge, Cuttack, calling upon the defendants in a suit for defamation to begin their case. The plaintiff opposite party filed the suit for defamation claiming Rs. 1 lakh as damages, for alleged libel on his reputation caused by certain writings in the "Matrubhumi" of which the defendants are the Editor and the Publisher.

The defendants' case is that these publications do not constitute libel; they also plead, in the alternative, fair comment, privilege and justification by truth.

These being the allegations and the counter-allegations, the trial Court framed issue No. 4 as follows:

"Is the plaintiff entitled to recover damages from the defendants; if so how much and from whom?"

Sometime later, on an application made by the plaintiff, the learned Subordinate Judge framed some additional issues. Issues No. 4 and 5 as thus framed read as follows:

'4. Whether the articles referred to in the plaint and the extract quoted therein were published maliciously?

5. Whether the articles referred to in the plaint and the extracts quoted therein constitute libel on the plaintiff?"

The other three issues relate to the plea of justification by truth, fair comment, and qualified privilege.

(2) On these issues the question arises as to who has the right to begin. It was contended for the plaintiff-opposite party that in view of the admissions made by the defendants in the written statement regarding the position held by the plaintiff and the publication of the impugned articles, the onus had shifted to the defendants to prove the truth of the articles and the privileged occasion in which they were published. The substantial contention raised on behalf of the plaintiff is that the words used are per se defamatory and the question whether they amount to libel or not is one for the Court to decide and not for the plaintiff to prove by adducing evidence. The learned Subordinate Judge has accepted this contention of the plaintiff and called upon the defendants to begin in the first instance.

(3) The same contentions have been repeated before us and a number of citations have been made from the text books on the subject of 'Torts'. It appears to us, however, that the statements made in the text-books regarding what the plaintiff has to prove in such suits are not quite relevant to the point that falls to be decided by us.

The procedure to be adopted at a trial is laid down in O. 18, R. 1, Civil P. C., which says that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some other additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. Rule 2 of O. 18 says that the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove.

The issues framed by the learned trial Judge called upon the plaintiff to prove firstly that the impugned publications constituted a libel on the plaintiff and secondly that he is entitled to recover damages and, if so, assess the quantum of damages from the party concerned. On a mere perusal of the issues, it would appear that the plaintiff should have been called upon to state his case and adduce evidence in support of his claim that

his reputation has been damaged by the alleged publication of articles which constitute a libel on his character.

The lower Court appears to have made a confusion between the right to begin and the proof required in support of the plaintiff's case. It may be that the defendant has admitted the publication of the articles but it cannot be stated that he admitted that the articles constituted a libel on the character of the plaintiff. That the plaintiff has a reputation which could be damaged by the alleged libellous writing or that it has been so damaged as to justify the claim is a matter peculiarly within the knowledge of the plaintiff and has to be established by him.

Sections 101, 102 and 103, Evidence Act, lay down the rules to be followed in determining on whom the onus lies of proving a particular fact. The allegations essential for the support of a party's case may be negative in form but affirmative in essence. The plaintiff who complains of an attack upon his character or reputation has, in the first place, however cleverly he may frame his allegations in the plaint, to make out that he had a reputation which had been damaged by the writing complained against.

The true rule in such cases is laid down in Ameer Ali's commentary on this bunch of sections to the following effect:

> "When the issue raised by the Court is in substance whether the plaintiff's or defendant's story is true, it is possible that neither of the stories may be true. The question, then, arises which of the two alternative issues is the really material one. So the really material one is the first of the issues — is the plaintiff's story true?"

If this rule is applied as the proper test to the facts of the present case the Court has before it two alternative stories: firstly, that the plaintiff had a reputation which has been damaged giving him a right to recover damages; but as against this the defendant claims privilege, fair comment, and justification by truth. Neither of these versions may ultimately be found to be true. In such a situation, it would clearly be the duty of the plaintiff to prove, in the first instance, that his story is true.

(4) Another point which the Court below has missed is that the defence is substantially an argumentative traverse of the truth of the plaintiff's story and cannot be taken to be an admission of any of the plaint allegations, constituting defamation of the plaintiff's character. The only fact that may be regarded as having been admitted is that the defendants are respectively the editor and publisher of the journal in which the impugned articles appeared. But it cannot be taken to have been admitted in the pleading that they constitute a libel on the plaintiff's character. In these circumstances the onus lies on the plaintiff affirmatively to establish his case, as set out in the first two issues; otherwise he must fail and in that event, it is open to the defendant to say:

> "I need not prove the truth of my defence as the plaintiff has not proved his."

(5) It should therefore be borne in mind that the right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two. It is open to the plaintiff to say that although he has the right to begin he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence, but the plaintiff should make this statement before the defendant is called upon to adduce evidence. Unfortunately, the Court below has confused the issue and has called upon the defendant to open his case even before the plaintiff went into the box or testified to the truth of his story. We are clearly of opinion that the order of the learned Subordinate Judge is erroneous and must be set aside.

(6) The second point urged before us is about the maintainability of this revision. It has been contended that however erroneous the view taken by the Court below may be, it does not affect his jurisdiction nor does it constitute a material irregularity in procedure. We are unable to accede to this contention as we are of opinion that there has been a clear breach of the provisions of Rules 1 and 2 of Order 18, Civil P. C., as well as of the rules of evidence.

(7) If we do not interfere at this stage it may well be that the point will again be agitated at a later stage necessitating an order for re-trial. Such a course would involve the parties in considerable expense and would also entail delay which can be avoided by our interference at this stage. We would therefore overrule the second contention on this ground also.

(8) In the result, this revision succeeds and the order of the learned Subordinate Judge is set aside. The petitioner will have his costs which we assess at Rs. 50/- (rupees fifty only).

(9) MOHAPATRA J.: I agree.

B/M.K.S. Revision allowed.

A. I. R. 1954 ORISSA 193 (Vol. 41, C.N. 58)

PANIGRAHI C. J. (16-12-1953)

Muhammad Khan, Complainant, Petitioner **v.** Gourishankar Misra, Accused Opposite Party.

Criminal Revn. No. 111 of 1953, from judgment of S.-J., Sambalpur, D/- 19-2-1953.

(a) Penal Code (1860), S. 193 — Contradiction between pleading in plaint in former suit and deposition in later suit — Prosecution for perjury — (Criminal P. C. (1898), S. 476) — (Civil P. C. (1908), O. 6, R. 15).

In many cases, persons in verifying pleadings are often found to say something which is not strictly true, but by such action they do not render themselves liable for prosecution for perjury for making a false statement. This by itself does not constitute an offence under S. 193. AIR 1930 Cal 639, Foll. (Para 4)

Accused making allegation of oral partition in plaint in former suit — Accused stating on oath in later suit that there was no partition — Allegation of oral partition found not necessary for getting decree in former suit nor allegation spoken to by accused in evidence recorded in that suit — Facts showing that there could have been no intention to make false statement to get undue advantage over defendant or to mislead Court — Allegation of oral partition held could not be regarded as intentionally false so as to attract operation of S. 193, I. P. C. (Para 3)

Anno: Penal Code, S. 193 N. 2, 8, 9; Criminal P. C., S. 476 N. 11; Civil P. C., O. 6, R. 15 N. 7.

(b) Criminal P. C. (1898), S. 439 — Revision against acquittal.

The revisional jurisdiction of the High Court is not to be ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on the record. It cannot, in the absence of

any error on a point of law, re-appraise the evidence and reverse the finding of fact on which the acquittal is based. (Para 4)

Anno: Criminal P. C., S. 439 N. 12.

CASES REFERRED: Paras

(A) ('51) Civil Appeal No. 1 of 1951 (Ori) 2
(B) (V16) AIR 1929 All 936: 30 Cri LJ 1154 4
(C) (V17) AIR 1930 All 490: 31 Cri LJ 954 4
(D) (V20) AIR 1933 All 318: 34 Cri LJ 686 4
(E) (V17) AIR 1930 Cal 639: 32 Cri LJ 238 4
(F) (V14) AIR 1927 Nag 170: 28 Cri LJ 523 4
(G) (V38) AIR 1951 SC 196: 52 Cri LJ 510 (SC) 4
(H) (V38) AIR 1951 SC 316: 52 Cri LJ 1248 (SC) 4

L. Mohanty, for Petitioner; P. C. Chatterji, for Opposite Party.

ORDER : This is a revision directed against an order of acquittal passed by the Sessions Judge, Sambalpur, in an appeal against the conviction of the opposite party, Gouri Shankar Misra, who is said to be a Pleader of Sambalpur. The facts giving rise to this petition are that the opposite party filed Money Suit No. 213 of 1936 in the Court of the Munsiff, Sambalpur, on the foot of a money-bond, Ext. A-1, dated 22-6-32, against one Kruttibas Naik who is said to be his maternal uncle. The debt was originally contracted by Kruttibas Naik and his brother from the father of the opposite party. One of the debtors paid up his share of the debt and for the share of Kruttibas a fresh bond was taken in the name of the opposite party. The bond recites :

"From your father, I and my brother had incurred a loan of Rs. 500/- by executing a bond, towards the interest of which we had paid Rs. 120/-. Rs. 366/- is the share payable by me, being half of the total dues thereunder. As the dues under that bond have fallen to your share and as I am unable to repay the same, I execute this bond acknowledging my liability to pay Rs. 366/-. I stipulate to pay you within one year the amount with interest at 6 per cent. per annum."

The opposite party filed a suit for recovery of this amount and it was alleged in the plaint that Ext. A was allotted to the share of the plaintiff at an earlier partition between himself and his father.

(2) Eleven years later, that is in 1947, the opposite party and his father R. N. Misra instituted Title Suit 11 of 1947 in the Court of the Subordinate Judge against the present petitioner and another person for a declaration that they had the sole right to collect kendu leaves within a particular area. The contention raised by the petitioner who was the defendant in that suit is that the suit was hit by S. 69, Partnership Act, as the plaintiffs were divided in status. The opposite party examined himself in the suit and stated on oath that there was no partition, in fact, between him and his father and that the allegation made by him in the plaint of the year 1936 was made only for the purpose of that suit as he was under the belief that the suit was to end in a compromise. It is due to the apparent contradiction between the pleading in the plaint of 1936 and the deposition of the opposite party in 1949 in the later Title Suit that the petitioner ventured to file a petition under S. 476, Cr. P. C., for prosecuting the opposite party for perjury.

That petition ultimately came up to the High Court and my learned brother Narasimham J. sanctioned the prosecution of the opposite party in — 'Civil Criminal Appeal No. 1 of 1951, (Ori) (A)', in consequence of which the Registrar filed a complaint in the Court of the Subdivisional Magistrate, Sadar Sambalpur. The learned Magistrate found that an offence under Section 193, I. P. C., had been made out against the opposite party as the allegation made by him in the plaint in 1936 was intentionally false. On appeal the learned Sessions Judge came to a different conclusion and set aside the conviction and sentence passed on the opposite party. The learned Sessions Judge held that there was no evidence in the case to establish which of the two contradictory statements was true. He further held that the allegation in the plaint was carelessly made and cannot be said to have been intentionally false.

The learned Judge was also of opinion that the allegation of oral partition was not necessary for getting a decree in the money suit; and it is significant that this allegation was not spoken to by the opposite party in the evidence recorded in that suit.

(3) It appears strange that the complainant who initiated criminal proceedings has not thought fit to complain against the order of acquittal words used are "as the dues under the bond have the State Government appealed against that decision. It is at the instance of a third party that this matter has been brought to the notice of this Court. I should be extremely reluctant to interfere in revision and set aside an order of acquittal which would inevitably lead to a re-trial of the opposite party. Having regard to the fact that the allegation about the oral partition was made over 17 years ago it cannot be said to be in the interests of public justice that the opposite party should be put to the harassment of a new trial at this stage. Apart from that there was sufficient justification, in my opinion, for the view taken by the learned Sessions Judge.

The bond, Ext. A, itself recites that the debt was payable to the opposite party; the express words used are "as the dues under the bond have fallen to your share". That is a recital made by the debtor in favour of the creditor and the pleading should necessarily accord with the terms of the contract. It appears to me, therefore, that there could have been no intention on the part of the opposite party to make a false statement to get an undue advantage over the debtor or to mislead the Court. The father of the opposite party was made a defendant. Whatever the truth may be, the facts were all known to the parties and were in accordance with the recitals in the bond. In these circumstances, I am not inclined to regard the allegation about the oral partition, made in the plaint in 1936, as intentionally false so as to attract the operation of S. 193, I. P. C.

(4) It was urged at the Bar by learned counsel for the petitioner that a false pleading is hit by S. 191, I. P. C. and the cases reported in — 'Raja Ram v. Emperor', AIR 1929 All 936 (B); — 'Emperor v. Padam Singh', AIR 1930 All 490 (C); — 'Durga Prasad v. Emperor', AIR 1933 All 318 (D), were cited in support. On the other side also, there is a line of cases which take the contrary view. As was observed in — 'Rashbehari Roy v. Emperor', AIR 1930 Cal 639 (E) :

"in many cases persons in verifying pleadings are often found to say something which is not strictly true, but by such action they do not render themselves liable for prosecution for perjury for making a false statement. This by itself does not constitute an offence under S. 193, I. P. C."

In — 'Sher Khan v. Anwar Khan', AIR 1927 Nag 170 (F), the plaintiff gave a wrong date of the transaction between him and the defendant and affirmed in his oral statement the correctness of the date wrongly given. On a prosecution being filed at the instance of the Judicial Commissioner's Court, the plaintiff was convicted by the trial Court for perjury under S. 193, I. P. C. But on appeal the Sessions Judge reversed this order. When the matter was taken up to the Court of the Judicial Commissioner in revision that Court refused to interfere with the acquittal order and held that it would not interfere unless the trial could be shown to have been illegal, or so radically and incurably irregular as, in fact, to have occasioned a failure of justice. In a recent decision of the Supreme Court reported in — 'Stephens v. Nosibollah', AIR 1951 SC 196 (G), the Supreme Court laid down that the revisional jurisdiction of the High Court is not to be ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on the record.

In a later case of the Supreme Court reported in — 'Ugendra Nath v. Potai Lal', AIR 1951 SC 316 (H), the same principle of law was reiterated and it was held that the High Court cannot, in the absence of any error on a point of law reappraise the evidence and reverse the finding of fact on which the acquittal is based. I am unable to discover any such error either of law or of appraisal of evidence by the lower appellate Court. I would, therefore, uphold the order of acquittal passed by the learned Sessions Judge and dismiss this petition.

B/G.M.J. Petition dismissed.

A. I. R. 1954 ORISSA 195 (Vol. 41, C.N. 59)

PANIGRAHI C. J. AND NARASIMHAM J.
(27-4-1954).

Udaya Naik, Appellant v. Lokanath Naik and others, Respondents.

Second Appeal No. 322 of 1948, from decision of Sub-Judge, Sambalpur, D/- 30-3-1948.

(a) Tenancy Laws — C. P. Tenancy Act (11 of 1898), Ss. 46(3) and (5) and 47(1) — Object.

The main object of Ss. 46(3) and (5) and 47(1) is to prohibit the transfer of an occupancy holding or a portion thereof to any person other than the next heir of the transferor or his co-sharer. (Para 3)

(b) Tenancy Laws — C. P. Tenancy Act (11 of 1898), Ss. 46(3) and (5), 47(1) and 95 — Transfer — Gift — Invalidity — Registration — Jurisdiction of Revenue Court. AIR 1945 Nag 119 and AIR 1947 Pat 424, Dissented from — (Transfer of Property Act (1882), Ss. 3 and 123) — (Civil P. C. (1908), S. 9).

The word "transfer" in S. 46(3) means a valid transfer and the Revenue Officer's exclusive jurisdiction under S. 47(1) arises only where a transfer otherwise valid contravenes the provisions of S. 46(3) and (5). (Para 7)

Sub-section (5) of S. 46 is also 'a law for the time being in force regulating the registration' of a certain class of documents. Hence, by construing sub-s. (5) of S. 46, along with the provisions of the Indian Registration Act and S. 123, Transfer of Property Act it may be reasonably held that the requirement about compulsory registration of a deed of gift under the general law of transfer is not applicable where the transfer is of an occupancy holding to a person other than the persons specified in sub-s. (3) of S. 46. Hence invalidity of a deed of gift arises not on the ground of non-registration of a compulsorily registrable document because it is not registrable under any circumstance but by virtue of the contravention of sub-s. (3) of S. 46. Therefore the Revenue Court alone has exclusive jurisdiction to avoid such transfers provided the application is made within the special rule of limitation fixed in S. 47(1). If this procedure is not adopted, the transfer cannot be avoided. AIR 1945 Nag 119 and AIR 1947 Pat 424, Dissented from; AIR 1936 PC 301, Foll. (Paras 7, 8)

Anno: T. P. Act, S. 3, N. 20; S. 123, N. 6; C. P. C., S. 9, N. 51, Pt. 1.

(c) Legislation — Act creating new jurisdiction.

Where an Act creates a new jurisdiction, a new procedure, new forms and new remedies, the procedure, forms and remedies there prescribed and no other must be followed. (Para 8)

CASES REFERRED : Paras

(A) (1887) 18 QBD 704: 56 LJ QB 315 8
(B) ('35) 1 Cut LT 57 9
(C) (V32) AIR 1945 Nag 119: ILR (1945) Nag 433 9, 10
(D) (V34) AIR 1947 Pat 424: 25 Pat 764 9
(E) ('21) 1921 Rev Rul 24 10
(F) ('25) 1925 Rev Rul 23 10
(G) (V23) AIR 1936 PC 301: ILR (1936) Nag 104 (PC) 11
(H) ('13) 17 Cal WN 621: 18 Ind Cas 273 12
(I) ('12) 13 Ind Cas 909: 8 Nag LR 22 12
(J) (V23) AIR 1936 Nag 18: 159 Ind Cas 862 12
(K) (V26) AIR 1939 Nag 166: ILR (1941) Nag 203 12

R. N. Sinha and B. N. Das, for Appellant; P. C. Chatterji, for Respondents.

NARASIMHAM J. :

This is a defendant's appeal against the concurrent decisions of the two lower Courts decreeing the plaintiffs' suit for declaration of title and recovery of possession of some raiyati lands described in Sch. A-1 of the plaint and a portion of a residential building (Sch. B-1) situated in village Bandhapali, P. S. Dhama, in the district of Sambalpur.

(2) Plaintiff No. 1 had a brother named Balamakund to whom the disputed property originally belonged. The appellant-defendant No. 1 is their sister's son. Balamakund was issueless and had brought up defendant no. 1 in his house though he did not formally adopt him as his son. On 11th of April 1938 Balamakund executed an unregistered deed of gift (Ext. E) giving away all his properties to defendant No. 1. The consent of the Gaontia to the transfer was obtained on the document itself and similarly the consent of the plaintiff who was the next heir of Balamakund was also obtained on the same document.

Balamakund died a few days afterwards and defendant No. 1, with a view to further safeguard his rights, obtained an Ekrarnama (Ext. B) from the plaintiff on 7-12-1938 in which his consent already given in the deed of gift was ratified. Defendant No. 1 obtained possession of the properties by virtue of the deed of gift and continued in possession and was paying his share of the rent regularly to the Gaontia. On 16-7-1942, however, the plaintiff instituted the suit under appeal alleging that he was the next heir

of Balamakund and as such entitled to his property.

The suit was brought as if it were a simple suit for ejectment of a trespasser and in the plaint there was a complete suppression of the deed of gift and the Ekrarnama (Exts. E and B). Defendant No. 1 contested the claim alleging various grounds such as estoppel, waiver, valid surrender, etc. But one of the important grounds urged by him was that the suit was barred by the special rule of limitation laid down in S. 47(1), C. P. Tenancy Act, 1898. This was the only point that was pressed before us and we think that it would suffice for the disposal of the appeal. Plaintiff No. 2 and defendant No. 2 are not necessary parties.

(3) The disputed property is situate in that portion of Sambalpur district where the Central Provinces Tenancy Act of 1898 is still in force. As the property is admittedly an occupancy holding the relevant sections for consideration are sub-ss. (3) and (5) of S. 46 of that Act and S. 47(1) of that Act. They are reproduced below for ready reference.

"S. 46(3).— No occupancy tenant shall be entitled to sell, make a gift or mortgage, sub-let (except for a period not exceeding one year) or otherwise transfer his right in his holding or in any portion thereof, and every such sale, gift, mortgage, sub-lease (other than for a period not exceeding one year) or transfer shall be voidable in the manner and to the extent provided by the two next following sections:

Provided that an occupancy tenant may transfer his right of occupancy to any person who, if he survived the tenant, would inherit the right to occupancy, or to any person in favour of whom as a co-sharer the right of occupancy originally arose, or who has become by succession a co-sharer therein:

Provided also that nothing in this section shall affect the right of the Government to sell the right of an occupancy tenant in his holding for the recovery of an advance made to him under the Land Improvement Loans Act, 1883, or the Agriculturists Loans Act, 1884, or the right of the purchaser at such sale to succeed to the holding."

"S. 46(5).— Notwithstanding anything contained in the Indian Registration Act, 1877, no officer empowered to register documents shall admit to registration any document which purports to transfer the right of an occupancy tenant in his holding or in any portion thereof unless the document recites that the transferee is a person who, if he survived the tenant, would inherit the right of occupancy or is a person in favour of whom as a co-sharer the right of occupancy originally arose or who became by succession a co-sharer therein."

"S. 47(1).— If an occupancy tenant transfers any portion of his right in any land in contravention of the provisions of the last foregoing section, any such person as would be entitled to inherit his right in the holding in the event of his death without nearer heirs, or the landlord from whom the tenant held the land, may, on application to a Revenue Officer, made within two years from the date on which in pursuance of the transfer the tenant parted with possession of the land, be placed in possession, subject, so far as the Revenue Officer may, in accordance with rules made by the Local Government, determine, to his acceptance of the liabilities of the transferring tenant for arrears of rent and for advances made by the landlord or other persons for the necessary expenses of cultivation."

It will be clear that the main object of the aforesaid sections is to prohibit the transfer of an occupancy holding or a portion thereof to any person other than the next heir of the transferor or his co-sharer. Sub-section (5) of S. 46 prohibits the registration of any document of transfer if ex facie there are recitals therein which would contravene the provisions of sub-s. (3). Sub-section (1) of S. 47 gives a remedy to the next heir of the transferor to avoid the transfer by applying to the Revenue Officer within two years from the date on which the transferor parted with his possession of the land. Section 95 expressly bars the jurisdiction of the Civil Court to take cognizance of any dispute or matter in respect of which authority is given by the Act to a Revenue Officer.

(4) It was therefore argued on behalf of the appellant that the transfer in his favour by Balamakund by virtue of the deed of gift (Ext. E) contravened sub-s. (3) of S. 46 and that the only remedy of the plaintiff was by way of an application to the Revenue Officer under sub-s. (1) of S. 47. Admittedly, this procedure was not adopted and on the date of the institution of the suit under appeal the period of limitation for an application under S. 47(1) had expired. The maintainability of the present suit was challenged both on the ground of choice of a wrong forum and also on the ground of limitation.

(5) On behalf of the respondents, however, it was contended that S. 47(1) would apply only if the claim to the property was based on contravention of sub-s. (3) of S. 46, C. P. Tenancy Act. But the plaintiff's claim was based on his right of inheritance from his brother (S. 46(1), C. P. Tenancy Act) and the incompetence of the defendant to acquire any title on the basis of an unregistered deed of gift in contravention of S. 123, Transfer of Property Act. Hence, it was urged that this was a simple suit for ejectment of a trespasser, which had nothing to do with S. 46(3), C. P. Tenancy Act and that the general law of limitation would apply.

(6) Both the Courts have accepted the plaintiff's contention and taken the view that where the invalidity of a transfer is based on grounds other than those specified in S. 46(3), C. P. Tenancy Act, the Civil Court's jurisdiction would not be ousted and that the special rule of the C. P. Tenancy Act would apply where a transfer otherwise valid, contravenes S. 46(3) of that Act.

(7) It is true that the word 'transfer' occurring in sub-s. (3) of S. 46 would mean a valid transfer. Thus where a transfer is made by a limited owner who has no right to transfer the property except under some special circumstances or where the transfer is invalid as having been brought about by fraud, undue influence, etc., the right of an aggrieved person to challenge the validity of such a transfer in a Civil Court cannot be taken away. The Revenue Officer's exclusive jurisdiction under S. 47(1) arises only where a transfer otherwise valid contravenes the provisions of S. 46(3) and (5).

Hence, we have to see whether in the present case the dispute between the parties is, in substance, one regarding the validity or otherwise of a transfer effected in contravention of the relevant provisions of S. 46, C. P. Tenancy Act. Both the Courts thought that as the deed of gift was unregistered the transfer was invalid under

the provisions of the Transfer of Property Act. I am unable to accept this argument. Doubtless, S. 123, Transfer of Property Act says expressly that a deed of gift of immovable property can be effected only by a registered instrument. But the expression 'registered' occurring in that section must be construed in accordance with the definition of that expression given in S. 3 of that Act which is as follows:

"'Registered' means registered in a State under the law for the time being in force regulating the registration of documents."

Apparently, both the Courts thought that 'the law for the time being in force regulating the registration of documents' is the Indian Registration Act, 1908 only. But there is no justification for limiting that expression only to that Act. Sub-section (5) of S. 46, C. P. Tenancy Act is also 'a law for the time being in force regulating the registration' of a certain class of documents and that sub-section should be construed along with the provisions of the Indian Registration Act for the purpose of deciding the effect of non-registration of transfers of this type.

Where the special law in question (the Central Provinces Tenancy Act) prohibits transfer of occupancy holdings except to a specified class of persons and also prohibits the registration of those documents in which the recitals contravene the provisions restricting the transfer, it seems clear that the provisions of the Indian Registration Act cannot apply with full force to such prohibited transfers. Hence, such transfers cannot be registered under 'any law for the time being in force regulating the registration of documents' because as soon as they are presented before the Sub-Registrar he would, under sub-s. (5) of S. 46, refuse to register them.

The requirement about compulsory registration of a deed of gift as laid down in S. 123, Transfer of Property Act cannot be fulfilled in respect of those prohibited transfers. Hence, the invalidity of such a transfer arises, not because of non-registration of an otherwise compulsorily registrable document but because by virtue of sub-section (5) of S. 46, C. P. Tenancy Act the document cannot be validly registered at all. Hence, by construing sub-s. (5) of S. 46, C. P. Tenancy Act, along with the provisions of the Indian Registration Act and S. 123, Transfer of Property Act, it may be reasonably held that the requirement about compulsory registration of a deed of gift under the general law of transfer is not applicable where the transfer is of an occupancy holding to a person other than the persons specified in sub-s. (3) of S. 46.

The plaintiff cannot contend that S. 46, C. P. Tenancy Act, must be completely ignored and the validity of the transfer judged from the provisions of the Transfer of Property Act and the Registration Act only. Section 6, Transfer of Property Act, makes it clear that the provisions of that Act apply only to those classes of properties which are transferable and where by any other law for the time being in force, transfer of a certain class of property is prohibited except to a certain specified class of persons the provisions of the Transfer of Property Act would apply to such transfers except to those specified persons. That is to say, in the present case if Balamakund wanted to execute a deed of gift in favour of the plaintiff who was his brother and next heir he would be bound to comply with the provisions of S. 123, Transfer of Property Act regarding registration.

(8) Hence, I am satisfied that the invalidity of the deed of gift (Ext. E) arises not on the ground of non-registration of a compulsorily registrable document because it is not registrable under any circumstance but by virtue of the contravention of sub-s. (3) of S. 46, C. P. Tenancy Act. The remedy for that is provided in S. 47(1). A special rule of limitation of two years is fixed and the Revenue Court alone has jurisdiction to entertain an application for avoiding the transfer. This is made clear by S. 95 of that Act. Moreover, it is a well settled rule that where an Act creates a new jurisdiction, a new procedure, new forms and new remedies, the procedure, forms and remedies there prescribed and no others must be followed (see Lopes L. J.'s observation in — 'Reg v. County Court Judge of Essex', (1887) 18 Q B D 704 at p. 825 (A)).

Sub-section (3) of S. 46 does not say that the transfers in contravention of that sub-section are void but only says that they are voidable 'in the manner and to the extent provided by the two next following sections' namely, Ss. 47 and 48. Hence the Revenue Court alone has exclusive jurisdiction to avoid such transfers provided the application is made within the special rule of limitation fixed in S. 47(1). If this procedure is not adopted, the transfer cannot be avoided.

(9) Mr. Chatterji on behalf of the respondents, however, relied on some observations in — 'Madan Meher v. Jujesti Meher', 1 Cut L T 57 (B), in support of his argument that where there are two-fold remedies open to a party he was free to avail himself of one of them even though he might not have availed himself of the other. He also relied on — 'Chindhu v. Dadu Ambar', AIR 1945 Nag 119 (C), where it was held that if a transfer of an occupancy holding which is otherwise compulsorily registrable is made by an unregistered document the transferee is a mere trespasser against whom a remedy will lie in the Civil Court.

Doubtless, that decision was based on a construction of Ss. 12 and 13, C. P. Tenancy Act, 1920 as it was before the amendment of 1939. But the provisions of those two sections of the 1920 Act are not materially different from the provisions of Ss. 46 and 47 of the 1898 Act so far as the point in controversy is concerned. Mr. Chatterji also relied on a Division Bench decision of the Patna High Court reported in — 'Madhuban v. Basanta', AIR 1947 Pat 424 (D), where following the aforesaid decision of the Nagpur High Court it was held that such a transfer was only an attempt at transfer as it was not completed by registration and that the remedy lay in the Civil Court.

(10) With great respect to the learned Judges I am unable to accept their reasoning. In — 'AIR 1945 Nag 119 (C)', there are some observations to the effect that judicial opinion had varied from time to time as to whether transfers of this type can be challenged in Civil Courts or in Revenue Courts. It is mentioned therein that in — 'Moolchand v. Munney', 1921 Rev Rul 24 (E) and — 'Gopala v. Mt. Bula', 1925 Rev Rul 23 (F), a contrary view was held and it was observed that the intention of the Legislature was to prohibit transfers of occupancy holdings irrespective of their value for the purpose of registration and that consequently jurisdiction lay only with the Revenue Courts whether the documents were compulsorily registrable or optionally registrable.

In my opinion, in the aforesaid two decisions of the Nagpur High Court and the Patna High

Court the full implications of the definition of the expression 'registration' occurring in S. 3, Transfer of Property Act were not considered. It is difficult to understand how a transfer which cannot be validly registered by virtue of the special law supplementing the general law regulating the registration of documents can be held to be invalid on the ground of non-registration on the assumption that it is compulsorily registrable. For such transfers the question of registration does not arise and the validity or otherwise must be determined by the other provisions either of the general law dealing with transfers or of the special law that may be contained in the Tenancy Act.

(11) In — 'Parashram v. Asaram', AIR 1936 PC 301 (G), there are the following observations regarding sub-ss. (3) and (5) of S. 46, C. P. Tenancy Act, which would support the above view.

> "It is to be observed that sub-section (5) does not determine the question of validity or otherwise of the transaction itself. For that purpose reference must be made to sub-s. (3), which alone interdicts certain transfers. Sub-section (5) merely shuts out the evidence, which would furnish a proof of the transfer, but does not enlarge the sphere of the prohibition. 'The registration or non-registration of the document does not affect the inherent character of the transfer, which is to be judged by another provision'. Their Lordships do not think that it can be held that the Registering Officer had no jurisdiction to register the document, because it included a transfer which was of a doubtful validity. They consider that, while the registration cannot be avoided, the validity of the transfer must be tested by the language of sub-s. (3)."

In particular, I would emphasise the passage underlined (here into ' ') where their Lordships have stated unambiguously that the inherent character of the transfer should be judged from sub-s. (3) and not from the fact that the document was registered or unregistered.

(12) There are innumerable Nagpur decisions dealing with cases where either through fraud or inadvertence transfers made in contravention of S. 46(3) have been registered by the Registering authorities. As early as 1912 the Calcutta High Court in — 'Baikantha Nath v. Laboo Nag', 17 Cal WN 621 (H) held that in such cases the remedy for the aggrieved party was only in the Revenue Court under S. 47, C. P. Tenancy Act. This view has been followed in several Nagpur decisions and I need refer only to — 'Ganeshdas v. Shankar', 13 Ind Cas 909 (Nag) (I); — 'Kanhaiya v. Sitaram', AIR 1936 Nag 13 (J) and — 'Jabbarshah v. Kanchhedi Lal', AIR 1939 Nag 166 (K). Those decisions, however, are not very relevant for the present case inasmuch as the impugned document was not even presented for registration.

(13) Mr. Chatterji then urged that the deed of gift ex facie did not contravene the provisions of sub-s. (3) of S. 46, C. P. Tenancy Act and that if it had been presented for registration the Sub-Registrar would not have refused to register the same. In support of this argument he invited our attention to the recitals in the deed of gift in which the donor stated that he had brought up the donee as if he were his son ('Putrapari Lalana Palana Kari') and that the donee was his successor-in-interest ('Tumbhe Ambhara Uttaradhikari Ata'). But this passage does not contain an unambiguous admission that the donee was the next heir of the donor or his co-sharer. The donee is not admitted to be his adopted son. Consequently, the recitals do not fulfil the requirements of sub-s. (5) of S. 46.

(14) In the plaint, apart from the occupancy holding, claim was made for a portion of a residential house of the parties. There is, however, no evidence to show that the house was treated as part of the holding being the homestead of a raiyat. The arguments in both the Courts proceeded on the assumption that the entire disputed property was an occupancy holding to which S. 46, C. P. Tenancy Act would apply. In this Court also no separate argument was advanced as regards the invalidity of transfer of the house by the deed of gift. Hence, it is unnecessary to consider whether even if the plaintiff's remedy against the transferee of the occupancy holding is barred he can claim relief as regards that portion of the residential house described in Sch. B-1 of the plaint.

(15) I would, therefore, in disagreement with both the lower Courts hold that the plaintiff's only remedy was under S. 47(1), C. P. Tenancy Act in the Revenue Court and that remedy also has become time-barred. The judgment and decree of both the Courts are set aside and the plaintiff's suit is dismissed with costs throughout.

(16) PANIGRAHI, C. J.: I concur.

A/V.R.B. Appeal allowed.

A. I. R. 1954 ORISSA 198 (Vol. 41, C.N. 60)

PANIGRAHI C. J. AND NARASIMHAM J.

(22-4-1954).

Sm. Mahani Dasi and others, Plaintiffs-Appellants v. Pareshnath Thakur and others, Defendants-Respondents.

Second Appeal No. 174 of 1948, from decision of D. J., Cuttack, D/- 12-1-1948.

(a) Hindu Law — Religious endowment — Idol — Deed of endowment.

No endowment of property in favour of a deity is created if the deed of endowment is not meant to be acted upon, and the founder had other or ulterior motives such as tying up of property in the family and keeping it out of the reach of creditors. The mere fact that an idol is proved to have been established does not, by itself, create an endowment of properties in favour of the idol. An idol may be installed and worshipped without any property being dedicated to it. An idol, like any living person, may be rich or poor. If property is dedicated a religious trust is created and the property vests absolutely in the idol though the management may be left in the hands of the trustees; but the title to the property itself is in the idol and not in the shebayat. (Para 3)

(b) Hindu Law — Religious endowment — Idol — Absence of endowment deed.

Absence of a document creating a trust does not necessarily imply the absence of an endowment of property in favour of a deity, though the absence of a formal deed throws a heavy onus on the party, who sets up dedication, to prove that the property has been inalienably conferred upon the idol. (Para 3)

(c) Hindu Law — Religious endowment — Idol — Proof of dedication.

A deed of trust by itself creates no endowment of property in favour of an idol, it is

necessary for the persons relying upon it to show by evidence 'aliunde' that there had been an existing endowment in favour of the idol to which the description "Devottar" can be applied. To prove the fact of dedication it must further be established that the executants had intended to divest themselves of their ownership in the properties dedicated. (Para 3)

(d) Hindu Law — Religious Endowment — Idol — Act of dedication.

No formal act of dedication of property to an idol is necessary either by way of a deed or performance of ceremonies. Performance of ceremonies is only relevant to show the intention of the grantor, and a dedication must be held to be complete if there is an unequivocal manifestation of the intention to create a trust. The absence of religious ceremonies may constitute an item of evidence in helping the Court to arrive at a proper decision, but mere performance of ceremonies is no conclusive test. (Para 4)

(e) Evidence Act (1872), S. 60 — Hearsay evidence — Its admission in evidence.

Where the evidence of the witnesses examined for a party stands on no higher footing than mere hearsay evidence, it is not open to any Judge to exercise a dispensing power and to admit evidence not admissible by the statute, because to him it appears that the irregular evidence would throw light upon the issue. AIR 1941 PC 16, Rel. on. (Para 8)

Anno: Ev. Act, S. 60, N. 4.

(f) Hindu Law — Religious endowment — Idol — Nature of endowment how determined.

The mode of dealing with the property by the donor and his successors is an important factor in determining whether the endowment of property to an idol is fictitious or real. 27 Cal 242; AIR 1919 Pat 442, Foll. (Para 8)

(g) Hindu Law — Religious Endowment — Idol — Essentials of endowment.

To support the case that the properties in suit formed the subject of a valid public endowment it must be established that an absolute grant was, in the first place, made with the intention that the properties should be applied for the service of the idol, and that the properties have since been so applied, and that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their benefit. 15 Cal WN 126; AIR 1925 Cal 996, Rel. on. (Para 8)

(h) Hindu Law — Religious Endowment — Idol — Oral dedication.

Where the dedication of property to an idol is alleged to be oral and is not followed by mutation of names and no accounts are produced to show how the rents and profits and the income of the dedicated property were used, the inference would be that there was no complete divestment of ownership. AIR 1930 Pat 610, Rel. on. (Para 8)

CASES REFERRED : Paras

(A) ('76) 4 Ind App 52: 2 Cal 341 (PC) 6
(B) (V28) AIR 1941 PC 16: ILR (1941) Kar PC 54 8
(C) (1900) 27 Cal 242: 4 Cal WN 405 8
(D) (V6) AIR 1919 Pat 442: 4 Pat LJ 533 8
(E) ('11) 15 Cal WN 126: 6 Ind Cas 26 8
(F) (V12) AIR 1925 Cal 996: 41 Cal LJ 396 8
(G) (V17) AIR 1930 Pat 610: 11 Pat LT 658 8

L. K. Das Gupta, for Appellants; L. Mohanty, for Respondents.

PANIGRAHI C. J. :

This second appeal by the plaintiffs is directed against the judgment of the District Judge, Cuttack, affirming a decision of the Second Munsif, Cuttack, in a suit filed under Order 21, R. 63, Civil P. C. The plaintiffs' case was that plaintiff No. 1 Mahani Dasi and Chandamani Dasi, mother of plaintiffs Nos. 2 to 4, obtained on 6-7-1932, a transfer of a mortgage deed executed by one Kapur Chand (deceased husband of defendant No. 2) and his brother Kanhailal (defendant No. 3) in favour of one Hanuman Bux and Ratiram on 14-4-1927, for the sum of Rs. 3300/-. The plaintiffs filed Mortgage Suit No. 17 of 1934, in the Court of the Subordinate Judge, Cuttack, against defendants 2 and 3 and obtained a mortgage decree, in execution of which the mortgaged properties were put to sale and purchased by the plaintiffs.

During the pendency of the mortgage suit, the plaintiffs had the two plots, now in dispute, namely C. S. plots 140 and 216, attached before judgment on 23-9-1934. Thereafter, the plaintiffs obtained a personal decree against the judgment-debtors, as the amount realized by the sale of the mortgaged properties was insufficient to satisfy the mortgage-debt. In execution of this personal decree, the suit properties were brought to sale in Execution Case No. 258 of 1941. The first defendant, who is an idol going by the name of Pareshnath Thakur represented by defendants 1-(a) to 1-(f), filed a claim petition under O. 21, R. 58, Civil P. C., claiming the disputed properties on the strength of a trust deed, Ext. F dated 15-12-1926, executed by (1) defendant No. 3, (2) Kapur Chand, the deceased husband of defendant No. 2, and (3) Kunja Behari Lal (defendant No. 1-(f)) who is one of the three alleged trustees of the above-named deity. This claim having been upheld the plaintiffs filed the suit, out of which the present second appeal arises, for a declaration that the suit properties belong to the judgment-debtors and as such are liable to be put to sale in execution of the decree obtained by the plaintiffs.

The contesting defendants are the idol and its trustees. The substantial contention put forward on behalf of the defendants is that defendant No. 1 is a deity dedicated to the Jain community of Cuttack town and that it was installed on C. S. plot No. 216 which formed part of the residential house of the late Iswarlal. Iswarlal died in the year 1923, and his three sons — Kapur Chand (husband of defendant No. 2), Kanhailal (defendant No. 3) and Kunja Behari Lal (defendant No. 1-(f)) executed Ext. F, dated 15-12-1926, conveying the suit properties in favour of the three trustees named in the trust deed. Of the three trustees, Chandulal was appointed President, Kapur Chand (one of the executants) was appointed the Secretary, and Jagulal (D. W. 2) was appointed the Treasurer. The defendants averred that these properties had been dedicated to the deity long prior to the execution of the trust deed, and that both before and after the execution of the trust deed they have been in the possession of defendant No. 1. It is accordingly contended that the judgment-debtors have no subsisting interest in the properties covered by Ext. F and as such they are not liable to attachment and sale by the plaintiffs-decree-holders.

(2) The principal issue on which the decision of this case turns, is issue No. 3 which is as follows:

"Are the properties in suit Devottar properties of the deity (defendant No. 1), or the properties of the husband of defendant No. 2 and of defendants 3 and 4?"

A mass of irrelevant evidence was adduced on both sides, bearing on the existence and identity of the idol, namely defendant No. 1. The plaintiffs' case was that the Jain community owned a Temple in Choudhuri Bazar of Cuttack town in which a deity (bearing the same name as the suit deity) is installed, and that no deity bearing the name of the first defendant ever existed in the house on C. S. plot No. 216. The plaintiffs also led evidence to show that the family of the executants of the trust deed (Ext. F) was heavily involved in debts, and that the deed was executed with a view to keep the properties away from the reach of the creditors. The defendants, on the other hand, attempted to establish that Iswarlal, the father of the executants was a rich man owning "vast properties" and that the deity had been installed by his father Hiralal and had been dedicated to the Jain community of the town.

It was further sought to be proved by them that the properties conveyed under Ext. F valued at Rs. 5,000/- and consisting of buildings and about 8 acres of land, had been donated to the deity by religious-minded members of the Jain community at different times and that the family of the executants had no interest therein at any time. Both the Courts have concurrently found that the deity defendant No. 1 has been in existence at least since 1914. They have held that after having found that the disputed properties were Devottar in character it is unnecessary, for the purpose of deciding the suit, to record a finding whether the deity was a public or private one. The Courts have also found that the disputed properties belong to the Deity. In arriving at this finding, they have relied upon the recitals in Ext. F and on the oral evidence of D. W. 3. On these findings the plaintiffs' suit was directed to be dismissed.

(3) In second appeal, the substantial point urged before us is whether the evidence, both oral and documentary, would warrant an inference that the properties had, in fact been dedicated to the deity. As stated already, both the Courts below have based their findings on the recitals in the trust deed and on the oral evidence of D. W. 3. It should be made clear at the outset that no endowment is created if the deed is not meant to be acted upon and the founder had other or ulterior motives such as tying up of property in the family and keeping it out of the reach of creditors. The mere fact that an idol is proved to have been established does not, by itself, create an endowment of properties in favour of the idol. An idol may be installed and worshipped without any property being dedicated to it. An idol, like any living person, may be rich or poor. If property is dedicated a religious trust is created and the property vests absolutely in the idol though the management may be left in the hands of the trustees; but the title to the property itself is in the idol and not in the shebayat.

It is equally well-established that the absence of a document creating a trust does not necessarily imply the absence of an endowment, though the absence of a formal deed throws a heavy onus on the party who sets up dedication, to prove that the property has been inalienably conferred upon the idol. Judged by these principles Ext. F, the deed of trust by itself creates no endowment; and it is necessary for the defendants to show by evidence 'aliunde' that there had been an existing endowment in favour of this particular idol to which the description "Devottar" can be applied.

The Courts below have rested their decision by merely relying on a recital in the deed to the effect that certain properties belong to the deity. But this, by itself, is not sufficient to prove that there had, in fact, been a dedication. To prove this fact it must further be established that the executants had intended to divest themselves of their ownership in the properties dedicated. The test of a bona fide or nominal endowment is: "How did the founder treat the property, or how have the descendants treated it? Has the income of the endowed lands been continuously applied to the object of dedication?" The Courts have not tried the bona fide character or the nature of the endowment with reference to the use of the proceeds, either from before or after the execution of the deed of trust, exclusively for the purpose of the deity, and have confined their decision to an inference drawn from the recitals in the deed itself.

(4) There are innumerable decisions where it has been held that no formal act of dedication is necessary either by way of a deed or performance of ceremonies. Performance of ceremonies is only relevant to show the intention of the grantor, and a dedication must be held to be complete if there is an unequivocal manifestation of the intention to create a trust. The absence of religious ceremonies may constitute an item of evidence in helping the Court to arrive at a proper decision, but mere performance of ceremonies is no conclusive test.

(5) Applying the above principles to the facts of this case, we find that no evidence has been given with regard to the formal dedication of the properties to the deity except what is recited in Ext. F. This recital is insufficient to support a finding that there had been a real dedication of these properties. It is clear from the evidence that two of the trustees appointed under the deed as President and Treasurer are brothers, while the third who was appointed Secretary is himself an executant of the deed. The deed recites that the deity had been in existence from a "very long time" and that different donors had made gifts to the deity at different times. But no details are available as to when and by whom these gifts were made.

On the other hand, there is a clear admission in the deed itself that all these properties stood recorded in the name of Iswarlal, the father of the executants, and that their names had also been recorded in the Revenue accounts as owners of these properties after the death of Iswarlal. There is, again, another recital that the Puja or worship of the deity was being conducted by members of the defendants' family. Above all, there is a further significant recital which appears to have escaped the notice of both the Courts below, and that is that

"the trustees can dispose of the properties if ever they think it necessary, and may also appoint a pujari for conducting the daily worship of the deity".

In my opinion, this statement indicates that the executants could, if necessity arose, deal with the property through the trustees who were so appointed only nominally — one of them being Kapur Chand and the other two being relations

If the properties had been intended to be really Devottar, such a recital would be out of place in the deed.

(6) The other item of evidence relied on by the Courts below is that of D. W. 3, a Pleader of Cuttack, who attested the trust deed and effected a partition among the brothers. His evidence is to the effect that the properties included in the trust deed were all Devottar properties of the Thakur. In cross-examination, however, he admitted that he did not know how the properties stood recorded in the revenue papers, nor could he remember any details of the papers relating to the endowment. To quote one sentence from his evidence:

> "Except the building in which the Thakur is installed I do not remember the particulars of the other properties covered by Ext. F."

This evidence throws no light on the point at issue as to whether there had been a dedication of the properties in favour of the deity. Undoubtedly, the testimony of this witness is entitled to great respect and the Courts below have accepted it as reliable. But unfortunately they have failed to find whether his evidence by itself is of material help at all in ascertaining the fact in issue. The witness had no personal knowledge, either of the details of the properties or of their having been dedicated. The only fact which can be said to have been proved from his evidence is the existence of the deity in the house of Iswarlal; and this, to a certain extent, may serve to dispel the suggestion made on behalf of the plaintiffs that the deed was executed in order to keep the properties out of the reach of creditors.

But as I have stated above this is not the only criterion in determining the issue. The motive may be anything; the intention of the executants may have been to tie up the properties in the family, or there may be some other ulterior motive. It is unnecessary, for the purpose of deciding the case, to come to a finding on this point. We are here concerned with the determination of the sole question as to whether there has, in fact, been a dedication in favour of the deity. No witness has been called to prove the gift of any single item of the properties in suit. Even the evidence relating to the installation of the idol is extremely obscure. In addition to the insufficiency of proof, there is so much obscurity in the evidence that it is impossible to say when exactly the deity came into existence and whether any dedication of property was made for its worship or service.

There is no evidence of the appropriation of the rents and profits of the properties up to the year 1938, and even the accounts, which are alleged to have been maintained, have not been produced. No pujari had been appointed till the year 1935. There are no accounts to show that the rents were separately collected and applied for the worship of the deity. It is possible that the rents may have gone into the general body of the accounts relating to the estate of this family, and such evidence as has been given in this case can only be characterised as "extremely vague" and "extremely loose" as was done by the Privy Council in — 'Durga Nath v. Rama Chander Sen', 4 Ind App 52 (PC) (A) on facts similar to the present.

(7) On the other hand, the other facts and circumstances of the case raise a strong presumption that there had, in fact, been no such endowment. The conduct of the family in its relation to the deity and its properties would be a strong indicator as to how the properties were being used. It is said that the trustees never took any steps to have the properties mutated in the name of the idol till 1940. It is admitted that no accounts had been kept till Dhaneshwar took up the management in 1935, and no accounts of expenses have been actually produced in the suit. The attachment before judgment was made on the 23-9-1934, but no claim was put forward by the trustees till 1942. The shop-house which is one of the suit items has all along been in the possession of either D. W. 2 or his son-in-law, and no account relating to realization of rent has been produced.

D. W. 1, Kunja Behari Lal, one of the executants of the deed of trust admitted that some of his belongings were still to be found in one of the rooms forming a part of the Temple and he made the frank admission that he "could not give any reason why the Thakur's name was not recorded from 1926 to 1940." He said that one Maniklal gifted some properties by means of a formal deed, but no explanation was given as to why that deed was not produced. Indeed, there is no mention of any such gift-deed in Ext. F. D. W. 1 also admitted that the other two trustees, namely Chandulal and Jagulal, were his relations, and that he was living in the house of Chandulal without paying any rent. He lost all his properties in 1932 and his brother's properties were sold at the instance of the creditors in 1935. Even their residential house was sold away to satisfy a decree debt. The only inference possible from these facts is that so long as the brothers had other properties to satisfy the creditors they did not bother about the suit properties. It was only after all their properties had been sold away that they turned their attention to create evidence in favour of the deity in respect of the suit properties.

(8) There are also other circumstances which lend support to the fictitious character of the alleged deed of trust, Ext. F. It appears from Ext. 8 that one Pramode Kishore Das obtained a decree against the defendants for Rs. 8550/- on a registered mortgage bond dated 14th February, 1919. If Iswarlal had been such a rich man as he is claimed to be, it is difficult to explain why he was forced to mortgage his properties and raise a loan which remained undischarged even after his death. Ext. 11 series show that the brothers Kapur Chand and Kanhailal borrowed Rs. 1000/- on 7-7-1925 under a registered bond; Rs. 150/- on 17-9-1926 on a handnote; Rs. 300/- on a handnote dated 14-9-1926; Rs. 115/- by a handnote dated 25-10-1926; and Rs. 200/- by a handnote dated 4-12-1926.

It would thus appear that by 15-12-1926, the date of Ext. F, the executants were in straitened circumstances, and had to resort to borrowing side of the defendants to show what their assets were. All that the evidence discloses is a vague and loose general statement that Iswarlal was in an "affluent condition" and that he had left "vast properties". This is no more than opinion evidence and has little evidentiary value. It is not safe for the Court to speculate as to whether there was any necessity for the family to execute a formal deed of trust if really the properties had already belonged to the deity. As was pointed out by the Privy Council in — 'Sirish Chandra Nundy v. Rakhalananda', AIR 1941 PC 16 (B), the evidence of the witnesses examined for the defendants stands on no higher footing than mere hearsay evidence, and it is not open to any Judge to exercise a dispensing power and to admit evidence not admissible by the statute, because

to him it appears that the irregular evidence would throw light upon the issue.

The evidence here is of such doubtful value that on the whole it is more likely to disguise truth than discover it. If the trial court had excluded such evidence it would not have been led away from ascertaining the truth. Even if the evidence were to be accepted at its face value at best it proves only the existence of an idol and its worship being carried on by the family members of Iswarlal, but nothing more than that. Having regard to the admission that there was no separate passage or entrance leading to the temple and that the only passage runs through the dwelling house of Iswarlal, I am inclined to think that the deity was being worshipped by the members of Iswarlal's family and its puja was conducted from the income of their own properties. The evidence is consistent with there having been no dedication of properties, exclusively in favour of the idol at all. Indeed, the absence of accounts showing how the properties were being managed prior to the year 1926 would raise a reasonable presumption that there had, in fact, been no dedication of any property in favour of the deity.

In similar circumstances Banerji J. held in — 'Ramachandra Mukerjee v. Ranjit Singh', 27 Cal 242 (C), that "the mode of dealing with the property by the donor and his successors" is an important factor in determining whether the endowment is fictitious or real. The same proposition has been put in more lucid language by Das J., in — 'Parmod Banbehari v. C. G. Atkins', AIR 1919 Pat 442 (D), when his Lordship observed:

> "The property has always stood recorded in the name of the estate in the Land Registration Department, and the mode of dealing with the properties by the parties interested in the endowment shows conclusively that they regarded the properties as belonging to the estate."

To support the defendants' case that the properties in suit formed the subject of a valid public endowment it must be established that an absolute grant was, in the first place, made with the intention that the properties should be applied for the service of the idol, and that the properties have since been so applied, & that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their benefit; see — 'Madhab Chandra v. Sarat Kumari Debi', 15 Cal W. N. 126 (E). See also — 'Gopal Jieu Thakur v. Radha Binod', AIR 1925 Cal 996 (F).

The lower appellate court appears to have made light of the fact that the name of the deity was not mutated in the Khasmahal office for a long time as, in its opinion, the right of the deity was complete when the endowment was created. But it has again & again been laid down that if the dedication is alleged to be oral & is not followed by mutation of names and no accounts are produced to show how the rents and profits and the income of the dedicated property were used, the inference would be that there was no complete divestment of ownership, see — 'Harihar Prasad v. Gurugranth Sahib', AIR 1930 Pat 610 (G).

(9) My conclusions therefore are: that till sometime after the attachment before judgment was effected in September, 1934 there can be said to be no evidence of any dedication or appropriation of the income of the dedicated property for the service of the deity (defendant No. 1); that the trust deed, Ext. F does not, by itself, create any title in the deity and that accordingly the recitals in the deed are not sufficient to prove the alleged dedication; that the non-production of the accounts, which are alleged to have been kept, is a strong factor going against the case set up by the defendants: that there is a singular lack of documentary evidence to show that the defendants ever divested themselves of their interest in the property and the oral evidence relied on by the Courts below is of such vague and loose character that it is unsafe to act upon it. I would, therefore, hold that defendant No. 1 has failed to prove his title and that the plaintiffs are entitled to have the suit properties sold with a view to satisfy the decree obtained by them against the judgment-debtors.

(10) In the result, the appeal succeeds, the judgment and decree of the lower appellate court are set aside and the plaintiffs shall be granted a decree as prayed for in the plaint with costs throughout.

(11) NARASIMHAM, J. I agree.

B/V.S.B. Appeal allowed.

A. I. R. 1954 ORISSA 202 (Vol. 41, C.N. 61)

PANIGRAHI C. J. (30-3-1954)

Mukunda Pradhan and another, Appellants v. Krupasindhu Panda and another, Respondents.

Second Appeal No. 170 of 1950, from decision of Sub. J., Cuttack, D/- 7-12-1949.

(a) Civil P. C. (1908), S. 11, Explanation 5, O. 2, R. 2, O. 20, R. 12 — First suit for possession, second for mesne profits.

The claim for mesne profits which accrues from the date of the sale deed in favour of the plaintiff to the date of institution of the suit for possession arises out of the same cause of action. But it can hardly be said that the claim for mesne profits subsequent to the institution of the suit also arises before the suit was instituted. A subsequent suit for future mesne profits is not barred either under S. 11 or under O. 2, Rule 2 as the claim for future mesne profits arises subsequent to the suit for possession and not at the date when the suit was instituted. Order 20, R. 12, is permissive in nature and casts no obligation on the Court to direct an enquiry. Where therefore the decree is silent a second suit is not barred.

The expression "relief claimed" used in Explanation 5 to S. 11 refers to a relief which the Court is bound to grant and not to one which it is discretionary for the Court either to grant or not to grant. In other words, it must form part of the relief claimed in the plaint, that is, something which the plaintiff can claim as of right and something included in his cause of action. The word "relief" occurring in Explanation 5 does not include reliefs such as mesne profits accruing after the institution of the suit as to which no cause of action has then arisen, but which the Court has been empowered to grant.

Further, Explanation 5 should be read along with the parent S. 11. Where in the plaintiff's earlier suit there was a decree ex parte, there was no issue raised as to the right of the plaintiff to claim such mesne profits or as to the quantum to which he might be entitled and all that appears from the record is that he prayed for an enquiry and the decree is silent with regard

to the relief claimed it cannot be said that the issue has been tried and decided in the earlier suit. Hence neither O. 2, R. 2, nor Explanation 5 to S. 11 constitutes a bar to the subsequent suit for mesne profits. Case law discussed. (Paras 3, 4, 5)

Anno: C. P. C., S. 11 N. 100, 125; O. 2 R. 2 N. 24; O. 20 R. 12 N. 13.

CASES REFERRED: Paras

(A) (V18) AIR 1931 PC 229: 134 Ind Cas 654 (PC) 2
(B) (V2) AIR 1915 Mad 1132: 26 Ind Cas 622 3
(C) (V18) AIR 1931 Pat 1: 130 Ind Cas 785 3
(D) (V7) AIR 1920 Bom 39: 44 Bom 954 3
(E) (1851) 138 ER 672: 11 CB 755 3
(F) (V5) AIR 1918 All 412: 40 All 292 3
(G) (V5) AIR 1918 Mad 484: 41 Mad 188 (FB) 3, 4
(H) (V12) AIR 1925 Pat 145: 80 Ind Cas 710 3
(I) ('90) 17 Cal 968 3
(J) ('95) 19 Bom 532 3
(K) ('99) 21 All 425: 1899 All WN 153 (FB) 3
(L) ('05) 15 Mad LJ 462 (FB) 3
(M) ('75) 2 Ind App 219: 15 Beng LR 383 (PC) 3
(N) (V16) AIR 1929 Cal 566: 57 Cal 381 4
(O) (V24) AIR 1937 Mad 46: 71 Mad LJ 677 4

S. C. Das, for Appellants; S. K. De, for Respondents.

JUDGMENT: This second appeal raises an interesting point which has led to some divergence of opinion. The plaintiff-respondent purchased two plots, No. 1227 and No. 1712, and brought a suit O. S. No. 298 of 1943 in the Court of the 2nd Munsif, Cuttack, for recovery of possession of the same from the defendants who had trespassed upon the suit lands. In that suit he had prayed for subsequent mesne profits till recovery of possession. The suit was decreed ex parte and the decree directed that the plaintiff should be put in possession of the disputed properties, but contained no directions with regard to the claim for future mesne profits. In execution of the decree the plaintiff took delivery of possession of the disputed plots through Court, on 7-8-1946 and on 31-1-1947. Thereafter, he filed another suit for mesne profits, from the date of institution of the suit till the date of delivery of possession. The defendants contended that the second suit was barred under O.2, R. 2 as well as under Explanation 5 to S. 11, Civil P. C. Both the courts below have overruled the contention, and the point for decision is whether the plea taken by the defendants should be upheld.

(2) The plaint in the earlier suit has not been exhibited, but it appears from Ext. 4, the certified copy of the decree in that suit (O. S. 298 of 1943) that no direction had been given with regard to the ascertainment of the mesne profits. The decree is silent about it. But it is clear that if the plaintiff was bound to include this claim for subsequent mesne profits in his earlier suit, the second suit out of which the present second appeal arises must be held to be barred by the provisions of O. 2, R. 2 of Civil P. C. That rule lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and is intended to deal with the vice of splitting the cause of action.

It provides that the suit must include the whole of any claim which the plaintiff is entitled to make in respect of any cause of action on which he sues, and that if he omits (except with the leave of the Court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. The object of this salutary rule is doubtless to prevent multiplicity of suits. See — 'Naba Kumar v. Radheshyam', AIR 1931 PC 229 (A). The question, therefore, is whether the plaintiff was entitled to the claim which he now makes when he filed the first suit, and whether that claim arose out of the cause of action upon which the earlier suit was founded.

(3) There can be no doubt that the claim for mesne profits which accrued from the date of the sale deed in favour of the plaintiff to the date of institution of the suit arose out of the same cause of action. But it can hardly be said that the claim for mesne profits subsequent to the institution of the suit also arose before the suit was instituted.

Order 20, Rule 12 of the Civil Procedure Code provides the rule as to what the Court may do in a suit for possession and mesne profits. That rule is as follows:

"12.(1) Where a suit is for recovery of possession of immovable property and for rent or for mesne profits, the Court may pass a decree

(a) for possession of the property,

(b) for the rents or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rents or mesne profits,

(c) directing an enquiry as to rents or mesne profits from the institution of the suit until—

(i) delivery of possession;

(ii) relinquishment of possession by the judgment-debtor with notice to the decree-holder through court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs;

and

(2) Where an enquiry is directed under clause (b) or clause (c), a final decree in respect of the rents or mesne profits shall be passed in accordance with the result of such enquiry."

It will be seen that all the reliefs which the Court is empowered to grant in a suit for possession are enumerated in Rule 12. The word "may" used in the Rule would seem to indicate that it was discretionary with the Court to grant the prayer of the plaintiff with regard to mesne profits from the institution of the suit until delivery of possession to the decree-holder, or the expiration of three years from the date of the decree, whichever event first occurs. But it has been held in some cases that the power of the Court to direct an enquiry into future mesne profits has been placed precisely on the same footing as the power of the Court to pass a decree for possession, or for past mesne profits. There is nothing to indicate that the one relief is more a matter of discretion and less of right than the other. See — 'Ramaswami Iyer v. Sri Rangaraja Iyengar', AIR 1915 Mad 1132 (B) and the dictum of Das J. in — 'Haranandan Rai v. Baliram Prasad', AIR 1931 Pat 1 (C) at p. 11. See also — 'Atmaram Bhaskar v. Parasram', AIR 1920 Bom 39 (D).

According to this view the word "may" used in R. 12 of O. 20 has a compulsory force even if, ordinarily, it is an enabling word. It confers a power on the Court to use that power when

occasion arises and in such circumstances the Court is bound to exercise that power if that would avoid a multiplicity of suits. It has accordingly been held that the power should be exercised on all occasions on which the successful claimant establishes his right on merits. This view follows the well-known principle laid down in — 'Macdougall v. Patterson', (1851) 138 ER 672 (E) that where a statute confers an authority to do a judicial act in certain cases, it is imperative on those so authorised, to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application. But so far as the interpretation of Rule 12 is concerned there is abundant authority for the contrary view in several reported decisions of the High Courts where it has been held that the word "may" has no such compulsory force and that it is still discretionary with the court whether or not to grant the relief for future mesne profits.

When different claims are dealt with in one rule under various sub-sections, the fact that the word "may" should be construed as "shall" in respect of one of the sub-sections owing to the nature of the claim which it deals with, does not necessarily mean that the word cannot be construed in its ordinary sense as regards the other clauses. See—'Mohammed Ishaq Khan v. Mohammed Rustom Alikhan', AIR 1918 All 412 (F); —'Doraiswami Iyer v. Subramania Iyer', AIR 1918 Mad 484 (FB) (G). In — 'Ramjanam Singh v. Khub Lal', AIR 1925 Pat 145 (2) (H) it was held that a subsequent suit for mesne profits is not barred either under S. 11 or under O. 2, R. 2 of the Civil P. C. as the claim for future mesne profits arises subsequent to the suit for possession and not at the date when the suit was instituted. It has also been held that O. 20, R. 12, Civil Procedure Code is permissive in nature and casts no obligation on the Court to direct an enquiry. Where therefore the decree is silent a second suit is not barred. This decision was followed in — 'AIR 1931 Pat 1 (C)' by Wort J. to whom the matter was referred on a difference of opinion between Fazl Ali and Das JJ.

The consensus of opinion among the several High Courts is that where a decree for possession is silent as regards the mesne profits which had accrued between the dates of institution of the suit and delivery of possession, a separate suit will lie for subsequent mesne profits: See — Mon Mohun v. Secy of State', 17 Cal 968 (I); Bhivrao v. Sitaram', 19 Bom 532 (J); 'Ram Dayal v. Madan Mohan Lal', 21 All 425 (FB) (K); and 'Kuppuswamy v. Venkataramier', 15 Mad LJ 462 (FB) (L) — which are all cases decided under the old Code. But even prior to these decisions the Judicial Committee had accepted that construction as the settled law in — 'Sadasiva Pillai v. Ramalinga Pillai', 2 Ind App 219 (PC) (M).

(4) It was then argued that irrespective of the provision contained in O. 2, R. 2, Civil P. C. s. 11, Explanation 5, constitutes a bar to the maintainability of the second suit. Section 11, Explanation 5 says:

> "Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purpose of this section, be deemed to have been refused."

The main argument advanced in support of the view taken in the latter group of decisions cited above is that the mesne profits that accrue subsequent to the institution of the suit formed no part of the cause of action on which the plaintiff comes to court, and therefore, the plaintiff cannot as a matter of right claim any decree for such mesne profits, except by filing another suit for that purpose.

It is, therefore, argued for the respondent that before this relief is barred under Explanation V to Section 11, Civil Procedure Code it must be shown that the relief claimed is one which the Court was bound to grant and not one which was discretionary for the Court to grant. Under the old Code, a subsequent suit for mesne profits was not barred and there does not appear to be any reason why it should be barred under the present Code. The expression "relief claimed" used in Explanation 5 to S. 11 refers to a relief which the Court is bound to grant and not to one which it is discretionary for the Court either to grant or not to grant. In other words, it must form part of the relief claimed in the plaint, that is, something which the plaintiff can claim as of right and something included in his cause of action. If the cause of action is established then the Court has no discretion to refuse.

This view was given expression to by Wallis C. J. in 'AIR 1918 Mad 484 (F.B.) (G)', and his Lordship observed that the word "relief" occurring in Explanation 5 did not include reliefs such as mesne profits accruing after the institution of the suit as to which no cause of action had then arisen, but which the Court has been expressly empowered to grant, and was followed by Fazl Ali J., in 'AIR 1931 Pat 1(C) at p. 11'. See also — 'Bipul Behari v. Nikhil Chundra', AIR 1929 Cal 566 (N), and in — 'In re Kantheeswaram E. Koil', AIR 1937 Mad 46 (O).

(5) Furthermore, it appears to me that Explanation 5 should be read along with the parent S. 11, which says that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties. In the plaintiff's earlier suit, where there was a decree ex parte, there was no issue raised as to the right of the plaintiff to claim such mesne profits or as to the quantum to which he may be entitled. All that appears from the record is that he prayed for an enquiry and the decree is silent with regard to the relief claimed. In these circumstances it cannot be said that the issue had been tried and decided in the earlier suit. I have, therefore, arrived at the conclusion that neither O. 2, Rule 2, nor Explanation 5 to Section 11 of the Civil Procedure Code constitutes a bar to the present suit.

(6) The appeal fails and is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A. I. R. 1954 ORISSA 204 (Vol. 41, C.N. 62)

NARASIMHAM AND MOHAPATRA JJ. (26-3-1954)

V. V. Rama Rao and others, Petitioners v. Bhavan Narayan Rao, Opposite Party.

Civil Revn. No. 44 of 1952, (Analogous to M. A. No. 104 of 1951 and C. R. No. 71 of 1952), from order of Sub.-J., Berhampur, D/- 3-3-1952.

(a) Civil P. C. (1908), S. 2(11) and O. 22, Rr. 1 and 3 — Right to sue in personal action by a Hindu widow.

The plaintiff, K's widow, brought a suit for declaration that she was entitled to the plaint schedule properties and to enjoy them peace-

fully and without any interference from the defendants and for a permanent injunction restraining defendants 1 to 3 from interfering with her peaceful possession and the enjoyment of the said properties. The substance of the plaintiff's allegations was as follows: Her husband K had executed a registered partition deed in respect of all the joint family properties which were divided in three equal shares — Sch. A properties falling to K's share and Schs. B and C properties falling to shares of K's two sons, defendants 1 and 4 respectively. Subsequently, K executed a will in respect of A schedule properties which had fallen to his share bequeathing a life interest in favour of the plaintiff and after her death defendants 1 and 4 were to get absolute interest in those properties according to the schedule attached to the will. The plaintiff alleged that her right to enjoy the properties on the basis of life interest created under the will was being disturbed by defendant 1 and his two sons defendants 2 and 3. Defendant 1 contested the suit repudiating the partition deed as well as the will while defendant 4 supported the plaintiff's case. During the pendency of the suit, the plaintiff-widow died and defendant 4 sought leave to continue the suit as the legal representative of the deceased plaintiff.

Held that the right to sue based on the life interest created by the will lapsed along with the life interest of the plaintiff and did not survive after the plaintiff's death and therefore, the suit abated. Defendant 4 could not be held to be the legal representative of the deceased plaintiff and therefore was not entitled to continue the suit which was purely brought for the personal benefit of the plaintiff and not in a representative character. If defendant No. 4 was to be substituted as the legal representative of the original plaintiff the identity of the reliefs in the original plaint could not be maintained inasmuch as even on the case made out in the plaint itself on the death of the widow defendants 1 to 3 would be entitled to some properties in suit in their absolute rights. AIR 1915 PC 124; 23 Cal 636; 33 All 15; AIR 1916 Mad 611: AIR 1953 Mad 869; AIR 1949 Mad 379, Distinguished; AIR 1929 Mad 524, doubted and distinguished.

(Paras 5, 6, 8, 13)

Anno: C. P. C., O. 22, R. 1, N. 5, 15; O. 22, R. 3, N. 10.

(b) Hindu Law — Widow — Widow's estate and life estate — Difference.

Dicta : The conception of a limited owner of a widow's estate under the Hindu law is different from a life interest holder. A Hindu widow, daughter or mother, inheriting the property of her husband or father or son, as the case may be, has absolute right of disposal of the property for legal necessity while a mere life estate holder under a will has not. (Para 15)

CASES REFERRED : Paras

(A) (V2) AIR 1915 PC 124: 38 Mad 406 (PC) 9, 17
(B) ('96) 23 Cal 636 10
(C) ('11) 33 All 15: 7 Ind Cas 97 11
(D) (V3) AIR 1916 All 34: 38 All 111 11
(E) (V3) AIR 1916 Mad 611: 39 Mad 382 11
(F) (V16) AIR 1929 Mad 524: 115 Ind Cas 831 14
(G) (V40) AIR 1953 Mad 869: 1953-2 Mad LJ 88 15
(H) (V36) AIR 1949 Mad 379: 1948-2 Mad LJ 211 16

H. Mohapatra and K. S. R. Murty, for Petitioners; D. Narasaraju and P. V. B. Rao, for Opposite Party.

MOHAPATRA J. :

This civil revision is against an order of the Subordinate Judge of Berhampur allowing defendant no. 4 to be substituted as the legal representative of the deceased plaintiff in Title Suit No. 29 of 1951 in the Court of the Subordinate Judge of Berhampur. The original plaintiff who died on 22-11-1951 was the widow of late Varada Kameshwar Rao Naidu Garu. The first defendant Varada Vizaya Rama Rao is the first son of the said Kameswar Rao & the fourth defendant Varada Bhavan Narayan Rao is his second son. Defendants 2 and 3 (Varada Venkatakameswar Rao & Varada Venkateswar Rao) are the two sons of defendant no. 1. The widow of Kameswar Rao (the plaintiff, Varada Mahalakshmi Amma) brought this suit on 7th May, 1951 on the following allegations :

"The joint family consisting of the father, the two sons (defendants 1 and 4), the two grandsons (defendants 2 and 3) and the widow (the plaintiff) owned extensive properties. Kameswar Rao having felt that he could no longer continue to manage the extensive properties considered that during his life time a partition of the joint family properties was necessary in the best interest of the joint family and eventually, in exercise of his powers as the father-manager of the joint family, effected a partition of the joint family properties in three equal shares in a just and equitable manner after making a small provision for his twelve granddaughters. The partition-deed was executed on 24-4-1949 and registered on 9th May, 1949.

Of the said partition-deed, the properties described in Schedule A of the deed were allotted to Kameswar Rao, the properties mentioned in Schedules B and C of the said deed were respectively allotted to the first and the fourth defendants. According to the plaintiff the two sons had consented to the said partition even though it was executed by the father alone. On 15th August 1949, Varada Kameswar Rao executed a Will whereby he bequeathed all the immovable properties that were allotted to his share in the partition referred to above to his wife, that is, the plaintiff, for life and after her to the first and the fourth defendants absolutely. The first defendant would be entitled to absolute rights in respect of the properties described in Schedule of the Will and the fourth defendant would be entitled to absolute rights in respect of the properties described in Schedule of the Will.

By the said Will, Kameswar bequeathed all his movable properties to the plaintiff, that is, the widow, absolutely with a legacy of Rs. 35,000/-. It is to be mentioned here that the movables are not the subject matter of the present suit. Kameswar died on 26-11-1949 and the Will was shown to the respectable people present on the eleventh day of his death; a copy of the Will was also given to the first defendant. Thereafter the Will was presented for registration and was registered after necessary enquiry.

(2) The plaintiff's further allegation was that after the death of her husband she was entitled to a life interest in respect of the properties bequeathed to her by her husband; the Will having been accepted and given effect to by defendants 1 and 4, they (defendants 1 and 4) had absolutely no interest in the properties bequeathed in her

favour which are the subject matter of the present suit during her life time; that she was also in exclusive possession and enjoyment of the suit properties in her own right; but defendant No. 1 was approaching her (the plaintiff) and the 4th defendant several times to get the partition made by the father annulled, but his request to that effect was definitely refused and thereafter defendants 1 to 3 had been attempting to forcibly trespass on the suit properties by means of false propaganda and threats and had been trying to win over the tenants and collect rents from them. The widow-plaintiff therefore brought the present suit praying for the following reliefs:

"(a) declaring that the plaintiff is entitled to the properties described in Schedule X hereto attached and to enjoy them peacefully and without any interference by the defendants.
(b) granting a permanent injunction restraining the defendants 1 to 3 from interfering with the peaceful possession and enjoyment of the plaintiff of the properties described in Schedule X;
(c) awarding to the plaintiff the costs of the suit; and
(d) granting such further or other relief as the Hon'ble Court deems fit under the circumstances of the case."

(3) Defendant No. 4 filed written statement supporting the case of the plaintiff and ultimately stating that he had no objection to the granting of the reliefs prayed for by the plaintiff. Defendant No. 1 is contesting the suit by repudiating the alleged deed of partition and the Will. It is to be noted here that the present defendant No. 2 has filed a suit for partition of all the joint family properties in the Court of the Subordinate Judge of Srikakulam in the State of Madras as there are considerable properties also within the State of Madras. The plaintiff (widow) having died on 22-11-1951, defendant No. 4, that is, the second son of late Kameswar Rao, filed a petition for continuing the suit after being substituted as the legal representative of the widow (the plaintiff). The learned Subordinate Judge having allowed the petition filed by defendant no. 4 by his order dated 3-3-1952, the present civil revision has been filed against the said order.

(4) The main question for determination is whether after the death of the plaintiff (Varada Mahalakshmi Amma) the right to sue survives and if the right to sue survives, is defendant no. 4 the legal representative of the plaintiff to be substituted in her place and is he to be allowed to continue the suit in that capacity? The relevant provisions of law are contained in Order 22, Rr. 1 and 3 and the definition of the word 'legal representative" contained in S. 2(11) of the Civil Procedure Code. Order 22, R. 1 runs thus :

"The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."

Rule 3 is as follows :

"Where one or two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

Section 2(11) runs as follows :

"'Legal Representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

(5) On a plain reading of the above provisions, it appears to be clear to us that two conditions must be satisfied before defendant no. 4 can be allowed to continue the suit in the place of the original plaintiff, namely, firstly, that the right to sue as disclosed in the plaint survives even after the death of the widow; and secondly, that defendant no. 4 is the legal representative of the deceased plaintiff within the meaning of Section 2(11), Civil Procdure Code. After a careful reading of the plaint as a whole, we are definitely of the view that the right to sue is based upon the life interest that the widow got by virtue of the Will dated 15-8-1949 by the late Kameswar Rao.

The substance of the plaintiff's allegations is that all the properties are joint family properties which were divided into three equal shares by the partition-deed dated 24th April, 1949 Schedule A falling to the share of late Kameswar (plaintiff's husband) and Schedules B and C to the shares of the two sons (defendants 1 and 4). Kameswar executed a Will in favour of the widow (Mahalakshmi Amma) and bequeathed life interest in her favour and provided further that after her (widow's) death defendant no. 1 would get absolute interest in respect of one schedule and defendant no. 4 would get absolute interest in respect of the other.

It is on the basis of this bequest of late Kameswar Rao that the plaintiff's life interest was created and the further cause of action for the suit arose as her right to enjoy the properties was being disturbed by defendants 1 to 3. She therefore prayed for declaration of her right to enjoy the suit properties peacefully and without any interference by the defendants and further for a permanent injunction restraining defendants 1 to 3 from interfering with her peaceful possession and enjoyment. On her death, the right on the basis of which she brought the present action, that is, her life interest by virtue of the Will, has lapsed, and further that on her very case and according to the provisions of the Will itself, defendants 1 and 4 are entitled to absolute interests in the suit properties. It is therefore clear to us that the right to sue of the widow does not survive and the suit would abate.

(6) The difficulty seems to be obvious if we consider the reliefs sought for in the plaint itself. If defendant no. 4 is substituted in the place of the widow, he cannot certainly on the very case disclosed in the plaint be entitled to a declaration that he is entitled to the properties described in the schedule and to enjoy them peacefully and without interference by the defendants. Further defendant No. 4 being substituted as the plaintiff cannot be granted a permanent injunction against defendants 1 to 3 from interfering with his peaceful possession and enjoyment of the properties described in the plaint. This is manifestly for the reason that defendant No. 1 is also entitled to absolute right in respect of a substantial portion of the plaint properties according to the case of the plaint itself. It is further clear that the life interest on the basis of which the widow had claimed the reliefs had lapsed and that defendant No. 4 is entitled to absolute right only in respect of some portion of the plaint properties.

(7) A further anomalous position will arise by allowing defendant No. 4 to be substituted in the place of the deceased plaintiff in the present suit. In this connexion, we will refer to the allegations made in paragraphs 12 and 21 (a) of the plaint. In paragraph 12, the widow had stated that:

> "It is obvious that the 1st defendant and his sons 'and defendant No. 4' and his sons have absolutely no right to the properties bequeathed to the plaintiff by the Will dated 15-8-1949..... which she has been in exclusive possession and enjoyment in her own right."

It is clear from this paragraph that her allegation regarding the title to the properties is as much against the 1st defendant as against the 4th defendant. On the basis of this allegation, she had prayed for her right to enjoy the properties peacefully and without any interference 'by the defendants'. How can the defendant against whose title the plaintiff had made equal allegations and had also prayed for a relief against that defendant, be substituted in the place of the plaintiff to continue the suit as it was brought.

(8) It is clear to us, therefore, that the right to sue lapses along with the lapse of the life interest of the original plaintiff, the widow, and further that the 4th defendant cannot be called as a legal representative as defined in Cl. (11) to S. 2, Civil P. C. The 4th defendant does not in law represent the estate of the deceased plaintiff which being a life interest has lapsed. Neither is he any person who intermeddles with the estate of the deceased. The 4th defendant does not satisfy the condition of the last clause which was very much emphasised by the learned counsel for the opposite party as the suit brought by the plaintiff was not in a representative character.

While bringing the suit on the basis of her life interest which she obtained by virtue of the Will she had not brought the suit for the benefit of defendant No. 4 who is one of the remaindermen. The suit was purely for the personal benefit of the plaintiff alone inasmuch as she wanted her enjoyment of the properties not to be disturbed or interfered with.

(9) Mr. Narasaraju, appearing on behalf of the opposite party, has relied upon several decisions in support of his contention that in the present case the right to sue does survive and that defendant No. 4 ought to be allowed to continue the suit in order to avoid multiplicity of suits. His main contention is that both the plaintiff and defendant No. 4 rely upon the validity of the partition deed and the Will which are being repudiated by defendants 1 to 3. The main purpose of the suit is to avoid the 'common danger' of the plaintiff and defendant No. 4 on the two title-deeds, that is, the deed of partition and the Will.

He has first placed before us a decision of their Lordships of the Privy Council reported in — 'Venkatanarayan Pillai v. Subbammal', AIR 1915 PC 124 (A). There, Venkatanarayan brought a suit to obtain a declaration that the adoption of defendant No. 2 by Subbamal (defendant No. 1) that is, the widow of the last male owner, was invalid and did not affect the plaintiff's reversionary interest in the ancestral estate of one Venkatakrishna, the deceased last male owner. Venkatanarayana, that is, the plaintiff in the suit, who claimed to be the presumptive reversioner of the last male owner (Venkatakrishna) died during the pendency of the appeal before their Lordships of the Privy Council whereupon the petitioner Kuppasami Pillai (another reversioner) applied to be substituted in the place of the deceased appellant Venkatanarayana and for leave to prosecute it.

Indeed it is a very well settled principle of law that suit of this nature brought by the presumptive reversioner is a representative one not for the personal benefit of the presumptive reversioner but will enure to the benefit of the actual reversioner who will succeed to the estate on the death of the widow. The presumptive reversioner in such a case represents all the reversioners, and their Lordships of the Privy Council observed:

> "The right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights and the act complained of is to their common detriment, just as the relief sought for is for their common benefit."

Such being the right to sue in cases of reversionary suits, their Lordships found that the right to sue survived to the other reversioners and did not die with the death of the presumptive reversioner. The two species of cases brought by the presumptive reversioner for declaring that an adoption had never taken place or was invalid or to set aside alienation by the widow on the ground that it was not for legal necessity and they are not binding on the reversioners are peculiar to Hindu law wherein the reversioner, even though he has merely a spes successionis, has given the right to sue for the avoidance of a common danger to the reversionary heir. The plaintiff in such a suit represents all the reversionary heirs to such an extent that if he obtains a decree he may himself be able to enjoy the benefit of the decree even though he may be living at the time of the death of the widow if there is a nearer heir to the last male owner.

Such cases, to our mind, have no parallel to the case before us. We would further observe in this connexion that in this case their Lordships, while considering whether the next reversioner Kuppasami could be deemed to be a legal representative within the meaning of S. 2 (11), Civil P. C., remarked:

> "The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner."

The decision of their Lordships on the point depended on the representative character of the suit and the present suit is not one of that nature.

(10) Mr. Narasaraju has drawn our attention to another batch of cases where a Hindu widow enjoying her qualified interest in a deceased husband's estate brings suit for recovery of possession of certain items of property appertaining to the estate against trespassers and on her death the next heir to her husband is allowed to be substituted to continue the suit on the basis of the position that the right to sue survives and the next heir is the legal representative to continue the suit. The decision in this batch of cases is based upon the very well settled principle that a Hindu widow even though she takes in some respects a qualified interest in her husband's estate 'fully represents that estate' and if the suit is conducted bona fide the succeeding heirs would be bound by the decision in that suit either in favour of the widow or against her.

In such a suit, it is manifest that the right to sue is not a personal one dying with the death of the widow. The right to sue being to recover the property of the deceased husband from the hands of a trespasser it survives on the death of the widow and a next heir who is entitled to succeed to the estate of the husband is also entitled to continue the suit to bring back the property from the hands of the trespasser. He relies upon a decision reported in — 'Premmoyi v. Preonath', 23 Cal 636 (B), where Iswari Dassi brought a suit as heir of her deceased husband and in which she had been wrongfully deprived by the defendants in the suit. She died while the suit was pending and the petitioners who were to be substituted were her daughters, the next reversionary heirs. Their Lordships allowed the petition for substitution observing that the widow had brought the suit as representing her husband's estate and the next heirs being the legal representatives as the estate devolved on them on the death of the widow were entitled to pursue the suit.

(11) The learned counsel for the opposite party cited another decision of the Allahabad High Court reported in — 'Rikhai Rai v. Sheo Pujan Singh', 33 All 15 (C). There the daughter of the last male owner brought a suit for possession of certain land on cancellation of a perpetual lease executed by her mother, that is, the widow of the last male owner, during her life time. The daughter died during the pendency of the suit on which the reversionary heir of the last male owner of the property in suit applied to be substituted. Relying on the same principle, their Lordships had allowed substitution.

In the case of — 'Jadubansi Kuer v. Mahpal Singh', reported in AIR 1916 All 34 (D), the unmarried daughter of the last male owner being the preferential heir brought a suit to recover possession of her father's estate from the defendants on the allegation of their wrongful possession. The three married sisters of the plaintiff were also named as pro forma defendants in the suit. The plaintiff died during the pendency of the suit. The three married daughters on their application were transferred from the array of defendants to that of the plaintiffs. The trial Court dismissed the suit on the ground that the suit had abated by reason of the death of the original plaintiff. Relying upon the selfsame principle that the original plaintiff had represented the estate of her father and as the right to sue, that is, the right to recover the property from the hands of the trespassers survived the death of the plaintiff, the married daughters who were the next heirs as the legal representatives were held entitled to continue the suit.

Their Lordships had emphasised the position that in a suit of this nature if the suit was conducted bona fide the decision of the case would bind all the reversionary heirs of the last male owner and as such they ought to be allowed to continue the suit as representing the estate to recover it from the hands of the trespassers. 'Gandi Ramaswami v. Puramsetti Pedamunayya', AIR 1916 Mad 611 (E) is another decision of the same kind.

(12) The main distinguishing feature in this batch of cases is that the limited owner under the Hindu law brings a suit for recovery of possession from the hands of the trespasser; the limited owner undoubtedly represents the entire estate of the last male owner and the right to recover possession from the trespassers survives in favour of the man succeeding to the estate.

In the present case, the remarkable feature is that the suit is not one to recover possession of the estate from the hands of the trespassers who are in wrongful possession of the properties. The suit was filed by the widow on the basis of her life interest and on her death these defendants are the persons who are entitled to the properties in either view of the case whether the partition deed and the Will are held to be invalid or otherwise. Even if the deed of partition and the Will go, these defendants will be entitled to the properties in suit by way of inheritance and survivorship as sons and grandsons of late Kameswar and if the partition deed and the Will are held to be valid, defendants 1 and 4 would be entitled to the different items of properties scheduled in the Will which covers the properties in dispute. So, if there be a dispute amongst the defendants themselves, the dispute has got to be settled in a separate suit the frame of which is bound to be entirely different.

(13) Another remarkable feature which is common to all the cases relied upon by Mr. Narasaraju is this that wherever a proposed legal representative has been allowed to continue the suit, the frame of the suit remains completely unaffected and the reliefs sought for by the proposed legal representative are identical. In the present case, however, as we have indicated above, if defendant No. 4 is to be substituted as the legal representative of the original plaintiff we cannot maintain the identity of the reliefs in the original plaint inasmuch as even on the case made out in the plaint itself on the death of the widow defendants 1 to 3 will be entitled to some properties in suit in their absolute rights.

(14) The learned counsel for the opposite party drew our attention to a decision of Ramesam, J. sitting singly in the case of — 'Subramania Pillai v. Venkatachalam Pillai', AIR 1929 Mad 524 (F). In that case the original plaintiff was legatee under a Will. The Sub-Registrar and the District Registrar having refused to register the Will the plaintiff filed a suit for registration. During the pendency of the suit the plaintiff having died another legatee under the Will applied to be substituted and was allowed to continue the suit. Ramesam, J. observed that such a suit must be regarded as one filed in his representative capacity as, if the Will was finally registered, all the legatees would get the benefit.

Ramesam, J. further observed that the new plaintiff might not be the legal representative of the old one in respect of the specific rights but was to be deemed as legal representative only for the purpose of continuing the suit. With respect, we have got to observe that we doubt the correctness of the decision very much. Supposing the original suit brought by plaintiff No. 1, was decided against plaintiff No. 1, would the decision be binding on plaintiff No. 2 who claimed entirely different rights and different properties even though by virtue of the said Will when he was not a party to the suit itself? In any view that case has no bearing on the facts of the case before us.

(15) Mr. Narasaraju, however, strongly relies upon a Single Bench decision of the Madras High Court reported in — 'A. G. Ramiah Pillai v. Adhikesavalu', AIR 1953 Mad 869 (G). In that case, the widow claimed life estate on the basis of a Will executed by the last male owner, that is, her husband Veeraswami Pillai. In that Will the further provision was that Veeraswami's sister's son would be entitled to absolute interest in the property on the death of the widow. The

widow brought a suit for recovery of possession of certain items of property and for mesne profits against the defendants on the allegation that they were absolute trespassers. On the death of the widow, the nephew who was entitled to absolute interest in the property as the remainderman filed a petition to be substituted in the place of the deceased widow and to be allowed to continue the suit.

Krishnaswamy Nayudu, J. drawing a parallel from the suit instituted by a Hindu widow on the basis of Hindu widow's estate to recover possession from a trespasser observed that even in the case of a widow claiming on the basis of a Will conferring life estate on her, the widow represents the estate completely. He observed:

"In so far as the representation of the estate of a deceased person is concerned, there is no difference between a widow, who succeeds to her husband's estate, or the sole life estate holder, who becomes entitled to possession of the property under the Will of the testator, here, her husband."

He further observed:

"In this case, there is no question that the right to sue does survive to the respondent, as the suit is one for possession based on a Will under which both the widow and the respondent claim certain rights, the widow being entitled to possession during her lifetime, and after her death, the person who is entitled to possession would be the respondent and none else. The right to sue for possession has certainly survived to the respondent who has become entitled to possession after the death of the widow."

We propose not to express an opinion on the question how far a person in possession of the property on the basis of a life interest conferred on him by the last testament of the previous owner of the property can represent the estate completely and how far in a suit of that nature the decision will serve as a res judicata against the remaindermen. We will only observe that the conception of a limited owner of a widow's estate under the Hindu law is different from a life interest holder. A Hindu widow, daughter or mother, inheriting the property of her husband or father or son, as the case may be, has absolute right of disposal of the property for legal necessity while a mere life estate holder under a Will has not. But we may dispose of the decision cited above on the ground that it is clearly distinguishable from the present case.

In the present case, it passes our comprehension how the widow in bringing a suit against both defendants 1 and 4 making allegations against the present title of both of them and seeking reliefs for declaration of her rights to peaceful enjoyment without interference by both of them, can be said to represent the interest of defendant No. 4 in the suit. In the case before us, it is not a mere suit for recovery of possession from the trespassers which would be equally available to the remainderman after the death of the widow. This is a suit against the remaindermen themselves and on the death of the widow on the Will itself the defendants would be entitled to absolute rights in respect of different items of the property and an entirely different situation arises. Defendant No. 4 cannot continue the suit exactly with the same reliefs.

(16) Another Bench decision of the Madras High Court which is also strongly relied upon by Mr. Narasaraju is the case of — 'Narayanswami v. Parvati Bai', reported in AIR 1949 Mad 379 (H). In that case the father and the sons had separated and had independent titles on the basis of the same deed of settlement. In a previous suit, the father was a party claiming title on the basis of the deed of settlement. In the subsequent suit the children claimed their separate and independent titles on the basis of the same deed of settlement. It was contended that the decision in the previous suit to which the father alone was a party would bar as a res judicata to the present suit.

Kunhi Raman, J. while sitting singly in the original side disposed of the suit negativing the contention of res judicata on the ground that there were two distinct rights in the case — one right conferred on the parents of the plaintiffs-children and the other on the plaintiffs themselves and therefore it could not be said that there was a private right common to themselves and others. This finding of Kunhi Raman, J. was set aside in the judgment of Rajamannar, Officiating Chief Justice (as he then was) sitting with Mack, J. They observed:

"With due respect to the learned Judge we are of opinion that he overlooked the fact that in this case both the plaintiffs and their parents rely on the same settlement deed as the source of their title. In the prior case the parents relied upon the deed and in the present case the children rely upon the same deed. We think on principle the parents of the plaintiffs in the prior case must be deemed to have represented not only their interest but also the interests of their children under the same deed."

On the basis of these observations, Mr. Narasaraju contends that in our case when both defendant No. 4 and the deceased plaintiff rely upon the two deeds, that is, the partition deed and the Will, it must be held that the original plaintiff represented the interest of defendant No. 4 as the deeds are common in both. With very great respect we are unable to appreciate how in the previous suit when the father was claiming, asserting and litigating upon his own separate and independent right, he (the father) could represent the interests of the children whose rights are separate and independent. In spite of the deed of settlement being common, when the rights were separate and distinct, the previous suit could not be taken to be a representative suit as contemplated under Explanation VI to S. 11, Civil P. C., which runs as follows:

"Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The decision, therefore, will not serve as a guide to us in disposing of the present case and also the other distinguishing features indicated above.

(17) The last contention of Mr. Narasaraju was based upon the observations made by their Lordships of the Privy Council in the last two paragraphs of their decision referred to above — 'AIR 1915 PC 124 (A)'. Their Lordships observed that on the death of the presumptive reversioner the next reversioner might be substituted in the place of the deceased "on a broader ground." Their Lordships thereafter quoted O. 1, R. 1, Civil P. C., and found that the contingent reversioner could be joined as plaintiff in the suit brought by the presumptive reversioner, and, as such, on the death of the next presumptive reversioner the contingent reversioner is entitled to continue the suit.

In our opinion, as is clear from the observations of their Lordships in the last paragraphs the observations were confined to the cases in which several persons could be joined as plaintiffs and were interested in the identical reliefs sought for in the original plaint. To hold otherwise, would be to lead to startling position. It cannot be seriously argued that the observations will mean that all those persons who may join as plaintiffs under the provisions of O. 1, R. 1 will be deemed to have their right to continue the suit brought by the original plaintiff even though others have absolutely no interest in the reliefs sought and are entitled to different reliefs, and particularly when they were not plaintiffs in the original plaint.

We will explain the position by reference to an illustration. Three persons A, B and C have got independent rights in respect of 3 items of properties, X, Y and Z by virtue of a common deed of gift. A is dispossessed of his lands, that is, X, and sues for declaration of title and recovery of possession against the trespasser. B's possession was disturbed but he chose not to come as a co-plaintiff in the suit even though he might have come as a co-plaintiff under Order 1 Rule 1 praying for his separate relief in respect of property Y. On A's death it can never be suggested for a moment that B will be entitled to continue the suit even though he is not interested in the reliefs sought for recovery of possession of the property X. The observations of their Lordships therefore on the basis of Order 1, Rule 1, Civil Procedure Code will be confined to those type of cases that were before them.

(18) In conclusion, therefore, the suit abates and the Civil Revision is allowed with costs.

(19) CIVIL REVISION 71/52.—This revision is against the same judgment of the Subordinate Judge arising out of the petition filed by defendant No. 1 for an order that the suit had abated. This revision also will be covered by this judgment of ours.

(20) M. A. 104/51.—This miscellaneous appeal has been filed against an order dated 22-11-51 passed by the Subordinate Judge in the same suit under O. 40, R. 1, Civil P. C., appointing a Receiver. As we have found above when the suit itself abates, the order appointing Receiver is bound to be vacated.

(21) In conclusion, therefore, both the Civil Revisions and the Miscellaneous Appeal are allowed with costs, and the suit abates. Hearing fee is fixed at a consolidated sum of Rs. 250/- (rupees two-hundred and fifty) only.

(22) NARASIMHAM J.: I agree.

B/K.S.B. Appeal and revisions allowed.

A.I.R. 1954 ORISSA 210 (Vol. 41, C.N. 63)

NARASIMHAM J. (13-1-1954)

Akulananda Rout, Petitioner v. State.

Criminal Revn. No. 395 of 1953 from order of Sub-Divisional Magistrate, Dhenkanal, D/- 27-10-1953.

(a) Criminal P. C. (1898) Ss. 139-A and 137 — Magistrate shall question as to existence of public right.

The provisions of S. 139-A are mandatory and when the party appears in pursuance of order under S. 133 the Magistrate is bound under S. 139-A to ask the party whether he denies the existence of any public right of way and if there is such a denial the Magistrate should hold an enquiry and take evidence. If instead of ascertaining whether the party denies the existence of any public right the Magistrate hears the evidence of both parties and passes a final order under S. 137, the order cannot be supported. **(Para 1)**

Anno: Cr. P. C., S. 139-A N. 2.

(b) Criminal P. C. (1898), S. 139-A — Inquiry into the matter.

In an inquiry under S. 139-A it is not necessary for the Magistrate to weigh the evidence and come to a clear finding as to whether there is, in fact, public right of way over the plot or not. If there is reliable evidence in support of the petitioner's claim his jurisdiction is ousted and he should direct both parties to go to the Civil Court. **(Para 1)**

Anno: Cr. P. C., S. 139-A, N. 4.

G. K. Misra, for Petitioner; L. K. Dasgupta and G. N. Sengupta, for the State.

ORDER: This revision is against an order under S. 137 Cr. P. C. passed by the Subdivisional Magistrate of Dhenkanal directing the petitioner to remove a fencing which was said to have been erected by him on plot No. 410 of village Kandabindha. It was alleged that the petitioner blocked a rasta by putting a fence over plot No. 410. The learned Magistrate started a proceeding under S. 133 Cr. P. C. and first passed a conditional order on 22-8-53. The petitioner appeared and showed cause and then instead of proceeding under S. 139A Cr. P. C. to ascertain whether the petitioner was denying the existence of any public right of way over the disputed plot the learned Magistrate heard the evidence of both parties and passed a final order under section 137 Cr. P. C. The order of the learned Magistrate cannot obviously be supported inasmuch as he had failed to comply with the mandatory provisions of section 139A Cr. P. C. In a dispute of this type where the public claim a right of way over a piece of land and one of the parties claims it as his property the Magistrate is bound under S. 139A Cr. P. C. to ask the party whether he denies the existence of any public right of way and if there is such a denial the Magistrate should hold an enquiry and take evidence.

In such an enquiry it is not necessary for him to weigh the evidence and come to a clear finding as to whether there is, in fact, public right of way over the plot or not. If there is reliable evidence in support of the petitioner's claim his jurisdiction is ousted & he should direct both parties to go to the Civil Court.

(2) Apart from non-compliance with the provisions of S. 139A, Cr. P. C., I find that there are several other unsatisfactory features in the procedure adopted by the learned Magistrate and also in the final order passed by him. From the settlement khatian it appears that plot No. 410 is the paddy field of the petitioner. Doubtless, while describing the boundary of the field it is noted that on its northern side lies a rasta. The map, however, shows that adjacent north of that plot is plot No. 404 which is a narrow strip connecting the public path-way on the west with village Beda on the east. But this plot No. 404 has also been recorded in the last settlement as the paddy field of the petitioner's father. Doubtless, the southern boundary of this plot is noted as 'Mahara' (water channel). It was alleged that the settlement entry was a mistake and the whole of plot No. 404 was a rasta. But in view of the clear settlement entry

to the effect that it was a paddy field this allegation on behalf of the opposite party cannot be so easily accepted. It may be that between plot No. 404 and plot No. 410 there was a narrow water channel which was presumably used as a rasta by the villagers during the off season and as the channel was too narrow to be clearly demarcated in the settlement map no separate plot number was assigned to it.

But its existence seems to be indicated by the southern boundary of plot No. 404 and the northern boundary of plot No. 410 as mentioned in the settlement khatian. In such circumstances, if the Magistrate considers that proceedings under section 133 Cr. P. C. should be initiated he may get an enlarged map of plot No. 404 prepared demarcating therein the narrow strip, if any, that is used as a water channel or rasta by the villagers. He may then start a fresh proceeding under S. 133, Cr. P. C. and after complying with the provisions of S. 139A Cr. P. C. complete proceeding according to law.

(3) The order under challenge of the learned Magistrate also suffers from another serious mistake. In the original proceeding under S. 133 Cr. P. C. the plot number of the path which was said to have been obstructed was not stated. In the final order the learned Magistrate directed the petitioner to remove the fencing from plot No. 410. Admittedly, plot No. 410 is the private property of the petitioner and he was clearly entitled to erect a fence on that plot and there can be no question of a proceeding under S. 133 Cr. P. C. in respect of such obstruction over a private plot. Presumably, the parties meant that the fencing had been erected over the path-way which was said to lie adjacent north of plot No. 410. But this fact is not clear either from the original proceeding under S. 133 Cr. P. C. or from the order of the Magistrate though the evidence of the witnesses seems to lend some support to that view. This question may, however, be further examined if a fresh proceeding under S. 133, Cr. P. C. becomes necessary.

(4) For the reasons given above, I would set aside the order dated 27-10-53 of the learned Subdivisional Magistrate subject to the aforesaid observations.

B/G.M.J. Order set aside.

A.I.R. 1954 ORISSA 211 (Vol. 41, C.N. 64)

PANIGRAHI C. J. AND MOHAPATRA J.

(12-3-1954)

Patto Padhanuni and another, Defendants-Appellants v. Bhikari Padhano, Respondent.

Second Appeal No. 52 of 1950, from decision of Addl. Sub. J., Berhampur, D/- 23-11-1949.

(a) Specific Relief Act (1877), S. 42 — Suit for declaration of title — Declaration, when granted.

In a suit for a declaration of title, the Court has got to see whether under S. 42, Specific Relief Act, the plaintiff is entitled to any legal character or to any right as to any property. It is only when either of these ingredients is present that the Court may, in its discretion, make a declaration that he is so entitled. (Para 4)

Anno: Sp. R. Act, S. 42 N. 1, 3(a).

(b) Hindu Law — Reversioner — Suit by — Suit for declaration that he is a reversioner — Maintainability — (Specific Relief Act (1877), S. 42).

It is only when a woman enjoys what is known in Hindu law as a "woman's estate" that a reversioner can claim a declaration that that property would revert to him on the termination of the widow's estate. Succession does not open to the heirs of the husband until termination of the widow's estate. A reversioner is not therefore entitled to sue for a mere declaration that he is the next reversioner though he has a right to sue for the protection of the estate. (Para 4)

A sued for declaration that an adoption of B, by C, his brother's widow, was invalid and that he was the next reversioner of C. C claimed the property absolutely under a deed of settlement executed by her husband in his life time. The genuineness of the deed was not disputed by A:

Held (1) that the Court was bound to hold, in the absence of any evidence to the contrary, that the deed of settlement was a genuine transaction and that the widow was in enjoyment of her husband's properties in her own absolute right;

(2) that A had thus no legal character or any interest in any of the properties of the deceased brother;

(3) that it was open to A to sue for a declaration that the settlement deed conveying the estate absolutely to the widow was never, in fact, executed, or that it was otherwise invalid. But where there was no estate to be protected a suit for a mere declaration did not lie. (Paras 4, 5)

Anno: Sp. R. Act, S. 42 N. 3(c).

CASE REFERRED: Para

(A) ('79-80) 7 Ind App 115: 5 Cal 776 (PC) 4

P. V. B. Rao and A. L. J. Rao, for Appellants; B. Mohapatra, for Respondent.

PANIGRAHI C. J.:

The suit out of which this appeal arises was filed by one Bhikari Padhano who claimed to be the reversioner to the estate of one Krishna Padhano. The first defendant, Patto Padhanuni is the widow of the deceased Krishna. The plaintiff's case was that his father and the father of the deceased Krishna were brothers and that Krishna died leaving the first defendant as his only surviving heir. The second defendant was put up as having been adopted to Krishna and a formal deed of adoption, dated 6-8-1947 was executed by the first defendant in favour of the second. The plaintiff impugned this as a collusive document and as such challenges the title of the second defendant to succeed to the estate of the deceased Krishna. The plaintiff therefore prayed for a declaration that the adoption should be declared invalid and that the plaintiff, the next heir, to succeed to the properties left by Krishna.

(2) The first defendant contested the suit and averred that her deceased husband, Krishna, had executed a registered deed of settlement dated 12-6-1939 under which he settled all his properties on her with full rights. Her further case was that he had also executed a registered will bequeathing all his properties to her. It was further alleged that Krishna died on 3-1-1940 and that even during his lifetime the first defendant enjoyed the properties settled upon her in her own right. She therefore disputed the right of the plaintiff to have a declaration of his reversionary interest to the properties of Krishna as, in fact, no properties had been left by Krishna. She supported the adoption of the second defendant by Krishna

besides claiming title to the properties in her own right.

(3) The genuineness and validity of the deed of settlement relied on by the first defendant, though raised in the written statement, was not put in issue. But the learned Munsif discussed it under issue No. 2 which read as follows:

"Whether the suit is maintainable in law."

In disposing of this issue, the learned Munsif observes that he was not called upon to decide whether Krishna Padhano left any estate at all, or whether that estate passed out of the hands of the reversioner by virtue of his own act, on the view that the plaintiff was related to Krishna Padhano as his nephew and was his nearest reversioner. He accordingly granted the plaintiff a declaration that the adoption of the second defendant was invalid. Both the defendants appealed against this judgment. The learned Subordinate Judge who heard the appeal, however, did not discuss the genuineness of the settlement deed at all nor did he consider whether the plaintiff could maintain the suit for a declaration of his reversionary interest in view of the fact that there was no property left by the last maleholder which can be said to revert.

(4) In second appeal, the only point that has been urged before us on behalf of the defendant-appellants is that unless the plaintiff succeeds in proving that Krishna Padhano left some properties in which the first defendant had only a woman's estate the plaintiff would not be entitled to a declaration of his future interest in such properties. If we hold that the deed of settlement relied on by the first defendant is a genuine transaction and that, by virtue of that deed, the first defendant has acquired an absolute right in the properties left by her deceased husband, then it is clear that there is no property left by him in which the plaintiff can claim any reversionary interest.

The suit being one for a declaration of title the Court has got to see whether under S. 42, Specific Relief Act, the plaintiff is entitled to any legal character or to any right as to any property. It is only when either of these ingredients is present that the Court may, in its discretion, make a declaration that he is so entitled. Assuming that the first defendant has acquired an absolute right in the properties left by her husband, can it be said that the plaintiff is entitled to a legal character or to a right to the properties of Krishna? It appears to us that the plaintiff had notice of the deed of settlement, about which there was a specific averment in the written statement, and did not care to amend his pleadings so that the binding character of the transaction may be decided by the Court.

We adjourned the hearing of this appeal to enable Mr. Mohapatra, appearing for the plaintiff-respondent to amend his plaint so that proper issues may be raised and the case sent back for final disposal. But the plaintiff did not choose to amend his plaint and have the matter finally disposed of. For the purpose of the disposal of this appeal, therefore, we are bound to hold, in the absence of any evidence to the contrary, that the deed of settlement must be taken to be a genuine transaction and that the widow is in enjoyment of her husband's properties in her own absolute right and that the plaintiff has no legal character or any interest in any of the properties of the late Krishna Padhano left in the hands of the first defendant. It is only when a woman enjoys what is known in Hindu law as a "woman's estate" that a reversioner can claim a declaration that that property would revert to him on the termination of the widow's estate. Succession does not open to the heirs of the husband until termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death: see — 'Moniram Kolita v. Kerry Kolitany', 7 Ind App 115 (A). A reversioner is not entitled to sue for a mere declaration that he is the next reversioner though he has a right to sue for the protection of the estate. It was open to the plaintiff in this case to sue for a declaration that the settlement deed conveying the estate absolutely to the widow was never, in fact, executed, or that it is otherwise invalid. But where there is no estate to be protected a suit for a mere declaration will not lie. Illustrations E and F to S. 42, Specific Relief Act, indicate the nature of suits contemplated in that Section.

(5) We have, therefore, no option but to declare that the plaintiff is not entitled to a declaration as we are not satisfied that Krishna Padhano left any property of which the first defendant can be said to be in enjoyment as a limited owner. In the result, we would allow this appeal, set aside the judgments of the Courts below, and direct that the plaintiff's suit be dismissed with costs throughout.

(6) MOHAPATRA J.: I agree.

B/D.R.R. Appeal allowed.

A.I.R. 1954 ORISSA 212 (Vol. 41, C.N. 65)

PANIGRAHI C. J. AND MOHAPATRA J. (27-1-1954).

Dulhabh Seth and another, Defendants-Appellants v. Bharat Seth and others, Plaintiffs-Respondents.

Second Appeal No. 16 of 1950 from decision of Addl. Sub-J., Sambalpur, D/- 7-11-1949.

Hindu Widows' Re-marriage Act (1856), S. 2 — Possession of Hindu female — Possession by Hindu widow as mother — Remarriage — Effect on character of possession — (Limitation Act (1908), Arts. 142 and 144) — (Hindu Law — Widow).

It is no doubt true that the rule of Hindu law which lays down that a widow, on her re-marriage, forfeits her interest in her husband's estate applies only to a widow as such and is not applicable to a widow who succeeds as mother. Even otherwise, under S. 2, Hindu Widows' Re-marriage Act, the widow would forfeit her right as mother. But as she entered into possession as limited owner the character of her subsequent possession after re-marriage would not be changed in the absence of evidence of a change of her animus. (Para 1)

Anno: Hindu W. R. Act, S. 2 N. 3; Lim. Act, Arts. 142 and 144 N. 19.

P. C. Chatterji, for Appellants.

PANIGRAHI C. J.:

This appeal arises out of a suit by the reversioners for possession of certain lands which were till recently in the possession of one Kausalya. Kausalya succeeded to the properties on the death of her son Kartick in 1905. Kartick died unmarried and issueless. In 1907 Kausalya re-married one Bigna Sethi and through this union Bakul, the father of the defendants (appellants) was born. Kausalya died in 1946, and the suit out

of which this appeal arises was filed on 14-2-1946 by the reversioners of Kartick.

The plea taken on behalf of the defendants is that Kausalya forfeited her right to the suit lands on her re-marriage and that she prescribed for an absolute title by reason of her possession after re-marriage, such possession having become adverse to the true owners. It is admitted that second marriage of widows is permitted in the caste to which the parties belong. It is also undisputed that Kausalya's possession was that of a mother and that her interest in the properties of Kartick was only a limited interest. The question is whether Kausalya forfeited her interest in her son's property by reason of her re-marriage and, if so, whether her possession became adverse from the date of her re-marriage.

The rule of Hindu law which lays down that a widow, on her re-marriage, forfeits her interest in her husband's estate applies only to a widow as such and is not applicable to a widow who succeeds as mother. This position of law is covered by ample authority and needs no discussion. Even otherwise if S. 2 of the Hindu Widows Remarriage Act, were to be applied the widow would forfeit her right as mother, but as she entered into possession as limited owner her subsequent possession would not be changed in the absence of evidence of a change of her animus. All that has been proved in this case is that she continued in possession, and nothing more. We are therefore unable to hold that the character of her possession underwent a change at any time during the period when she was enjoying the properties.

(2) In our opinion the Courts below have taken the right view of the law and we see no reason to interfere. The appeal is dismissed but as there is no appearance for the respondent there will be no order as to costs.

(3) MOHAPATRA, J.: I agree.

B/V.B.B. Appeal dismissed.

A.I.R. 1954 ORISSA 213 (Vol. 41, C.N. 66)

NARASIMHAM AND MOHANTY JJ. (9-10-1953).

State v. Radhakanta Patnaik, Accused-Respondent.

Govt. Appeal No. 2 of 1952, against Judgment of 1st Class Magistrate, Cuttack, D/- 16-1-1952.

(a) Penal Code (1860), Ss. 405, 420 — Criminal breach of trust distinguished from cheating — (Criminal P. C. (1898), S. 236).

The word 'entrustment' or 'entrusted' though used in S. 405 is not defined in the Penal Code. The word itself conveys and includes that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship as between them. That confidence cannot arise when the property was acquired by the offender by some trick. Such a trick prevents any true consent arising. If the property is obtained by trick, or by any other unlawful means, then there cannot be any entrustment. 'Entrustment' means the handing over of the property by lawful means. The phrase 'any other manner' connotes any other legal manner but not otherwise. Once a property is acquired by trick or 'in any other means' by false representation to the owner thereof, there is an offence under S. 420, I. P. C. and if the offender appropriates that amount to his own use, he cannot be said to have committed an offence of criminal breach of trust, because in that case there was practically no trust created by the owner of the property. But there can be an alternative charge under S. 236, Cr. P. C., but if once an offender is punished under S. 420, I. P. C., the other charge cannot be sustained. Majority view in AIR 1936 Mad 353 (FB) Foll. (Para 11)

Anno: Penal Code, S. 405, N. 2, S. 420, N. 2; Cr. P. C., S. 236, N. 9.

(b) Criminal P. C. (1898), Ss. 367, 423 — Appreciation of evidence.

Held that on a consideration of the entire evidence to prove the charge against the accused, the Court was of the opinion that the trying Magistrate was perfectly right in thinking that the evidence was not only untrustworthy but also conflicting in nature. On going through the evidence the Court was satisfied that the reason given for such a finding was not at all perverse, even though it created a great suspicion against the conduct and bona fides of the accused. The evidence on the record was inconclusive, though it did cast some amount of suspicion about the conduct of the accused. He was therefore entitled to the benefit of doubt and consequently acquittal. (Paras 6, 10)

Anno: Cr. P. C., S. 367, N. 6, S. 423, N. 14.

(c) Criminal P. C., (1898), S. 423 — New plea.

It was contended that certain instances revealed the mala fide conduct of the accused in making false representation to procure Government money from P. W. 1.

Held that no such point was taken up in the Court below, and no attempt was made to bring out any such circumstance in the evidence to prove it. The accused was not asked any question about it in his examination under S. 342, Cr. P. C. Had any such question been asked, he would have explained his stand with regard to it. (Para 9)

Anno: Cr. P. C., S. 423, N. 13.

CASES REFERRED: Paras

(A) (V23) AIR 1936 Mad 353: 37 Cri LJ 637 (FB) 11

(B) (V39) AIR 1952 SC 52: 1952 Cri LJ 331 (SC) 16

P. V. B. Rao, Govt. Advocate, for the State; M. S. Rao, for Respondent.

MOHANTY J.:

This is an appeal by the Government under S. 417, Cr. P. C., from the order of the Magistrate, 1st Class, acquitting Sri R. K. Patnaik of the charges under Ss. 409, 420 and 465, I. P. C.

(2) The accused Radhakanta Patnaik was the section officer, Manijanga, under the S. D. O., P. W. D., Jagatsingpur, in December 1950. On 17-12-1950, the then Chief Engineer Mr. Shaw, Irrigation Department, Orissa, intimated to the S. D. O., P. W. D., Jagatsingpur, that he would tour on the canal embankment from Santra Bundh to Paradwip from 24th to 27th December, 1950. He wanted the canal bund to be made motorable, vide Ext. 1. The S. D. O. (P. W. 1) directed the accused to "keep the canal embankment from Anantapur to Paradip in motorable condition on 26th and 27th December", vide Ext. I-a. The order was communicated to the accused on 20-12-50, vide Ext. I-b. The evidence on the record is to the effect that the accused-section-officer personally came to S. D. O.'s office, where the order was communicated to him on the morning of 20-12-1950.

The evidence of the S. D. O. (P. W. 1) shows firstly, that he instructed the accused to engage labourers departmentally on muster roll; and that on 25-12-1950 he found the work to have been done satisfactorily. On 2-1-1951, the accused-section-officer submitted the muster roll, Ext. 3 for payment of Rs. 166/- to 31 labourers who, according to him, were engaged for the work on the aforesaid bund from 20th to 25th December, 1950. That muster roll appears to have been prepared by the accused-section-officer in accordance with the daily accounts of work submitted to the S. D. O., P. W. D., Jagatsingpur, for the work done from 20th to 26th December, 1950 (Ext. 2). In the muster-roll, Ext. 3 the accused has shown the names of the labourers engaged, the amount paid to them and also their signatures and thumb-marks as the case may be against the name of each.

Ext. 3 was checked by the cashier with reference to the daily account of work; and an order for payment of Rs. 166/- to the labourers was passed by P. W. 1; and the amount was sent to the accused for payment to the labourers mentioned in Ext. 3. The accused-section-officer resubmitted the muster-roll Ext. 3, with a certificate Ext. 3-c dated 20-3-51 showing the disbursement of the amount and the signatures and thumb-marks against the names of those labourers by way of an acknowledgment of the payment made.

(3) The patrol K. C. Samantray was the subordinate of the accused. On 31-1-51 he sent three petitions against the accused-section-officer, one to the Chief Engineer, another to the Executive Engineer and the third to the S. D. O. (P. W. 1), alleging therein that the section officer had engaged only five outside labourers for three days and spent only Rs. 26-8-0 but billed for Rs. 166/- in the muster-roll as if thirty-one outside labourers were engaged for doing the repair work. The matter was then handed over to the Enforcement Department, Orissa, for investigation and necessary action, if on investigation, the facts alleged in the petition of K. C. Samantray were found to be true. Accordingly, the police submitted charge-sheet against the accused after necessary investigation, to take his trial under Ss. 420, 409 and 465, I. P. C.

(4) The defence of the accused was throughout that the muster-roll showed the correct state of affairs in this that besides the departmental gang-coolies and Khalasis, 31 outside coolies were engaged for the repair of the embankment from Anantapur to Paradip in connection with the impending visit of the Chief Engineer; that the amount of Rs. 166/- sent to him by the S. D. O., P. W. D., was rightly disbursed among the labourers; and that they put their signatures and thumb-marks as the case may be against their names in the muster-roll on receiving their wages.

(5) The trying Magistrate has acquitted the accused of all the charges levelled against him.

(6) The main charge against the accused is cheating under S. 420, I. P. C., it being that the accused on 5-1-51 induced the S. D. O., P. W. D., to deliver Rs. 166/- only

> "by deceiving him to pass payment orders on the muster-roll Ext. 3 for payment of wages to 31 coolies engaged for repairs of the right embankment of the canal from Anantapur to Paradip and to deliver the same for payment to the coolies."

The learned trying Magistrate has acquitted him of the charge substantially on a two-fold ground, firstly, that the evidence of witnesses who prove the charge is not only discrepant, but also untrustworthy; and secondly that there is a lacuna in the prosecution case, inasmuch as no attempt was ever made either by the P. W. D. authorities or by the I. O. to ascertain on inquiry as to the total quantity of work done on the embankment from 20th to 25th December, 1950, so as to find out whether besides the 20 Government retained coolies the 31 outside coolies were engaged for the work as shown in Ext. 3.

None of these reasons can be lightly brushed aside. To prove the charge, the prosecution has examined five outside coolies, P. Ws. 5 to 8 admittedly engaged for the work on the embankment and two P. W. D. retained coolies P. Ws. 9 and 10 who admittedly did the work on the embankment and who got monthly wages from the department. Their evidence shows that only 20 P. W. D. retained coolies and 5 outside coolies did the entire repair work on the embankment, and that no other outside coolies were engaged during the period from 20-12-50 to 25-12-50. Their evidence finds corroboration from the contractor, P. W. 25, and the two patrols under the accused. They are P. W. 2, K. C. Samantray and P. W. 26 one S. C. De. They have filed their diaries in corroboration of what they have deposed to in the court.

Ext. 7 is the diary of P. W. 2, and Ext. D is the diary of P. W. 26. Siba Jena (P. W. 25), a contractor who supplied these five outside coolies P. Ws. 5 to 8, and another who has not been examined in this case, at the request of the accused, has stated that those coolies started their work not from 20th but from 22nd December, and continued the work not till 25th December, but till 24th December. He has further stated that only five outside coolies were engaged, and that the entire work was done by 20 retained Government coolies and 5 outside coolies. But the evidence of P. W. 25, when closely analysed with reference to that of P. Ws. 5 to 8 makes it abundantly clear that they did the repair work over a distance of only one mile from Santra Bend to Bhutmundi and not over the distance of entire six miles. It appears from their evidence that the embankment beyond those places cannot be visible from the places where they were working which is only over a distance of one mile. It is therefore not surprising that they could not know as to whether any other outside coolies were engaged at other places on the embankment.

From their evidence, it does not appear clear beyond any shadow of doubt that they could speak of the work done over the whole distance of six miles. It appears from Ext. 3 that four kinds of work were done on the embankment so as to make it motorable. They are: (1) Removing blown down trees and branches from the water surface of T. canal; (2) Refixing sign posts in position; (3) Earth work, and (4) Kia cutting. It is not denied by the prosecution that these four kinds of work were done on the embankment; but from the evidence of the coolies and P. W. 25, it appears that what the outside coolies did, is only the earth work. P. Ws. 9 and 10 are retained coolies. They speak to the same fact, viz., that only 20 retained coolies and 5 outside coolies did the work. But their evidence shows that they did the repair work only from Santra Bend to Bhutamundi for six days, and that they were never engaged for the work at other places of the embankment. But from the evidence of outside coolies, it appears that they did the repair work from Santra Bend to Bhutmundi.

In face of this conflicting evidence, I think that the learned trying Magistrate is perfectly right to say that not only they cannot be said to have had sufficient knowledge about the work over the rest of the distance, but also that their evidence is untrustworthy. P. W. 2 is the patrol on whose petition the accused was prosecuted. On his own evidence, it appears clear that he is on inimical terms with the accused, because the accused had taken steps against him not only for non-submission of his diary, but also for his insubordination. His evidence is to be taken with great caution. He has produced his diaries, Ext. 7 to prove that his evidence is trustworthy. But the learned trying Magistrate has disbelieved the bona fides of his diary on the view that it exhibits signs of interpolation.

The Magistrate called for the original of Ext. 7 said to have been sent to P. W. D., but it was not produced. It is why he has drawn an adverse inference against the genuineness of Ext. 7. We have closely examined that diary; and we are satisfied that the internal evidence in it shows signs of interpolation with regard to the names of five coolies supplied by P. W. 25. The evidence of P. W. 26 does not give us any help. His diary Ext. D shows how much distance he covered during those periods. It does not show whether he was looking after the work of outside coolies. All that it shows is that he was supervising the work of Khalasis and gang-coolies from Paradip to Bhutumundi but not from Anantapur to Paradip. On a consideration of the entire evidence to prove the charge against the accused, we are of the opinion that the learned trying Magistrate is perfectly right in thinking that the evidence is not only untrustworthy but also conflicting in nature. On going through the evidence, we feel satisfied that the reason given for such a finding is not at all perverse, even though it creates a great suspicion against the conduct and bona fides of the accused.

(7) The prosecution has also examined some outside coolies, P. Ws. 11 to 24 to prove that they never worked during the period in question on the embankment as outside labourers. Names of some persons bearing the names of P. Ws. 10 to 25 appear in Ext. 3, and have been described by names of their respective fathers. But curiously enough, their places of residence have not been given. Such an omission in Ext. 3 may be taken as deliberate, so that the higher authority would not be in a position to check the correctness of the entries on verification. Notwithstanding it, the I. O. with great difficulty visited some villages such as Podopoda, Ananthapur, Bambilo, & Jagannathpur situate near about the canal embankment. It is, therefore, that the learned trying Magistrate has rightly observed that when with reference to their places of residence, the persons examined as witnesses cannot be identified to be the persons shown in Ext. 3, no reliance can be placed on their evidence. We think that he is not wrong in taking this view. P. W. 15 one Nilei Swain has stated in his examination in chief that he was not engaged for the repair work. He was at first examined by the police.

It appears that before the police, he admitted to have worked (sic) on the embankment, but subsequently he denied his version that he never worked. He has stuck to his second version before the court. His evidence when considered with reference to his earlier statement gives us an indication that some other outside coolies were also engaged. On 25-12-50, the S. D. O., P. W. D., (P. W. 1) visited the locality from Anantapur to Bhutumundi. In Ext. 3, eleven outside coolies have been shown to have worked on that day; but from the evidence of P. Ws. 2 and 25, it appears that only five outside coolies supplied by P. W. 25 worked from 22nd to 24th, but not on 25th December. But P. W. 1 has stated that he found some gang coolies and Khalasis and also some outside coolies working on the canal embankment.

This evidence supports the fact shown in Ext. 3 that some outside coolies were engaged on 25-12-1950; and it at the same time shows that P. Ws. 2 and 25 have not given the correct version. Taking into account all these circumstances, it appears to me that by the examination of these witnesses, the prosecution has not satisfactorily proved the charge against the accused, though their evidence has revealed certain suspicious circumstances as against the accused.

(8) Another ground which I think was rightly taken by the learned trial court is that no attempt appears to have been made either by P. W. 1 or by I. O., P. W. 3 to prove by actual check and measurement what was the total quantity of work done over the six miles of the embankment during the period from 20th to 25th December, 1950. In Ext. 3, the accused has shown the total quantity of work done under various heads by 31 coolies. It does not show the quantum of work done by Government retained coolies. Separate Hazira is maintained for the work of retained coolies; and their wages are calculated on a monthly basis on the footing of that Hazira. Exts. 3, 3-b and 3-c are their Haziras for the month of December, 1950. Exhibit 3-a shows the total quantity of work done by the Govt. retained coolies during the month of December, 1950. There is nothing in it to show what was the total quantity of work turned out by them on the canal embankment from 20th December to 25th December.

It appears that in the last week of January 1951, P. W. 1 received the petition from P. W. 2 on which this prosecution has been launched. Had he started an inquiry immediately on receipt of that petition, and checked the out-turn of the work done on the embankment, certainly he would have been in a position to know the correctness of the entries as regards the out-turn of work shown in Ext. 3. Had he found on inquiry that the total quantity of work done on the embankment to make the road motorable is what has been shown in Ext. 3-a certainly it would have gone a great way to show that the work shown in Ext. 3-a was done not only by outside coolies, but also by the twenty retained coolies, proving to the hilt that the accused has falsely and dishonestly shown in Ext. 3, the names of outside coolies inflating their number so as to obtain Rs. 166/- of Government money from P. W. 1 by false representation.

If, on the other hand, such an inquiry would reveal that besides the work shown in Ext. 3-a, the other quantum of work was found to be sufficient enough for the labour of 20 Government retained coolies, then it would clearly prove that the figure of 31 coolies shown in Ext. 3 is not an inflated one. This measurement could have been done by P. W. 1, even though at the time when the police inquiry was started, some of the repair work might have been obliterated. P. W. 1 was not prompt in this respect. Moreover, on 27th February, he got an order from the Chief Engineer that he should stop inquiring, as the matter had been handed over to the police. However, the learned trial court cannot be said to have taken this view as beside the point. In my view, he has made

the right approach in finding out the truth or otherwise of the prosecution case.

(9) It is further urged on behalf of the prosecution that there was really no work done on 20-12-50; but it has been shown in Ext. 3 as having been done by 31 coolies, and that though the five coolies were engaged according to the evidence of P. W. 25 from 22nd December, their names have been shown in Ext. 3 as having started the work on 20-12-50. It is, therefore, contended that these two instances reveal the mala fide conduct of the accused in making false representation to procure Government money from P. W. 1. No such point was taken up in the court below, and no attempt was made to bring out any such circumstance in the evidence to prove it. The accused was not asked any question about it in his examination under S. 342, Cr. P. C. Had any such question been asked, he would have explained his stand with regard to it. However, the conduct of the accused in this connection appears to be suspicious. It appears from the evidence that the accused on the morning of 20-12-50 covered a distance of 14 miles from Manijanga to Jagatsingpur. It was there that the order to make the road motorable was communicated to him as appears from Ext. 1 (b).

He left that place at about 9 or 10 a.m. met the contractor (P. W. 25) at about 10-30 a.m. at Nuapada, and requested him to supply outside labourers. As a matter of fact, P. W. 25 supplied five labourers on 22nd. As it was the harvesting season, labourers were not easily available unless offered higher wages. It appears to me difficult to believe that the accused could arrange 26 more labourers on reaching his section office and engaged them for the day. They must have gone to fields in the morning. There is no evidence to show how could the accused, who had joined his post quite recently, arrange so many coolies on the 20th itself. But curiously enough, no evidence was adduced to that effect in the trial court; and it also remained unnoticed by the prosecution in the trial court.

As a matter of fact, on 27-12-50 the accused sent the account of his daily work, which was accepted by P. W. 1 as a bona fide transaction. He never challenged it, having regard to the time of the presence of the accused at his office at Jagatsingpur. In this view of the case, I think though there arises a grave suspicion against the bona fides of the accused, it cannot go to prove, beyond doubt, the case of the prosecution.

(10) As regards the entries in Ext. 3 regarding the engagement of the five outside coolies supplied by P. W. 25 from the 20th, they appear to have been made deliberately. They worked, as evidence shows, for three days. But in Ext. 3 they have been shown to have worked for five days. We have it from the evidence of P. W. 25 that they were paid in all Rs. 25/- as their wages. Exhibit 3 shows it. We are told, though there is no positive evidence that the scheduled rate of daily wages is Re. 1/-. Exhibit 3 shows that daily wages at the rate of Re. 1/- for each coolie has been charged, presumably showing it to be the scheduled rate. Nevertheless P. W. 25 engaged them at a higher rate on account of the non-availability of labourers during the harvest season. It is contended on behalf of the accused that they have been shown as working on 20th and 21st only to reconcile the difference on account of payment of wages at a higher rate, but not to deprive the Government of its money.

It is, therefore, that the learned trying Magistrate has held that such an entry in Ext. 3 cannot be said to have been done either dishonestly or fraudulently, when it does not reveal any intention on the part of the accused, either to cause loss to Government or to cause gain to himself. I think, the learned Magistrate has taken the correct view of the case, even though the conduct of the accused cannot be said to be beyond reproach. He could have asked the Government to pass the bill at higher rates, stating that for that immediate and urgent work, labourers could not be available at the scheduled rate. However, this cannot prove that P. W. 1 has been cheated of the amount shown as paid to P. Ws. 5 to 8 and to other. In view of all these circumstances, we are of the opinion that the evidence on the record is inconclusive, though it does cast some amount of suspicion about the conduct of the accused. He is therefore entitled to the benefit of doubt and consequently acquittal. We therefore accept the order of his acquittal under this section.

(11) Another charge against the accused is under S. 409, I. P. C. The learned Magistrate has acquitted the accused of this charge on the ground that on the facts disclosed in the prosecution case there is a case of cheating under S. 420, and that consequently, there can be no charge under S. 409, because the offences under both these sections are mutually exclusive. He has relied for this view, on a Full Bench decision of the Madras High Court reported in — 'Emperor v. John McIver', AIR 1936 Mad 353 (A), to the effect that a person who obtains property by trick from another bears no resemblance to a trustee under S. 405, I. P. C. But the learned Government Advocate contends in line of the argument adopted in that case by his Lordship Laxmana Rao J., that after the completion of the offence of cheating, the money or property obtained by cheating comes into the hands of the offender, and when he appropriates it to himself or converts it to his own use, it becomes an offence under S. 409, I. P. C.

In that case, the accused was prosecuted under Ss. 420 and 409, I. P. C. before the Magistrate. The facts of that case as stated in that judgment clearly disclose the case of cheating. During the pendency of the criminal case before the Magistrate, both the complainant and the accused compounded the case. The charge under S. 420 is a compoundable one with the permission of the Magistrate, whereas a charge under S. 409, I. P. C. is not so. The Magistrate on receipt of the compromised petition gave permission to compound charge under section 420 and acquitted the accused of both the charges, stating in the order that the facts disclosed in the prosecution case, amounted really to an offence under S. 420; and that there can be no case of criminal breach of trust when the property acquired by the complainant was by cheating.

Against that order, the Government preferred an appeal before the High Court. A Division Bench of the High Court took the view that both the charges can be sustainable in one criminal case; and therefore they set aside the order under S. 409 and sent back the case to the trying Magistrate for retrial, under S. 409, I. P. C. During the retrial, a question arose before the Magistrate on the plea of the accused as to whether the accused can legally take up the plea of autrefois for his prosecution under S. 409, when he has already been acquitted of the charge under S. 420, I. P. C. The Magistrate, while taking a different view, negatived that plea on the ground that he is bound by the order of the High Court. Against that order, the accused went up to the High Court in revision, but the single Judge before whom the revision petition came, passed an order saying that

he does not like to interfere in revision with the order of the Magistrate. The accused was then convicted; and against his conviction, he again preferred an appeal to the High Court; and the questions about his plea of autrefois and also about his conviction under S. 409 were referred to a Full Bench.

In that Full Bench, the majority of the Judges were of the opinion that both the charges under Sections 420 and 409 cannot be sustainable as they are mutually exclusive, and that the property acquired by trick cannot be the subject-matter of a trust so as to bring the offender under S. 409, I. P. C., for the appropriation of that property to his own use. The minority view expressed by Laxmana Rao J. is to the effect that the offence of cheating becomes complete as soon as the offender procures the property by deception, and that when he appropriates that amount to his own use he commits an offence of criminal breach of trust punishable under S. 409, I. P. C. He, therefore, maintained the conviction under S. 409 even though the offence as disclosed, comes under S. 420.

In my view, the view taken by the majority Judges is the correct view. The word 'entrustment' or 'entrusted' though used in S. 405, I. P. C. is not defined in the I. P. C. The word itself conveys and includes that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship as between them. That confidence cannot arise when the property was acquired by the offender by some trick. Such a trick prevents any true consent arising. If the property is obtained by trick, or by any other unlawful means, then there cannot be any entrustment. 'Entrustment' means the handing over of the property by lawful means. Laxmana Rao J. has laid much stress on the presence of the phrase "in any other manner" in S. 405, I. P. C. His view appears to be this that the property acquired either by lawful means or unlawful means may be the subject-matter of a trust, because the phrase "in any other manner" occurring in S. 405 includes both the means. But in my view, it is not so.

The phrase "any other manner" connotes any other legal manner but not otherwise. The person handing over the property cannot be (sic. in?) that case have a free and voluntary volition of mind. However, I think the view taken by the majority of Judges is this that once a property is acquired by trick or 'in any other means' by false representation to the owner thereof, (sic) creates an offence under S. 420, I. P. C., and that if the offender appropriates that amount to his own use, he cannot be said to have committed an offence of criminal breach of trust, because in that case there was practically no trust created by the owner of the property. But there can be an alternative charge under S. 236, Criminal P. C.; but if once an offender is punished under S. 420, I. P. C. the other charge cannot be sustained. In my view, the learned trial Court has taken the correct view of the case.

(12) As regards the charge under S. 465, I. P. C. I think the Magistrate is perfectly right in holding that the prosecution has failed to prove the charge against the accused. The charge is to this effect that the accused in order to show false payment in the muster roll, Ext. 3, forged thumb impressions of the alleged payees showing the disbursement of Rs. 166/- among them. The specimen thumb impressions of P. Ws. 5, 6, 7 and 8 and 11 to 24 were sent to the finger-print expert, P. W. 4, for comparison with the disputed thumb impressions appearing against their names in Ext. 3, and for opinion as to whether or not they tally. He has given his opinion in Ext. 10 and has confirmed it in his evidence before the Court. His opinion is that they do not tally with the specimen impressions taken by the I. O. As already stated above, the prosecution has failed to prove beyond any doubt, the identity of P. Ws. 11 to 24 as those whose names appear in Ext. 3. It being so, it cannot be said that the thumb-impressions of the labourers taken by the accused are forged ones. This view, I think, has rightly been taken by the learned trial Court. The opinion of the expert is that the specimen thumb impressions of P. Ws. 5 and 6 do not tally with the impressions appearing against their names in Ext. 3. It is, therefore, contended on behalf of the appellant that the accused has committed forgery. The learned Magistrate has held that the accused cannot be said to have acted dishonestly in respect of their thumb impressions appearing in Ext. 3. The view taken by the Magistrate for this opinion is that actually the amount shown against their names was paid to them. There was no dishonest intention on the part of the accused to create those thumb impressions so as to dishonestly misappropriate the amount shown as paid in Ext. 3. Really it is so.

I have discussed this point in connection with the charge under S. 420. P. Ws. 5 to 8 and another who were really paid their wages have admitted this. The scheduled rate is only Re. 1/-. They worked for three days; and consequently they were entitled to Rs. 15/- at the scheduled rate. But as it was the harvest time, they claimed higher rate. In such circumstances, I think the lower Court was perfectly right in holding that in so far as their thumb impressions are concerned, the accused has not committed any forgery. Nevertheless, I think no material was placed before the trial Court for its judicial opinion, about the identity or otherwise of the thumb-marks in Ext. 3. The finger-print expert has not given any reason for his opinion, nor has he furnished any reason in his evidence before the Court. Though he has prepared the photographic enlargement of the disputed thumb marks and the specimen thumb marks, they were not placed before the court. Practically, there was no material before the trying Magistrate to give his judicial opinion as to the correctness or otherwise of the opinion of P. W. 4. It may be an expert opinion, but nevertheless, it cannot be a substitute for the judicial opinion. Inveriably in all such cases, the courts below should insist upon the production of such materials by the expert as to enable the court to verify the correctness or otherwise of his opinion. However, we agree with the trial court that the accused has not committed any offence under S. 465, I. P. C.

(13) In the result, the accused should, as I have stated above, be given the benefit of doubt; and he has been rightly acquitted. We do not see any reason to interfere with the order of acquittal.

(14) This appeal must, therefore, fail.

(15) NARASIMHAM J.: I agree that the appeal should be dismissed.

(16) There are reasonable grounds for believing that the respondents Radhakanta Patnaik committed the offence of cheating under S. 420, I. P. C. But bearing in mind the observations of the Supreme Court in — 'Surajpal Singh v. The State', AIR 1952 SC 52 (B), I do not think that this is a fit case for interference with an order of acquittal.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 ORISSA 218 (Vol. 41, C.N. 67)

PANIGRAHI C. J. AND MOHAPATRA J.
(16-2-1954)

Chairman, Municipality of Balasore, Defendant-Appellant v. Mahammad Abdul Sattar Khan, Plaintiff-Respondent.

Second Appeal No. 34 of 1950, from decision of Sub-J., Balasore, D/- 31-10-1949.

Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 82(1)(a) — Assessment of personal tax based on property situate outside municipal limits — Validity.

For the purpose of making the assessment under S. 82(1)(a), the Municipal Body can base their assessment only on a consideration of the circumstances of the property within the jurisdiction of the Municipality and the assessment is vitiated and is ultra vires if the property outside the jurisdiction of the Municipality is taken into consideration. 27 Cal 849; AIR 1920 Pat 427; AIR 1920 Pat 429, Rel. on. (Para 3)

The personal tax under the Municipal Act is not the same as the tax levied under the provisions of Income-tax Act. Hence, the contention that as soon as the income comes to the hands of the assessee, who is a resident within the municipal jurisdiction, it will come within the meaning of circumstances of the assessee within the municipality even though the property be situate outside, cannot be accepted. (Para 4)

CASES REFERRED :	Paras
(A) (1900) 27 Cal 849	3, 4
(B) (V7) AIR 1920 Pat 427: 4 Pat LJ 673	3, 4
(C) (V7) AIR 1920 Pat 429: 1 Pat LT 591	3
(D) (V9) AIR 1922 Cal 46 (2): 34 Cal LJ 283	5

H. Mohapatra and R. N. Misra, for Appellant; L. K. Dasgupta, for Respondent.

MOHAPATRA J. :

This appeal has been brought by the defendant (Municipality of Balasore) against the confirming judgment of Sri T. V. Rao, Subordinate Judge of Balasore, dated 31-10-1949. The plaintiff is a resident of Balasore Town occupying Holding No. 5 in Ward E together with Holdings No. 256 of Motiganj and No. 5 of Daftary Sahi. He has been assessed to pay a personal tax of Rs. 9/7/- per quarter. The only contention of the plaintiff is that the assessment is ultra vires inasmuch as the tax has been fixed on a consideration of his income from properties outside the jurisdiction of the Balasore Municipality. The plaintiff admits that in fact he possesses 40 acres of land but that is in Chandipur which is admittedly outside the municipal jurisdiction.

(2) The contention of the defendant-appellant is that the assessment is legal and in accordance with the provisions of S. 82, Bihar and Orissa Municipal Act. The relevant provisions of law are contained in S. 82, clause (1), sub-clause (a) which runs as follows :

"82. (1) The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notices shall have been given, subject to the provisions of this Act and with the sanction of the Local Government, impose within the limits of the municipality the following taxes and fees, or any of them :

(a) a tax upon persons in sole or joint occupation of holdings within the municipality according to 'their circumstances and property within the Municipality'."

The decision of the Appeal Committee passed on 8-4-1947 on the objection filed by the plaintiff under S. 116 of the Act shows that the Chairman and four other members constituted the Committee. The order runs as follows :

"The applicant says that he has forty acres of land, income from which they assess at Rs. 1,000/-. They also assess his income from Jewellery shop, cloth shop and Homeopathy and the house rent in the name of his wife at Rs. 2,200/-. So the total income comes to Rs. 3,200/- which they divided on the three holdings. As the previous tax was assessed on this basis, they maintained the previous personal tax of Rs. 9/7/- per quarter."

The order for the assessment of personal tax which is impugned in this suit is based on the income of the forty acres of land as one of the items. This has been found by the Courts below and it is without any dispute that this forty acres of land is situate outside the jurisdiction of the Municipality. .

(3) The point to be determined, therefore, is whether the assessment is to be declared as invalid and ultra vires as it was based upon consideration of properties outside the municipal jurisdiction. This point has been the subject of Judicial pronouncement in several cases, the earliest of which that has come to our notice is a decision in the case of — 'Kameshwar Prasad v. Chairman, Bhabua Municipality', 27 Cal 849 (A), which is to the effect :

"An assessment of tax under Section 85, Clause (a) of the Bengal Municipalities Act (which exactly corresponds to S. 82 of the Bihar and Orissa Municipal Act which was in operation in the years in question) made in consideration of the assessee's 'circumstances and property' (altogether or partly) outside the local limits of the Municipality is ultra vires and illegal; and the Civil Court has jurisdiction to set aside such an assessment."

At page 859, their Lordships observed as follows :

"And the whole question which had to be considered in this case was whether the Municipality had not in making the assessment in question proceeded upon the basis of the plaintiff's circumstances and property outside the Municipality of Bhabua. If they did so altogether or even partly, as it seems to have been the case, it is obvious that the assessment was ultra vires, and the plaintiff was entitled to bring the suit that he instituted."

It seems to be the definite view that for the purpose of making the assessment under S. 82 (1)(a), the Municipal Body can base their assessment only on a consideration of the circumstances of the property within the jurisdiction of the Municipality and the assessment is vitiated and is ultra vires if the property outside the jurisdiction of the Municipality is taken into consideration. The same view also was taken by Coutts and Das JJ. of the Patna High Court in the case of 'Chairman, Bihar Municipality v. Ramdeo Das', AIR 1920 Pat 427 (B), where their Lordships lay down:

"Income derived from property situated outside the Municipality does not come within the phrase 'circumstance and property within the municipality' in S. 85 of the Bengal Municipal Act, 1884, and is not liable to assessment under clause (a) of that section."

The main contention before their Lordships was in respect of income from the zamindary property which was admittedly outside the municipal area. The contention that the income from the zamin-

dary will be brought within the meaning of 'circumstances and property within the municipality' was negatived by their Lordships and the principle laid down in 27 Cal 849 (A) was followed.

The same view also was affirmed in another subsequent case of the Patna High Court reported in — 'Md. Ali Nawab v. Behar Municipality,' AIR 1920 Pat 429 (C).

(4) Mr. Mohapatra, appearing for the appellant, strenuously argues that as soon as the income comes to the hands of the assessee, who is a resident within the municipal jurisdiction, it will come within the meaning of circumstances of the man within the municipality even though the property may be situate outside. His contention is that the man may have several sources of income. The sources may be situate outside the municipality, but as soon as the income is received by the assessee within the municipal jurisdiction, the provisions of S. 82(1) (a) are complied with. It is to be remembered that the personal tax under the Municipal Act is not the same as the tax levied under the provisions of Income-tax Act. Moreover, as we have indicated above, this contention was raised and negatived in the case reported in '27 Cal 849' (A) and AIR 1920 Pat 427 (B), and with respect we agree with the view expressed in these decisions.

(5) Mr. Mohapatra, however, relies upon another decision of the Calcutta High Court reported in — 'Chairman, Jalpaiguri Municipality v. Jalpaiguri Tea Co.', AIR 1922 Cal 46 (2) (D), where the assessment was found to be legal even though the income in that case was the sale proceeds of a Tea Garden outside the local limits of the municipality. We find from the facts stated in the judgment of Sir Ashutosh Mukherjee that in that case the income derived from the Tea Gardens in the Western Doars in the district of Jalpaiguri was deposited in the bank to the credit of the assessee-company within the municipal jurisdiction and further that the entire income is brought to be spent and enjoyed within the Municipality. Mukherjee J. observed:

> "There can be no room for doubt that the sale proceeds of the tea, when they are brought within the municipal limits and are placed in the Bank to the credit of the companies, may, without undue strain on the language, be described as their 'circumstances and property', that is, their 'means and property' within the Municipality, and may consequently be taken to furnish a just measure of their liability to assessment under section 85(a)."

It is to be noted that the earlier decisions of the Calcutta High Court and the Patna High Court that we have referred to above were also placed before their Lordships; but they have disposed of the earlier cases with the remark:

> "What constitutes the circumstances and property of a person within the Municipality must in a large measure depend upon the facts of the particular case."

In our view, the above feature, that in the case the income was brought and deposited in the bank within the municipal area, distinguishes it from the present one. In the case before us, there is no evidence whatsoever as to whether the present assessee was receiving income of his property at Chandipur within the municipal area; but that apart if there be any conflict in principle between the proposition laid down in the case of AIR 1922 Cal 46 (2) (D), and the view expressed in the earlier decisions of the Calcutta High Court and Patna High Court, we would agree with the view of the earlier decisions of the Calcutta and Patna High Courts referred to in our judgment in preference to the view expressed in AIR 1922 Cal 46 (2) (D).

(6) In this view of the position of law, the decisions of the Courts below are correct. The appeal is, therefore, dismissed with costs and the judgments of the Courts below are confirmed.

(7) PANIGRAHI C. J.:— I agree.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 ORISSA 219 (Vol. 41, C.N. 68)

NARASIMHAM J. (1-3-1954)

Iswar Das, Appellant v. Abhiram Mohanty and others, Respondents.

Second Appeals Nos. 314 and 383 of 1948, from decision of Addl. Sub. J., Cuttack, D/- 2-3-1948.

(a) Tenancy Laws — Orissa Tenancy Act (B. and O. Act 2 of 1913), S. 31-B — Knowledge of landlord — Finding of fact — (Civil P. C. (1908), Ss. 100-101).

The concurrent finding of both the lower Courts about the landlord's knowledge of the transfer in favour of the plaintiff is a finding of fact which is binding on the Court in second appeal. (Para 2)

Anno: Civil P. C., Ss. 100-101 N. 52, 54.

(b) Tenancy Laws — Orissa Tenancy Act (B. and O. Act 2 of 1913) (as amended in 1938), S. 31B (2) — Object of — Non-compliance with — Effect — (Orissa General Clauses Act (1 of 1937), S. 29).

It is primarily the duty of the transferee to inform the landlord about transfer and the Legislature in requiring him to give notice by registered post by sub-s. (2) of S. 31-B means to relieve him of the liability of proving in every case by other evidence that the landlord was made aware of the transfer. His responsibility ceases as soon as he sends the notice by registered post. He can then rely on the provisions of S. 29 of the Orissa General Clauses Act. (Para 4)

If, however, the landlord is made aware of the transfer by other methods, the necessity of giving him notice of the transfer by registered post becomes unnecessary. In such cases, it appears that the provision for giving him notice by registered post is merely directory and not mandatory. The provision being specially inserted for the benefit of the transferee and with a view to relieve him of the onerous duty of proving actual knowledge of the transfer by the landlord in every case, cannot be so literally construed so as to result in his disadvantage. (Para 4)

Held on the peculiar facts of the case, that the omission on the part of the transferee to issue registered notice to the landlord was immaterial and that as the landlord was already aware of the transfer, the principle of representation laid down in sub-s. (2) of S. 31-B would not apply. That is to say, the landlord was bound to implead the transferee in the rent suit which he brought in respect of the holdings after the date on which he became aware of the transfer. His failure to do so had the effect of reducing the rent decree to a mere money-decree. AIR 1949 Orissa 51 and AIR 1953 Orissa 95, distinguished. AIR 1951 Orissa 186, Ref. (Para 4)

Held further that the conduct of the transferee from 1941 to 1944 in ignoring the notice

of the landlord to pay the mutation fee did not amount to acquiescence in the transferor's representing the holdings in rent suits.

(Para 7)

CASES REFERRED: Paras

(A) (V36) AIR 1949 Orissa 51: ILR (1949) 1 Cut 117 5

(B) (V40) AIR 1953 Orissa 95: 18 Cut LT 26 5, 6

(C) (V38) AIR 1951 Orissa 186: ILR (1951) Cut 1 (SB) 6, 7

L. K. Dasgupta, for Appellant in both the Appeals; B. M. Das and P. Misra, for Respondents in S. A. No. 314 of 1948; R. Mohanty and P. Misra, for Respondents, in S. A. No. 383 of 1948.

JUDGMENT: The appellants in these two appeals were the defendants in two suits (O. S. No. 93 of 1945 and O. S. No. 94 of 1945) which were heard analogously in the Court of the Munsif of Kendrapara. The plaintiff in both the suits was one Abhiram Mohanty, the respondent in these appeals. In O. S. No. 93/45 the property in dispute consists of 1.06 acres of raiyati land appertaining khata No. 246. In O. S. No. 94/45 the property in dispute consists of. 22 acres appertaining khata No. 251. These khatas originally belonged to the recorded tenants Prabalad Das, Krushna Chandra Das, Bairagi Das & Nabani Bewa. The plaintiff-respondent Abhiram Mohanty claimed to have purchased the property from the recorded tenants by a Kabala dated 18-9-31. He, however, did not take the necessary steps prescribed in Section 31, Orissa Tenancy Act (as it stood before the amendment of 1938) for the purpose of obtaining the consent of the landlord to the transfer and for getting his name mutated in the landlord's sherista. Consequently, whenever he paid rent for the two khatas the landlord granted Marfatdari receipt in the name of the recorded tenants showing, however, the plaintiff as the person who actually paid the money.

In 1938, the Orissa Legislature passed the Orissa Tenancy (Amendment) Act, 1938 (Orissa Act 8 of 1938) by which old S. 31, Orissa Tenancy Act, was replaced by four new sections, namely, 30A, 31, 31A and 31B which had as their primary object the conferring of unrestricted right of transfer of occupancy holdings on raiyats and the providing of other consequential matters.

In 1941, the landlord issued notice on the plaintiff-transferee calling upon him to pay the necessary mutation-fee required by sub-section (1) of S. 31-B and threatening the transferee with suit if the money was not paid. The transferee, however, did not respond to this notice. Then the landlord in 1943-44 instituted two separate suits (R. S. No. 6300 of 1943-44 and R. S. No. 6297 of 1943-44) for arrears of rent in respect of the two khatas and impleaded as defendants only the recorded tenants and completely ignored the plaintiff-transferee. In due course, the holdings were put to sale and purchased by the appellants. The property covered by O. S. No. 93/45 was purchased in a rent sale on 14-6-44 and the property covered by O. S. No. 94/45 was purchased in a rent sale held on 30-11-44.

The plaintiff thereupon instituted the suits under appeal alleging that the transfer of the holding in his favour was well-known to the landlord prior to the institution of the rent suits in question and that consequently the omission on the part of the landlord to implead him as a party in the suits had the effect of reducing the rent decrees to the position of mere money decrees. He, therefore, urged that the holdings were not properly represented before the rent Court and that consequently his right, title and interest were not affected by the rent sale. Both the Courts concurrently held that the landlord was fully aware of the transfer of the holdings in favour of the plaintiff by the recorded tenants and that the notice which the landlord himself issued to the plaintiff (ext. 7) on 26-11-41 calling upon him to pay the mutation-fee in respect of the transfer was conclusive on this question. They, therefore, hold that the holdings were not properly represented in the rent sale and that the plaintiff's interest was not affected by the sale.

(2) The finding of both the Courts about the landlord's knowledge of the transfer in favour of the plaintiff is a finding of fact which is binding on me in the second appeal. The transfer had taken place as early as 1931. The transferee (the plaintiff) was regularly paying rent; but as he did not pay the necessary mutation-fee the rent-receipts were granted as Marfatdari receipts. On 26-11-41 (ext. 7) the landlord while calling upon the plaintiff to pay the necessary mutation-fee clearly stated that the plaintiff had purchased the property by a Kabala of 1931 and that he was in actual possession of the holdings since that date. Hence, there can be no doubt about the fact that on the date of the issue of the notice (ext. 7 dated 26-11-1941) the landlord was fully aware of the transfer by the original recorded tenants in favour of the plaintiff. The question for decision, therefore, is whether three years later the landlord could obtain a valid rent-decree in a suit in which the plaintiff was not impleaded as a party.

(3) Prior to 1938, the law was quite clear on the subject. Under S. 31 of the old Act no transfer of an occupancy holding was valid as against the landlord unless and until he gave his consent thereto and such consent was deemed to have been given if the necessary mutation-fee had been paid in the manner prescribed in that section. If such payment was not made or consent was not obtained the landlord was entitled to ignore the transfer altogether and proceed against the recorded tenant only for realisation of arrears of rent in the Rent Court and a decree so obtained would clearly be a rent decree.

But by the amending Act of 1938 radical change was made in the law relating to transfer of occupancy holdings. By Section 30-A(1) such holdings were made freely transferable without the consent of the landlord and without payment of any fee to him. Doubtless, the amending Act would ordinarily be prospective and would apply to transfers made after the commencement of that Act. As regards pre-amendment transfers, however, the Legislature expressly inserted S. 31-B which is as follows:

"31-B.(1)— Notwithstanding anything contained in this Act, any transferee, who obtained a transfer of an occupancy holding or a portion or a share thereof, before the commencement of the Orissa Tenancy (Amendment) Act, 1938, shall be liable to pay the fees lawfully payable by him at the time of the transfer, within four years from the coming into force of that Act or the date of the landlord's knowledge of the transfer whichever is later, but he shall not be liable to ejectment on the ground that the landlord has not given his consent to the transfer.

(2) The holding or a portion or a share thereof shall not be liable to be sold in satisfaction of the decree for arrears of rent without making the said transferee a party to the proceedings in execution of the decree provided that the

transferee has given notice of transfer by registered post to the landlord.

Explanation.— Notwithstanding anything contained in this Act or in the Code of Civil Procedure, in the case of a transfer of a holding or a portion or a share thereof, whether before or after the decree the transferee may be brought on record in the proceedings in execution either in substitution of or in addition to the judgment-debtor, and such transferee shall, when so added or substituted, be treated as a judgment-debtor for all purposes of the said proceedings in execution of the decree."

The first sub-section expressly declared the right of the landlord to recover the mutation-fee lawfully payable to him within four years from the commencement of the amending Act or the date of his knowledge of the transfer. But at the same time that sub-section debarred his right to eject the transferee on the ground that the landlord's consent to the transfer had not been given. Sub-section (2) dealt with the question of representation of the tenant in any suit for arrears of rent on the holding. It also expressly declared that the holding shall not be liable to be sold for arrears of rent unless the transferee was made a party to the proceeding in execution of the decree

"provided that the transferee has given notice of transfer by registered post to the landlord".

Mr. Dasgupta's contention in that sub-section (2) of S. 31-B is a self-contained provision as regards representation of occupancy holdings in rent sales and that it should be strictly construed. If the transferee fails to give notice of transfer by registered post to the landlord the latter's right to proceed against the recorded tenant and ignore the transferee remained unaffected. In the present case admittedly the plaintiff did not give notice of the transfer by registered post to the landlord. Mr. Dasgupta therefore contended that as there was admittedly non-compliance with the provisions of sub-s. (2) of S. 31-B the landlord was entitled to ignore the plaintiff-transferee and obtain a valid rent-decree by impleading only the recorded tenants.

(4) The whole question ultimately turns on a true construction of words

"provided that the transferee has given notice of transfer by registered post to the landlord"

occurring in the later part of sub-s. (2) of S. 31-B. If these words are construed literally Mr. Dasgupta's case is unassailable. But such literal construction would lead to absurd results. For instance, if the transferee instead of giving notice by registered post, sends it by ordinary post or personally delivers the notice to the landlord and succeeds in establishing such due service before the Court it will obviously be quibbling with the provisions of that sub-section to say that the landlord was entitled to ignore the transfer because no "registered notice" was sent to him.

The object of giving such registered notice is clear. The landlord should be made aware of the transfer. It is primarily the duty of the transferee to inform the landlord about such transfer and the Legislature in requiring him to give notice by registered post meant to relieve him of the liability of proving in every case by other evidence that the landlord was made aware of the transfer. His responsibility would cease as soon as he sends the notice by registered post. He could then rely on the provisions of S. 29 of the Orissa General Clauses Act, and require a Court to hold that "unless the contrary is proved" that the notice was delivered in the ordinary course. If, however, the landlord is made aware of the transfer by other methods, the necessity of giving him notice of the transfer by registered post becomes unnecessary. In such cases, it appears that the provision for giving him notice by registered post is merely directory and not mandatory. A clause that was specially inserted in sub-s. (2) of S. 31-B for the benefit of the transferee and with a view to relieve him of the onerous duty of proving actual knowledge of the transfer by the landlord in every case cannot be so literally construed so as to result in his disadvantage.

Doubtless, where registered notice was not sent it would be somewhat difficult for the transferee to prove that the landlord had actual knowledge of the transfer. But in the present case that difficulty has disappeared because the landlord's notice (ext. 7) demanding mutation-fee conclusively established his knowledge. It was not a vague rumour about the transfer that had reached him at that time. His notice is categorical as regards the date of the execution of the Kabala in favour of the transferee and also as regards continuous possession of the holdings by the transferee since the date of the Kabala and his payment of rent. On the peculiar facts of this case, therefore, I would, in agreement with both the lower Courts, hold that the omission on the part of the transferee to issue registered notice to the landlord is immaterial and that the principle of representation laid down in sub-section (2) of S. 31-B would still apply. That is to say, the landlord was bound to implead the transferee in the rent suit which he brought in respect of the holdings after the date on which he became aware of the transfer. His failure to do so would have the effect of reducing the rent decree to a mere money-decree.

(5) Mr. Dasgupta, however, relied on two Division Bench decisions of this Court in support of his contention. The first one is reported in — 'Madhusudan v. Brajasundar', AIR 1949 Orissa 51 (A) and the second one is reported in — 'Gopinath Deb Thakur v. Govind Chandra Sahu', AIR 1953 Orissa 95 (B). Doubtless, in those two decisions there are general observations to the effect that by virtue of sub-section (2) of S. 31-B the transferee of an occupancy holding where the transfer has taken place prior to 1938 should give registered notice of the transfer to the landlord. But in those two decisions the peculiar position arising out of the knowledge of the transfer on the part of the landlord by other means was not considered at all. Hence, they are clearly distinguishable.

(6) In a Special Bench decision of this Court reported in — 'Keshab Chandra v. Lokenath Jena', AIR 1951 Orissa 186 (C) there are some observations regarding the construction of S. 31-B which are helpful. At pages 32 and 33 of that decision I observed that the main object of S. 31-B was to validate all pre-1938 transfers and place them on the same footing as post-1938 transfers except to the limited extent of retaining the landlord's right of realising mutation-fee in respect of the former class of transfers. I, however, pointed out that in considering whether the landlord was bound to implead the transferee in rent suits, his knowledge of the transfer was decisive and the giving of notice by registered post was only a mode of apprising him of such transfer and that it was open to a party to show in a particular case that he was made aware of the transfer by other means. It is true that the majority did not accept my view as regards post-1938 transfers. But as regards construction of S. 31-B no dissent was expressed by other Judges and in a later decision

reported in 'AIR 1953 Orissa 95 at p 96 (B) Das J. (as he then was) partly relied on my construction of S. 31-B.

(7) Mr. Dasgupta then urged that the conduct of the transferee in ignoring the notice (ext 7) sent to him by the landlord in 1941 and thereby allowing the holdings to be brought to sale for arrears of rent would amount to an acquiescence on his part to the representation of the holdings by the recorded tenants and that consequently the holdings were properly represented in the rent sale. In support of this argument he relied on some observations in the judgment of Das J. in 'AIR 1951 Orissa 186 at pp. 211, 212 (C)'. This argument appears to be based partly on a question of fact which cannot be taken up for the first time in a second appeal. The question as to whether the transferee's conduct from 1941 to 1944 would justify an inference that he acquiesced in allowing the holdings to be represented by his transferors in a rent suit was not taken up before the lower Courts nor was all available evidence in support of the same adduced. Mere silence on his part would not necessarily lead to an inference of such acquiescence. It may be that he did not want to pay the mutation-fee unless the landlord actually sued him for the same within the special period of limitation imposed by S. 31-B (1). But that would not take away his right which has been expressly conferred on him by the amending Act of 1938.

Moreover, in view of the knowledge of the transfer on the part of the landlord he might have kept quiet knowing fully well that if any rent suit was brought he would be given due notice. Apart from all these considerations the observations of Das J. in the case cited above are limited to those cases where the creditor's action in failing to implead the person really interested was 'bona fide'. Here, however, the 'bona fide' of the landlord is open to grave suspicion because with a clear knowledge of the transfer as early as 1941 he ignored the transferee in the rent suit brought in 1943-44. I am, therefore, not inclined to accept Mr. Dasgupta's argument that the conduct of the transferee from 1941 to 1944 would amount to acquiescence in the transferors representing the holdings in rent suits.

(8) For the aforesaid reasons, I would affirm the judgments of both the Courts and dismiss the appeal with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1954 ORISSA 222 (Vol. 41, C.N. 69)

PANIGRAHI C. J. (22-3-1954)

Shyamananda Mohapatra, Appellant v. Gopal Sahu and others, Respondents.

Second Appeal No. 455 of 1949, from a decision of Sub-J., Balasore, D/- 23-7-1949.

Civil P. C. (1908), O. 38, R. 6; O. 21, R. 54 — Attachment before judgment — Proof of — Presumption — When can be made (Evidence Act (1872), S. 114).

The facts that a notice under O. 38, R. 5 of the Civil Procedure Code had, in fact, been issued and served and that a claim had been preferred to the attachment by a third party terminating in an admission by the judgment-debtor that there had really been an attachment before judgment, are not sufficient to raise a presumption that the notice under O. 21, R. 54, Civil Procedure Code, as given in Form 24 of Appendix E was, in fact issued. No such presumption can be made merely on the basis of the admission of the judgment-debtor, when there is no evidence aliunde that such an attachment was in fact ordered to be made. Mere admission of the parties, without anything more, is not enough to constitute attachment which should be done in the manner prescribed in R. 54 of O. 21, Civil Procedure Code. AIR 1934 PC 217, Ref.

(Paras 3, 6)

Anno: C. P. C., O. 38 R. 6 N. 1; O. 21, R. 54 N. 1; Evi. Act, S. 114 N. 29, 30.

CASE REFERRED: Para

(A) (V21) AIR 1934 PC 217: 61 Ind App 371 (PC) 6

M. S. Rao, for Appellant; B. N. Das, for Respondents.

JUDGMENT: This is a plaintiff's second appeal in a suit for declaration of title and confirmation of possession of three acres of land in Khata nos. 39 and 51 of village Sadeipur. The plaintiff's case is that he purchased the suit property in execution of a money decree against defendant no. 4 on 21-1-1935 in M. S. No. 487 of 1927 and obtained delivery of possession through court on 15-8-1936. It is said that the property had been attached before judgment under Order 38, Rule 5 of the Civil Procedure Code. The contesting defendant No. 1 claims to have purchased the same property at an execution sale held at the instance of the landlords, who are defendants 2 and 3 and had obtained a rent decree. The main contest between the parties therefore is confined to the question as to who has got priority of title as between the two competing court sales.

(2) Admittedly Defendant No. 1's purchase was on 30-5-1934 while the plaintiff's purchase was on 21-1-1935. Both the Courts below have concurrently held that the decree in execution of which defendant No. 1 purchased the suit property was a money decree and did not have the effect of a rent decree. They have also concurrently held that the attachment before judgment relied on by the plaintiff has not been proved and that the plaintiff cannot claim priority of title on that ground.

(3) The only point that has been argued at some length before me is whether the attachment before judgment alleged to have been effected at the instance of the plaintiff can be said to have been proved, on the evidence produced by either party. The plaintiff alleged in paragraph 3 of his plaint that the properties had been attached before judgment and the defendant put him to proof of the alleged attachment and specifically denied that there had been any such attachment or delivery of possession through Court.

It is also admitted that much of the evidence relating to the proceedings which culminated in the attachment in the earlier suit is not available as the records concerned have all been destroyed. The plaintiff has therefore relied upon Ext. 3, the notice under O. 38, R. 5, Civil P. C., and Ext. 4, an order of the Court, to show that a claim case had been preferred and rejected. He has also relied on Ext. 2 of the year 1927, which is a compromise petition (rafanama) filed by the plaintiff and the judgment-debtor. The contention on behalf of the appellant-plaintiff is that in view of the fact that a notice under Order 38, R. 5, Civil P. C., had, in fact, been issued and served, and that a claim had been preferred to the attachment by a third party terminating in an admission by the judgment-debtor there had really been an attachment before judgment and that it should

be presumed that the notice under O. 21, R. 54, Civil P. C., as given in Form 24 of Appendix E was issued.

(4) Order 38, Rule 5 of the Civil Procedure Code provides that the Court may call upon the defendant either to furnish security, or to show cause why he should not furnish security. It also empowers the Court to direct conditional attachment of the whole, or any portion of the property specified by the plaintiff until the defendant shows cause. If the defendant fails to show cause why he shall not furnish such security or if he fails to furnish such security, the Court may order, under Rule 6, that the property be attached. If, on the other hand, the cause shown satisfies the Court the attachment may be directed to be withdrawn. Rule 7 provides that the attachment shall be made in the manner prescribed for attachment of property in execution of a decree.

Now, Ext. 3 shows that the order issued by the Court purports to be one under Order 38, Rule 5, Civil P. C. and directed the bailiff to attach the property, given in the schedule, until further orders of the Court. This order was duly executed and the Amin reported that he had proclaimed by beat of drum as well as by affixture of a copy of the notice on the land and thus effected the attachment. He further reported that he could not affix a copy on the Court house as a second copy had not been sent to him. It would appear that the plaintiff failed to give any evidence as to what transpired after the defendant appeared and showed cause. In fact, there is no evidence at all of any notice under Rule 6 of Order 38 having been issued, as provided in Form VII in Appendix F.

(5) The point made by learned counsel for the respondent is that what had been done so far was only a taking over of the property into the custody of the Court; and that there was no order prohibiting the judgment-debtor from dealing with property or restraining the alienation of the property as provided for in O. 21, R. 54, Civil Procedure Code. Form No. XXIV in Appendix E shows that the effect of an order under Rule 54 is to prohibit and restrain the defendant from transferring or charging the property specified in the schedule by sale, gift or otherwise. It also prohibits, all persons from receiving the property by purchase, gift, or otherwise. Mr. Rao for the appellant says that the Court may presume that such a notice must have been issued in view of the fact that the judgment-debtor himself made an admission in the compromise petition filed into Court (Ext. 2).

(6) Mr. Das, appearing for the respondent, however contends that the presumption that a Court can make can extend only to the regularity or otherwise of the official act and not to the performance of the act itself. My attention was drawn to the case reported in — 'Mohammad Akbar Khan v. Mushraf Shah', AIR 1934 PC 217 (A) where their Lordships of the Privy Council observed:

> "It ought to be presumed in the case of an attachment that all necessary formalities were complied with."

In that case, however, their Lordships were satisfied that there was evidence that the land had, in fact, been attached, and laid down that in such circumstances the presumption under S. 114, Evidence Act, could be made by Court. In the instant case, however, except an admission by the judgment-debtor that the attachment before judgment should continue there is no evidence aliunde that such an attachment was in fact ordered to be made. It may well be that the parties to the suit were acting under a misapprehension that the issue of the notice under Rule 5 of Order 38, Civil P. C. was itself a notice of attachment, as contemplated in R. 54 of O. 21. But mere admission of the parties is not, in my opinion, sufficient compliance with the specific provision of Rule 54. The further fact that a third party filed a claim petition on the assumption that there had been an attachment before judgment, is equally ineffective, in law, to operate as a valid attachment.

It may be noticed that the claim petition itself was filed seven years after the decree and the learned Munsif relied on Ext. 2 in proof of attachment before judgment. But as I have stated already, mere admission of the parties, without anything more, is not enough to constitute attachment which should be done in the manner prescribed in Rule 54 of Order 21, Civil P. C. I am therefore of opinion that this is not a case in which a presumption that an attachment had, in fact, been made before judgment can be drawn on the materials placed before the Court. I would therefore accept the findings of the Court below, though for different reasons, and would hold that the plaintiff has failed to prove that the properties had been attached before judgment. The defendant's title should accordingly prevail over that of the plaintiff.

(7) The appeal fails and is dismissed, but in the circumstances there will be no order as to costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1954 ORISSA 223 (Vol. 41, C.N. 70)

PANIGRAHI C. J. (30-3-1954)

Basu Behera, Petitioner v. Dombaru Behera and others, Opposite-Parties.

Civil Revn. No. 2 of 1953, from order of Munsif, Berhampur in Title Suit No. 224 of 1945.

Civil P. C. (1908), O. 20, Rr. 18 and 12 — Scope — Preliminary decree in partition suit — Subsequent application for future profits.

Rule 12 of O. 20 contemplates ascertainment of mesne profits as defined in S. 2(12) of the Code. But in the case of a suit for partition it can hardly be said that the coparcener or the co-sharer, as the case may be is in wrongful possession of such property, unless it is shown that the plaintiff has been excluded from enjoyment and there is a complete ouster. There is no justification for applying R. 12 when a specific provision is made in R. 18 with regard to suit for partition. There is nothing in R. 18 to indicate that the power of the Court to give directions in respect of any of the matters in dispute between the parties should be exercised only at the time of passing the preliminary decree or that the power is exhausted if it is not so exercised at that stage. The absence of a prayer in the plaint for ascertaining mesne profits from the date of suit will not debar the Court from entertaining an application for such profits at a later stage before the final decree is passed: AIR 1951 Mad 938 (FB), followed. (Para 3)

Anno: Civil P. C., O. 20, R. 18 N. 6.

CASES REFERRED: Paras

(A) (V21) AIR 1934 Cal 503: 151 Ind Cas 922 3
(B) ('82) 8 Cal 178: 8 Ind App 197 (PC) 3
(C) (V38) AIR 1951 Mad 938: 1951-2 Mad LJ 176 (FB) 3

G. K. Misra, for Petitioner; B. K. Pal, for Opposite Parties.

ORDER: This is a petition under S. 115, Civil P. C., calling in question the correctness of an order passed by the Munsif, Berhampur, in Title Suit No. 224 of 1945. That suit was filed by opposite parties 1 to 4 for partition and separate possession of certain properties belonging to the plaintiff and the defendants. A preliminary decree was passed for partition of the suit properties. A claim put in by the plaintiff to have an account taken of the collections made by the defendant-petitioner out of the fishery is still pending. A commissioner has been appointed to go into the account and his report is awaited. The plaintiff made an application to the court for ascertaining the mesne profits in respect of the share allotted to him from the date of institution of the suit, and the learned Munsif, by his order dated 20-9-1952, which is now under challenge, directed the commissioner to ascertain the mesne profits from the date of institution upto the date of the order.

The plaintiff's application was filed under O. 20, R. 12 and S. 151, Civil P. C. The defendants objected to the jurisdiction of the court to entertain such an application after the passing of the preliminary decree, specially when the plaintiff did not make any prayer for such a relief in his plaint. This objection was overruled by the Munsif and hence this revision.

(2) The Civil Procedure Code prescribes what a court may do in passing a decree for partition of property and separate possession of a share therein, in O. 20, R. 18 which is as follows:

"Where the court passes a decree for partition of property or for the separate possession of a share therein, then,

(1) .....

(2) If and in so far as such decree relates to any other immovable property or movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of several parties interested in the property and giving such directions as may be further required."

The Rule therefore empowers the Court to pass a preliminary decree merely declaring the rights of the parties and giving such further directions as may be required from time to time. It is a common knowledge that in a suit for partition various disputes are likely to crop up all of which cannot be disposed of at the trial. The Code, therefore, provides that the rights of the parties may be determined in the first instance and their disputes regarding divisions, allotments, ascertainment of assets and liabilities, etc., may be disposed of before a final decree is passed. All that the court does in passing the preliminary decree is to declare the rights of the parties and the nature of their rights, and until the disputes are finally disposed of and a final decree is passed the suit must be deemed to be pending. During this period the court may give such directions as may be necessary from time to time to adjust the equities between the parties as regards the valuation of the properties and their allotment to individual shares and decide all other incidental matters that may arise.

(3) Learned counsel for the petitioner contends that the court's power to deal with the claim of the plaintiff is exhausted after the passing of the preliminary decree, unless an inquiry as to rents and mesne profits is ordered in the preliminary decree itself. This contention is founded upon the language of R. 12 of O. 20, C. P. C. But it will be noticed that that rule contemplates suits for possession of land, while the relevant rule dealing with suits for partition and separate possession of shares is R. 18. There is therefore a well recognised distinction between the two classes of suits and I am unable to find justification for applying Rule 12 when a specific provision is made elsewhere with regard to suits for partition. Learned counsel for the petitioner relied on the case of —'Kiran Chandra Roy v. Erfan Karikar', AIR 1934 Cal 503 (A), but that case is easily distinguishable. There the suit was one for possession of lands and for mesne profits.

It may also be noticed that R. 12, O. 20, Civil P. C. contemplates ascertainment of mesne profits as defined in S. 2 (12) of the Code. But in the case of a suit for partition it can hardly be said that the coparcener or the cosharer, as the case may be, is in wrongful possession of such property unless it is shown that the plaintiff has been excluded from enjoyment and there is a complete ouster. The Judicial Committee while interpreting the provisions of S. 196, Civil P. C., of 1859 which corresponds to R. 12 of O. 20 of the present Code, held that a claim to future profits may be entertained by the Court and relief may be given to the plaintiff whether the plaint contained a prayer for such relief or not. See — 'Fakharuddin Mohammed v. Official Trustee of Bengal', 8 Cal 178 (PC) (B). The language of R. 18 is much wider in amplitude and it would follow therefore that the absence of a prayer in the plaint would not debar the court from entertaining such an application at a later stage before the final decree is passed.

There is nothing in the rule, to indicate that the power of the court to give such directions in respect of any of the matters in dispute between the parties should be exercised only at the time of passing the preliminary decree or that the power is exhausted if it is not so exercised at that stage. This is the view that has found favour with a Full Bench of the Madras High Court in — 'Basavayya v. Guravayya', AIR 1951 Mad 938 (C).

(4) I would, therefore, overrule the contention raised on behalf of the petitioner and dismiss this revision.

B/G.M.J. Revision dismissed.

A.I.R. 1954 ORISSA 224 (Vol. 41, C.N. 71)

PANIGRAHI C. J. AND MOHAPATRA J.

(16-2-1954)

Chairman, Municipality of Balasore, Defendant-Appellant v. Moulvi Mahammad Abdul Sattar Khan Plaintiff-Respondent.

Second Appeal No. 33 of 1950, from decision of Sub.-J., Balasore, D/- 17-11-1949.

(a) Municipalities — Bihar and Orissa Municipalities Act (7 of 1922) S. 95 — Enhancement of tax — Validity — (Civil P. C. (1908), S. 9).

In order that the Municipal Body may assume powers for the purpose of enhancing the tax of the assessee fixed in the General Assessment, they must be satisfied, as provided under the last clause of S. 95 that the assessment is inadequate and that it is so on account of mistake or fraud. Where there is nothing to indicate that the inadequate assessment, if any, was due to mistake or fraud, the enhancement must be held to be ultra vires.

A civil Court will, therefore, have jurisdiction to entertain a suit for declaring it as ultra vires. (Paras 2, 3)

Anno: C. P. C., S. 9, N. 53.

1953 Mulla: S. 9, P. 30, N. "Suits expressly barred" (Topic discussed in N. 53 to S. 9 in AIR Com. not independently dealt with in Mulla—AIR Com. note exhaustive of particular topic).

(b) Interpretation of Statutes — Taxing statutes.

The provisions of the taxing statute have got to be construed strictly and the requirements thereunder have got to be strictly complied with. (Para 3)

Anno: Civil P. C., Pre., N. 7.

H. Mohapatra and R. N. Misra, for Appellant

L. K. Dasgupta, for Respondent.

MOHAPATRA J.:

This appeal has been filed by the defendant — Municipality of Balasore — against the confirming judgment dated 17-11-1949, of Sri T. V. Rao, Subordinate Judge of Balasore, arising out of a suit brought by the plaintiff for a declaration that the enhancement of the municipal tax is ultra vires and without jurisdiction. The plaintiff, who is a Commissioner of the Balasore Municipality, is a resident of the Balasore Town and is in occupation of Holding No. 4 in Ward IV, that is, the Holding in question. He was assessed to pay a tax of Re. 1-8-0 per quarter in respect of this Holding in the General Assessment which had taken place in the year 1938. This tax, however, was enhanced to Rs. 9/7/- per quarter by the Resolution, dated 27-8-1945, of the Balasore Municipality affirming the proceedings of the Finance Sub-Committee dated 10-8-1945.

The contention on behalf of the plaintiff-respondent is that the tax which was assessed in the General Assessment of the year 1938 can be enhanced only in accordance with the provisions of S. 95, Bihar and Orissa Municipal Act, which was in operation during that time, and inasmuch as the provisions have not been complied with the assessment is bound to be declared ultra vires. It is also agreed by on behalf of the appellant-Municipality that the enhancement is to be effected only under the provisions of Section 95 and not otherwise.

(2) Mr. Mohapatra, appearing on behalf of the appellant, contends that the provisions had been complied with. Section 95 runs as follows:

"The Commissioners may, at any time after the publication of the notice required by S. 115, assess any person who was without authority omitted from assessment list, or whose liability to assessment has accrued thereafter, and may enhance any assessment which appears to them to be inadequate, and to have been so made owing to mistake or fraud."

Mr. Mohapatra relies upon the last clause and contends that the previous enhancement of the year 1933 appeared to the Municipal Body to be utterly inadequate and that the inadequate assessment was owing to the mistake of the assessing authorities. He particularly relies upon Exts. A and A-2, that is the inspection reports of the District Magistrate during the years 1943 and 1945, to show how the previous assessment was found to be inadequate.

On a perusal of the reports of the District Magistrate it may appear that the assessment may be inadequate in consideration of the circumstances of the respondent in the years 1943 and 1945. But there is nothing in the reports to indicate that in fact the assessment was inadequate in the light of the circumstances of the man in the year 1938, that is, the year of assessment. But that apart, one thing appears to be certain that there is nothing in the inspection reports of the District Magistrate to indicate that the inadequacy was the result of any mistake. We will quote in this connexion the Resolution dated 10th August, 1945 of the Finance Sub-Committee which runs as follows:

"Read the remarks of the District Magistrate and the Additional District Magistrate about the tax imposed upon Mr. A. Sattar Khan with regret and it is not desirable that one of our brother Commissioner should be remarked in this manner. It has been done and we dont think he will refuse to be taxed properly and take protection under the law to evade it and in our opinion he should be assessed upon a monthly income of Rs. 300/- per month as he is a prosperous jeweller, cloth merchant and is in a much happier position in the words of the District Magistrate."

This Resolution of the Finance Sub-Committee was simply confirmed by the Municipal Body on 27-8-1945. The Resolution running thus:

"The proceeding of the Finance Sub-Committee Meeting held on 10-8-1945 was confirmed and with the amendments moved by Sri Jnan Ranjan Patnaik and seconded by Sri Debendranath Das that after the demand of Rs. 3,000/- and "out of which Rs. 1,500/- will be spent from the Municipal fund" in Resolution No. 4."

Neither in the resolution of the Finance Sub-Committee nor of the Balasore Municipality confirming the resolution there is anything to indicate that the inadequacy was due to any mistake. In our opinion, in order that the Municipal Body may assume powers for the purpose of enhancing the tax of the assessee fixed in the General Assessment, they must be satisfied, as provided under the last clause, that the assessment is inadequate and that it is so on account of mistake or fraud. It is manifestly clear to us, therefore, in the present case that as there is nothing to indicate that the inadequate assessment, if any, was due to mistake or fraud, the enhancement must be held to be ultra vires.

(3) Mr. Mohapatra, however, argues that as it appears from the reports of the District Magistrate during the years 1943 and 1945 that the assessment was inadequate and further as was found by the Finance Sub-Committee that the previous assessment was improper, it has got to be implied that the previous inadequacy was on account of mistake. We are afraid, we cannot accept this contention of Mr. Mohapatra as it is one of the well settled principles that the provisions of the taxing statute have got to be construed strictly and the requirements thereunder have got to be strictly complied with.

(4) In our view, therefore, the enhancement being ultra vires, the Civil Court has jurisdiction to entertain the suit and the decisions of the Courts below are confirmed. The appeal, therefore, is dismissed with costs.

(5) PANIGRAHI C. J.: I agree.

K.S.B. Appeal dismissed.

A.I.R. 1954 ORISSA 225 (Vol. 41, C.N. 72)

NARASIMHAM AND MOHAPATRA JJ.

(21-1-1954)

Babulal Agarwalla, Plaintiff-Appellant v. Province of Orissa and others, Defendants-Respondents.

First Appeals Nos. 18 and 23 of 1946, from the judgment of Sub-J., Puri.

(a) Criminal P. C. (1898), S. 4 (1) (f) and (n) — Offence under R. 81 (4), Defence of India Rules

is non-cognizable — (Defence of India Rules, Rr. 81 and 128).

Since R. 81 is not specified in the list of cognizable offences given in R. 128, Defence of India Rules an offence under R. 81 (4) is a non-cognizable offence. (Para 16)

Anno: Criminal P. C., S. 4 (1) (f) N. 4.

(b) Criminal P. C. (1898), S. 550 — 'Any offence'

The words 'any offence' in S. 550 show unmistakably that even though there may be the commission of a non-cognizable offence a police officer may seize any property found under suspicious circumstances. (Para 16)

Anno: Criminal P. C., S. 550 N. 1.

(c) Defence of India Rules (1939), R. 81 (4) — Food Grains Control Order (1942), Cls. 2 (e) and 3 (1) — Contravention of.

A person keeping in his posession more than 50 maunds of foodgrains is to be presumed under the second proviso to Cl. 3 (1), Foodgrains Control Order to have stored them for the purpose of sale unless the contrary is proved. If such a person does not produce a valid license as required by Cl. 2 (e) of the Order, when demanded by any of the competent authorities he would be guilty of contravention of Cl. 3 (1) of the Order which is punishable under R. 81 (4), Defence of India Rules. (Para 16)

(d) Criminal P. C. (1898), Ss. 5 (2) and 550 — Offences against other laws — Powers of police officer to seize property — (Defence of India Rules (1939), Rr. 81 and 124) — (Food Grains Control Order (1952), S. 3(1)).

It is true that in Rule 81 (2) (f) of the Defence of India Rules provision was made for search and seizure. But this is a mere enabling provision and if in the Foodgrains Control Order made under Rule 81 (2) no such provision is made for search and seizure it will be unreasonable to hold that the general powers conferred on Magistrates and police officers under the Criminal Procedure Code are taken away. An offence under Rule 81 (4) will be an offence under a 'special law' and by virtue of sub-s. (2) of S. 5, Criminal P. C. the procedure for investigation of such offence will be regulated by the Criminal Procedure Code subject of course to any provision in the special law regulating the manner of such investigation. Hence, if there is any clear provision in the Defence of India Rules regarding the circumstances under which search and seizure of articles in respect of which an offence under Rule 81 (4) is suspected that provision will undoubtedly override the powers of the police under S. 550, Criminal P. C. or those of the Magistrate under the Criminal Procedure Code. But where there is no provision in the Defence of India Rules abrogating the powers of the police under S. 550, Criminal P. C., either expressly or by implication, it will not be proper to hold that that section cannot be resorted to merely because in the Foodgrains Control Order advantage was not taken of the provisions of Rule 81 (2) (f) and no special clause was inserted dealing with search and seizure. (Para 18)

The Sub-divisional Magistrate's power under the Criminal Procedure Code to direct search and seizure where there is a reasonable suspicion of contravention of any provision of the Defence of India Rules is equally clear not only by virtue of the general provisions of the Criminal Procedure Code but also by virtue of the express powers conferred by Rule 124 of the Defence of India Rules. AIR 1944 Nag 366, Rel. on; AIR 1944 Bom 247 and AIR 1945 Mad 23, Distinguished. (Para 18)

Anno: Criminal P. C., S. 5 N. 6; S. 550 N. 1.

(e) Defence of India Act (1939), S. 17 (1) — 'Good faith' — Meaning of — Conditions for claiming protection under section — (General Clauses Act (1897), S. 3 (20)).

The expression 'good faith' used in S. 17(1), Defence of India Act should be construed in the light of the definition given in S. 3 (20) of the General Clauses Act, 1897. (Para 19)

Hence, if from the proved facts of a case it can be inferred that the public officials acted honestly even though they might have acted negligently it must be held that they acted in good faith within the meaning of S. 17(1), Defence of India Act. But to seek protection under that section it must be further established that the act impugned was either done or intended to be done in pursuance of any provision of the Act or of the Defence of India Rules. (Para 19)

(f) Evidence Act (1872), Ss. 101 to 103 — Question of onus after evidence let in.

Where both the parties have led evidence and the question in the end turns on preferring the evidence of one party to that of the other the question of onus of proof becomes immaterial and is of academic interest only. (Para 19)

Anno: Evidence Act, Ss. 101 to 103 N. 9.

(g) Interpretation of Statutes — Penal Statute — Provision dealing with search.

The well known principle that penal statutes have to be strictly construed in favour of a subject should not be applied to provisions as regards search and seizure which are merely procedural matters. Any provision dealing with search cannot be said to be a penal statute so as to justify a strict construction. (Paras 17, 18)

Anno: Civil P. C., Pre. N. 7.

(h) Tort — Wrongful seizure — Damages — (Defence of India Act (1939), S. 17(1)).

Police officers seizing a number of bags of rice belonging to plaintiff with a view to prevent them from being exported from Orissa to Bengal in spite of the fact that the plaintiff had shown them a valid licence — Police acting in a high handed manner without caring whether there was any authority in them to make such seizures — They neither acted nor purported to act under the provisions of any statute — Held that the police officers were not entitled to claim the protection of S. 17 (1), Defence of India Act and, therefore, were liable to pay damages to the plaintiff for the loss sustained by the illegal seizure. (Para 21)

(i) Tort — Wrongful seizure of goods—Damages — Seizure held not wrongful — (Criminal P. C. (1898), Ss. 523 (1) and 550).

Police officer suspecting contravention of Cl. 3 (1), Foodgrains Control Order 1942, seizing certain bags of rice belonging to plaintiff — No valid permit produced at time of seizure — Plaintiff going three hours after seizure to police station where bags were removed and showing his licence and demanding release of bags — Police officer refusing to release bags on ground that they had no authority to release them without the authority of the Magistrate under S. 523 (1), Criminal P. C. — Held that the seizure was justified under

S. 550, Criminal P. C. and that he had acted within his authority in refusing to release them and therefore was not liable for damages. (Para 23)

Anno: Criminal P. C., S. 523 N. 6; S. 550 N. 1.

(j) Tort — Vicarious liability — Liability of Government for acts of their servants.

Police officers seizing goods belonging to plaintiff — Seizure neither authorised by the State nor had the sanction of any law nor was it for purposes of Government — Conspiracy between officers and Government not proved — Government neither ratifying nor deriving any benefit from such seizure — Held that in the circumstances the Government was not liable for the tortious acts of their servants. AIR 1953 Assam 116, Distinguished. (Paras 25, 26)

(k) Limitation Act (1908), Art. 2 — Scope.

Article 2 can have no application to a suit for damages against police officers for illegal seizure of goods when the seizure was not either made or even intended to be made by them in pursuance of any provision of law in force. (Para 27)

Anno: Lim. Act, Art. 2 N. 1.

CASES REFERRED: Paras

(A) (V31) AIR 1944 Bom 247: 46 Cri LJ 354 17
(B) (V32) AIR 1945 Mad 23: 46 Cri LJ 256 17
(C) (V31) AIR 1944 Nag 366: 46 Cri LJ 366 18
(D) (1929) 1929-1 KB 419: 98 LJKB 98 19, 20
(E) (V39) AIR 1952 SC 75: 1952 SCJ 55: 1952 Cri LJ 510 (SC) 19
(F) (V22) AIR 1935 All 538: 57 All 935 (FB) 19
(G) (1919) 89 LJPC 1: 17 LGR 369 20
(H) (V31) AIR 1944 FC 41: ILR (1944) Kar FC 83 (FC) 20
(I) (V40) AIR 1953 Assam 116 26

In F. A. No. 18/46:

M. S. Rao, for Appellant; Advocate General, Orissa, for Respondents.

In F. A. No. 23/46:

Advocate-General, for Appellants; N. Mukherji, for Respondent.

NARASIMHAM J.:

These two appeals arise out of the judgment and decree passed by the Subordinate Judge of Puri in a suit brought by one Babulal Agarwalla, a merchant of Faridpur district in East Bengal, claiming damages for alleged illegal and malicious seizure of several bags of rice on various dates in June and July, 1943. The learned Subordinate Judge decreed his claim for damages in respect of seizure of some bags of rice on three dates (16-7-1943, 22-7-1943 and 27-7-1943); but dismissed his claim in respect of seizure on other dates.

F. A. No. 18 of 1946 was filed against that portion of the judgment of the Subordinate Judge which disallowed his claim and F. A. No. 23 of 1946 was filed by two of the police officers against whom the learned Subordinate Judge had given a decree for damages for unlawful seizure. Both the appeals were heard together for the convenience of all concerned and will be dealt with in one judgment.

(2) During the year 1943 the second world war was going on with great intensity and the provisions of the Defence of India Act, the Defence of India Rules and the various Control Orders in respect of essential commodities were applied with full rigour in all the States of the territory formerly known as British India. The Control Order with which the Court is concerned in the present litigation is the Foodgrains Control Order, 1942 made by the Central Government in exercise of the powers conferred by sub-rule (2) of R. 81 of the Defence of India Rules. That Order prohibited any person from engaging in any undertaking in respect of purchase, sale, or storage for sale, in wholesale quantities of any foodgrain except under and in accordance with a licence issued in that behalf by a Provincial Government.

The Order defined 'purchase or sale in wholesale quantities' as meaning 'purchase or sale in quantities exceeding 20 maunds in any one transaction' and there was a further provision to the effect that any one 'who stores foodgrain in quantities exceeding 50 maunds may, unless the contrary is proved, be deemed to store the foodgrain for purposes of sale'. There are other provisions in the Order dealing with the conditions under which licences would be granted by the Provincial Governments and the terms of such licences.

In pursuance of this Order various Provincial Governments restricted the export of rice from one Province to another by the issue of licences. But during the great Bengal famine of 1942-43 when there was acute shortage of rice in Bengal the Government of India inserted a second proviso to sub-rule (2) of R. 81, Defence of India Rules by an amending notification No. 5-DC (28)/43, dated 18-5-1943 by which the Provincial Governments of Assam, Bengal, Bihar and Orissa were, in effect, prohibited from restricting movement, transport, distribution, disposal etc. of foodgrains within those four Provinces with effect from 18-5-1943.

By another notification No. C. G. IV(2)/43 dated 29-5-1943 a second proviso was added to clause 3 of the Foodgrains Control Order, 1942, to the following effect:

"Provided further that any licence issued, or deemed to be issued, under this clause in any of the four provinces of Assam, Bengal, Bihar and Orissa and for the time being in force in the province of issue shall be as valid in each of the other three provinces as if it had been issued by the Provincial Government of that province."

It is a notorious fact that this privilege of unrestricted inter-provincial movement of foodgrains amongst the said four Provinces though welcomed by Bengal was keenly resented by Orissa and Bihar and after some agitation the Government of India withdraw that privilege by notification No. C. G. 604/2 dated 16-8-1943. The period from 18-5-1943 to 16-8-1943 may conveniently be described as the 'free trade period' during which the various acts of seizure of the rice of the plaintiff took place.

The eagerness of the then Provincial Government of Orissa to bring about a speedy termination of the 'free trade period' will be apparent from the fact that on 16-8-1943 as soon as the Government of India issued the aforesaid notification the Provincial Government sent an urgent telegram (see (Ext. E-8) to the Collector of Puri informing him about the notification of the Government of India and directing him to take necessary steps to prevent all export of foodgrains and their products to any place outside the Province of Orissa except under a permit to be issued by the Provincial Director of Food Supplies. It seems thus a fair inference to say that the Provincial Government and its subordinate officers did not want free trade of foodgrains between Orissa and Bengal and were keen on retaining power to regulate export from Orissa to Bengal by issuing licences.

During the 'free trade period' their hands were tied inasmuch as by virtue of the amendments made by the Government of India to the Defence of India Rules and the Fodgrains Control Order any trader who obtained a valid licence under that

Order from a competent authority in Bengal was entitled to purchase rice in Orissa and export it to Bengal without any restriction whatsoever. The allegation of the plaintiff is that during the 'free trade period' though the Provincial Government could not directly prevent the transport of rice from Orissa to Bengal it encouraged its subordinate officials to prevent such export by indirect means by harassing the merchants in various ways, illegal seizure of various quantities of rice and deliberate delay and refusal to pass any orders on the various petitions filed by the merchants for redress against such illegal seizure.

(3) On 10-6-1943, plaintiff Babulal Agarwalla was granted a licence by the Supply Officer of Goalundo in Faridpur district to carry on the business of purchase, sale, storage for sale etc. of rice, paddy and other foodgrains. Another merchant of the same district named Makhanlal Sharma (P. W. 1) also obtained a similar licence and both these licensees came to Orissa for the purpose of purchasing rice at cheap rates and exporting it to Bengal for sale at high profits. The plaintiff opened a godown at Khurda and through various agents purchased rice from several cultivators in the mofussil. Several bags of rice thus purchased by him were seized by the police of Khurda and Jatni on 28-6-1943, 7-7-1943, 16-7-1943, 22-7-1943 27-7-1943 and 12-9-1943.

The plaintiff contended that these seizures were unlawful as they were done in pursuance of a preconcerted conspiracy on the part of the Provincial Government and its local officials to flout the orders of the Government of India regarding the free movement of foodgrains from Orissa to Bengal and that though he had shown his licence to the Subdivisional Magistrate of Khurda before commencing his business in Khurda sub-division yet he was put to much unnecessary harassment and huge loss by being entangled in several criminal cases for offences under the Defence of India Rules which were eventually withdrawn. Hence he claimed damages from the Government of Orissa (defendant No. 1), the then Sub-divisional Magistrate of Khurda (defendant No. 2), the then Assistant Price Control Officer, Khurda (defendant No. 3) and various subordinate police officials (defendants 4, 5, 6, 7, 8, 9 and 10) who actually seized his bags of rice.

The main defence of the Government of Orissa was that they were not responsible for the tortious act, if any, committed by their subordinate officials and that there was no conspiracy between them and their officials as alleged by the plaintiff. The Sub-divisional Magistrate of Khurda took the plea that he had acted bona fide in exercise of the powers conferred on him by the Defence of India Rules and that in any case his action was protected by S. 17 (1), Defence of India Act. The police officers also have taken a similar plea. The Assistant Price Control Officer took the plea that he had nothing to do with the seizure of any of the bags and that consequently he was not liable in any view of the case.

(4) Before discussing the various questions of law that arise in these appeals I may discuss the evidence regarding the circumstances under which various acts of seizure took place and give my finding thereon.

(5) '1st seizure'. — Admittedly on 28-6-1943 nineteen bags of rice were seized by A. S. I. Lokanath Misra (D. W. 1 and defendant No. 4) at Khurda, about 300 yds. off from the office of the Sub-divisional Magistrate. This A. S. I. has, in his written statement & in his evidence in Court, taken the plea that he found two cartmen named Ramnarayan Ram and Fakir Behera in charge of the said nineteen bags of rice and that on demand they could not produce before him any licence. Hence he suspected that there was contravention of the provisions of the Foodgrains Control Order which was punishable under R. 81 (4) of the Defence of India Rules and that he seized the rice bags.

The plaintiff, on the other hand, has examined his companion from Faridpur named Makhanlal Sharma (P. W. 1) to show that the plaintiff himself was present at the time of the seizure and that he actually showed his licence to the police officer and also showed the receipts in support of his statement that he had purchased the quantity of rice from various persons. It was alleged that without any justification the police officer seized the goods even though in view of the production of the licence by the plaintiff there could be no question of even a suspicion of his having contravened the provisions of R. 81 (2), Defence of India Rules. The crucial point for decision, therefore, is whether the plaintiff was present at the time of the seizure of these bags and whether he produced his licence (Ext. 1) before D. W. 1 as stated by P. W. 1 (After discussion of evidence His Lordship proceeded:) I would, therefore, hold that the plaintiff showed his licence at the time of the seizure of the bags by the police officer and there was no ground even for suspicion that there was a contravention of the Foodgrains Control Order.

(6) In this connection it should be further pointed out that it was during the cross-examination of P. W. 1 by the defendants' Advocate that the presence of the plaintiff at the time of the seizure and his production of the licence before the Police Officer were brought on record. In his examination-in-chief P. W. 1 did not care to say anything about this matter and similarly in the plaint also there was no mention about these facts. This itself is an important circumstance to show that the plaintiff was not overzealous to concoct a false story of his presence at the time of the seizure and his showing the licence to the police officer. Apparently, the plaintiff's Advocate also did not realise the importance of these facts. But the defendants' Advocate by questioning P. W. 1 on these points brought out answers which undoubtedly support the plaintiff's case to the effect that there was absolutely no justification for seizure.

(7) I may further state that in respect of this seizure a criminal case under R. 81 (4) of the Defence of India Rules was started against the plaintiff (No. 34 C of 1943) in the Court of Sri N. Sahu. But on 16-5-1944 (Ext. A-5) the case was withdrawn under the orders of the District Magistrate and the plaintiff was acquitted. The learned trying Magistrate directed that the rice bags seized should be returned to the plaintiff. There is, however, no evidence to show what happened subsequently to those rice bags.

(8) '2nd seizure'. — Admittedly on 7-7-1943 A. S. I. Purusottam Mohapatra (D. W. 2 and defendant No. 2) who was officer-in-charge of Khurda police station seized 299 bags. On 3-7-1943 the plaintiff had filed a complaint (Ext. E-1) under ss. 147 and 341, I. P. C. against several persons alleging that they wrongfully restrained him from despatching rice in bullock carts to the railway station. The complaint was sent by the Sub-divisional Magistrate to the local police for instituting F. I. R. and investigation. The police officer (D. W. 2) stated that while investigating that case he seized the said 299 bags which were pointed out to him by the complainant (plaintiff) himself and that he kept them in the custody of one Brajakishore Naik.

After completing investigation he submitted Final Report (Ext. E-3) in that case. Then the

Sub-divisional Magistrate on 5-8-1943 directed the release of these bags to the plaintiff. But on 12-9-1943 after the expiry of the 'free trade period' these bags and one more bag were seized by another police officer of Khurda (D. W. 4 and defendant No. 9) under the orders of the Sub-divisional Magistrate. There is no reason to disbelieve the evidence of D. Ws. 2 and 4 regarding the circumstances under which 299 bags of rice were seized on 7-7-1943, released on 5-8-1943 and again seized on 12-9-1943. The plaintiff's witness (P. W. 1) has not been able to say anything which would contradict the evidence of these two police officers regarding this seizure. I would, therefore, accept their evidence on this point.

It further appears that on 14-3-1944 (see Ext. E-7) the Sub-divisional Magistrate directed the release of these bags as the zimadar Brajakishore Naik (see Ext. E-6) reported that the bags were being damaged by white-ants and were deteriorating. But as the plaintiff took no steps to take possession of these bags they were sold and the sale-proceeds were deposited in the treasury.

(9) 3rd seizure: On 16-7-1943, A. S. I. Biswanath Patnaik (defendant No. 7) seized 35 bags of rice at Khurda. On 27-7-1943 a prosecution report was filed against one Bimbadhar Samantra (Ext. D) on the allegation that he transported these bags of rice for sale without a licence. The case against Bimbadhar Samantra proceeded in the Court of Sri N. Sahu (see G. R. case No. C/36 of 1943) and on a petition filed by him (see Ext. D-2 dated 6-11-1943) the learned Magistrate on 15-1-1944 (Ext. D-3) discharged him under S. 253, Criminal P. C.

In the meantime, the plaintiff had filed a petition before the trying Magistrate (Ext. D-1) stating that the bags may be restored to him as he was their owner. The learned trying Magistrate, however, directed the restoration of the rice bags to the said Bimbadhar Samantra and directed the plaintiff to establish his claim in the Civil Court. The plaintiff, however, did not implead Bimbadhar as a defendant in the present suit. Doubtless, his witness (P. W. 1) stated that the plaintiff was present when these 35 bags of rice were seized and that he showed his licence to the police officer. He totally denied any knowledge about the said Bimbadhar Samantra.

The seizure list in respect of these rice bags has not been proved and neither the police officer Biswanath Patnaik nor any other person who was present at the time of the seizure has been examined as a witness. But the unexplained omission on the part of the plaintiff to implead Bimbadhar or to file a separate suit against him though the trying Magistrate who delivered the rice bags to Bimbadhar by his order dated 15-1-1944 (see Ext. D1) directed the plaintiff to seek his redress against Bimbadhar in the Civil Court, must lead to an adverse inference against him. Bimbadhar is undoubtedly a necessary party so far as the recovery of damages for seizure of these 35 bags of rice is concerned. He had to stand in the dock as an accused in the criminal case (G. R. No. C/36 of 1943) brought by the police in respect of his unauthorised possession of these bags.

If the plaintiff was really present at the time of the seizure and had shown his licence to the police officer it is not likely that the police would have omitted to send him up also as one of the co-accused, if not as the only accused. I am therefore not inclined to accept the uncorroborated testimony of P. W. 1 regarding the presence of the plaintiff at the time of the seizure of these bags or the production of his licence before the police officer concerned.

I would agree with the learned lower Court that the bags were in the possession of Bimbadhar and as he could not produce any licence before the police officer the latter had reasonable grounds to suspect that there was contravention of the provisions of the Foodgrains Control Order and was justified in seizing the same. The question as to whether Bimbadhar was acting as the agent of the plaintiff at the time of the seizure cannot obviously be determined in the present litigation in the absence of Bimbadhar.

(10) 4th seizure: On 16-7-1943, A. S. I. Biswanath Patnaik (defendant No. 7) seized 41 bags of rice at Khurda. The seizure list has not been proved nor has the A. S. I. given evidence regarding the circumstances under which the seizure took place. His written statement was to the effect that the seizure took place for suspected contravention of the provisions of the Defence of India Rules and the Foodgrains Control Order. The plaintiff's witness (P. W. 1) however stated that the plaintiff was present at the time of this seizure also and that he showed his licence to the police officer. In the absence of any rebutting evidence on the defendant's side I am inclined to accept the plaintiff's evidence on this point.

As to what happened to these rice bags subsequently we have to rely on the written statement of defendant No. 7 to the effect that no prosecution was launched and the plaintiff was given notice to take back the bags. But he took no steps and the bags were, therefore, kept in police custody.

(11) 5th seizure: On 22-7-1943, S. I. A. Rauf (D. W. 3 and defendant No. 5) seized 90 bags of rice at Khurda. He stated that the bags were in the possession of some cartmen who could not produce any licence or permit and that he, therefore, seized them as he suspected contravention of the Foodgrains Control Order. But the evidence of P. W. 1 is to the effect that the plaintiff was present on that occasion and that he showed his licence to the S. I. The question for decision is whether the evidence of P. W. 1 should be believed or that of D. W. 3 on this point.

(After discussion of evidence his Lordship proceeded) I would, therefore, believe the evidence of P. W. 1, disbelieve the evidence of D. W. 3 regarding the circumstances under which this seizure took place and hold that the plaintiff was present and showed his licence to the police officer.

(12) 6th seizure: On 27-7-1943 the same police officer (D. W. 3 and defendant No. 5) seized another consignment of 90 bags of rice at Khurda. As in respect of the previous seizure there is a sharp conflict in the testimony of P. W. 1 and D. W. 3 regarding the circumstances connected with this seizure, the former saying that the plaintiff was present and that he showed his licence and the latter asserting that though the plaintiff was present he was not able to produce either his licence or his daily account register. (After discussion of evidence his Lordship proceeded). In view of these circumstances I would disbelieve the evidence of D. W. 3, accept the evidence of P. W. 1 and hold that the plaintiff was present and that he showed his licence to this police officer at the time of this seizure also.

(13) In respect of these two seizures of 22-7-1943 & 27-7-1943 two criminal cases under R. 81(4) of the Defence of India Rules were started against the plaintiff (Nos. 47 & 48 of 1943) in the Court of Sri N. M. Patnaik. But both of them were withdrawn on 15-5-1944 (see Exts. B-1 & B-2) and the Magistrate directed that the property should be restored to the owner. But it appears that the rice bags were not taken possession of by the plaintiff.

(14) 7th seizure: On 27-7-1943, S. I. Sri Budhinath Dalai of Jatni police station (D. W. 5 and defendant No. 10) assisted by his A. S. I. Sri B. Mohanty (defendant No. 6) seized 151 bags of rice from some cartmen close to Khurda Road Railway Station. The cartmen were unable to produce any licence. As the quantity of rice was more than 20 maunds and no licence was produced the S. I. seized the goods for contravention of the provisions of the Foodgrains Control Order. In the personal diary (Ext. C) this fact was also stated. The plaintiff's witness (P. W. 1) also admitted that at the time of seizure of these 151 bags of rice the plaintiff was not present nor any licence was shown to the police officer.

At that time the plaintiff was at Khurda, several miles away. The plaintiff came to Jatni police station three hours after seizure and produced his licence before the S. I. But the latter would not release the goods. Even if his evidence be believed on this point it seems clear that at the time of the seizure of these 151 bags the cartmen could not show any licence to the police officer. As the quantity of rice was more than 20 maunds the police officer was entitled to seize the goods for contravention of the provisions of the Foodgrains Control Order. The legal effect of the subsequent production of the licence by the plaintiff before the police officer three hours after seizure will be discussed later on.

(15) To sum up, therefore, my finding is as follows:

At the time of the 1st, 4th, 5th and 6th seizures (28--3-1943, 16-7-1943, 22-7-1943 and 27-7-1943) the plaintiff was present and showed his licence to the police officers who notwithstanding the production of the licence seized the goods and subsequently came forward with a false story that no licence was produced. The 2nd seizure of 299 bags of rice on 7-7-1943 was made by D. W. 2 during the investigation of a cognizable offence under Ss. 147 and 341, I. P. C. The same bags along with another bag were seized by defendant No. 9 on 12-9-1943 under the orders of the Sub-divisional Magistrate. The third seizure of 35 bags was made from one Bimbadhar, to whom they were subsequently restored after an unsuccessful prosecution. The seizure of 151 bags of rice on 27-7-1943 was made by defendants 10 and 6 from cartmen who were unable to produce any licence. The plaintiff was not there then but he appeared three hours after seizure at Jatni police station and produced his licence; but the police officer refused to release the goods.

(16) By virtue of the second proviso to sub-cl. (1) of cl. 3 of the Foodgrains Control Order, 1942 if any person is found in possession of more than 50 maunds of foodgrains he may be presumed to have stored them for the purpose of sale unless the contrary is proved. The definition of "storage in wholesale quantities" in cl. 2(e) shows that storage for purposes of sale of more than twenty maunds of foodgrains, requires a valid licence. Such storage for the purpose of sale without a valid licence would amount to contravention of cl. 3(1) of that Order and would thus be punishable under R. 81(4) of the Defence of India Rules. Hence, arises the necessity on the part of a person keeping in his possession more than fifty maunds of foodgrains to produce a valid licence when demanded by any of the competent authorities.

Rule 128 of the Defence of India Rules specified the various offences under those Rules which are of a cognizable nature. Rule 81 is not specified in that Rule and consequently it is clear that an offence under R. 81(4) is a non-cognizable offence, that is to say, a police officer cannot arrest a person suspected to have committed that offence without a warrant from a Magistrate. Rule 124 of the Defence of India Rules confers power on certain classes of Magistrates to issue warrants authorising the search of any place and the seizure of any article where there is a reasonable suspicion of contravention of any provision of the Defence of India Rules.

It is admitted that when the police officers seized the rice bags of the plaintiff on all the specified dates except 12-9-1943 they did not purport to act under any authority given to them by the Sub-divisional Magistrate of Khurda. But under S. 550, Criminal P. C. any police officer may seize any property which may be found under circumstances which create suspicion of the commission of 'any offence'. The words underlined (here into ' ') show unmistakably that even though there may be the commission of a non-cognizable offence a police officer may seize any property found under suspicious circumstances. Doubtless under section 523 (1), Criminal P. C. he is bound to report the seizure forthwith to the Magistrate concerned and await his orders regarding its disposal.

The suspicion of the commission of an offence in the present case would arise only if the person in possession of the rice bags could not produce any licence when demanded by the police officer. If, however, as found by me, it be held that the person in possession of the rice bags above the permissible limit actually showed his licence to the police officer concerned there would be absolutely no question of even a suspicion of his having committed any offence under the Defence of India Rules and the police officer will have no authority to seize the rice bags while purporting to exercise his powers under S. 550, Criminal P. C.

(17) The learned lower Court has misconceived the powers of the Sub-divisional Magistrate and the police officers as regards search and seizure of suspected articles where contravention of any provision of the Foodgrains Control Order is believed to exist. It thought that unless there was a special provision in the Foodgrains Control Order empowering either the Sub-divisional Magistrate or the police officer to enter and inspect premises and to seize articles in respect of which there was a reasonable suspicion of contravention of any provision of that Order those officers have no such powers at all and that the provisions of the Criminal Procedure Code giving them such powers should be deemed to have been impliedly taken away.

In taking this view the learned lower Court relied mainly on the fact that under cl. (f) of sub-r, (2) of R. 81 of the Defence of India Rules express power was conferred on the appropriate Government to provide in an Order made under R. 81(2) of the Defence of India Rules for entering, searching and inspecting premises with a view to secure compliance with the Order and to seize suspected articles.

By way of analogy it relied on — 'Purushottam Devji v. Emperor', AIR 1944 Bom 247 (A) & 'In re Appukutti Chettair', AIR 1945 Mad 23 (B). and other decisions where it was held that the power of a trying Magistrate to forfeit goods in respect of which contravention of an Order under R. 81 (4) of the Defence of India Rules was proved, arose only if in the relevant Order express power was conferred on a trying Magistrate to direct such forfeiture. In those decisions the reasoning adopted was that in view of the express provision in R. 81(4) regarding forfeiture of goods the provisions of S. 517, Criminal P. C. should be deemed to have been to that extent abrogated in respect of offences under R. 81(4) and that a trial Court

cannot rely on S. 517, Criminal P. C. for directing forfeiture. The learned Judges applied the well-known principle that penal statutes have to be strictly construed in favour of a subject.

(18) The learned lower Court should not have applied this principle as regards search and seizure which are merely procedural matters. Any provision dealing with search cannot be said to be a penal statute so as to justify such a strict construction. It is true that in R. 81(2)(f) of the Defence of India Rules provision was made for search and seizure. But this is a mere enabling provision and if in the Foodgrains Control Order made under R. 81(2) no such provision is made for search and seizure it will be unreasonable to hold that the general powers conferred on Magistrates and police officers under the Criminal Procedure Code are taken away. An offence under R. 81(4) will be an offence under a 'special law' and by virtue of sub-s. (2) of S. 5, Criminal P. C. the procedure for investigation of such offences will be regulated by the Criminal Procedure Code subject of course to any provision in the special law regulating the manner of such investigation. Hence if there is any clear provision in the Defence of India Rules regarding the circumstances under which search and seizure of articles in respect of which an offence under R. 81(4) is suspected that provision will undoubtedly override the powers of the police under S. 550, Criminal P. C. or those of the Magistrate under the Criminal Procedure Code.

But where, as in the present case, there is no provision in the Defence of India Rules abrogating the powers of the police under S. 550, Criminal P. C., either expressly or by implication, it will not be proper to hold that that section cannot be resorted to merely because in the Foodgrains Control Order advantage was not taken of the provisions of R. 81(2)(f) and no special clause was inserted dealing with search and seizure.

I do not wish to elaborate this point except to cite — 'Bhimji Ramji v. Emperor', AIR 1944 Nag 366 (C) where it was held that the police could seize articles for contravention of R. 90(2) of the Defence of India Rules relying on this section and that R. 124, Defence of India Rules had not even impliedly taken away that right. The Sub-divisional Magistrate's power under the Criminal Procedure Code to direct search and seizure where there is a reasonable suspicion of contravention of any provision of the Defence of India Rules is equally clear not only by virtue of the general provisions of the Criminal Procedure Code but also by virtue of the express powers conferred by R. 124 Defence of India Rules.

(19) I may now deal with S. 17(1), Defence of India Act on which much reliance has been placed by the defendants. That section is as follows:

"Section 17(1): No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder."

The expression 'good faith' used in this section should be construed in the light of the definition given in S. 3(20), General Clauses Act, 1897 which is as follows:

"A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not."

This definition differs fundamentally from the definition of 'good faith' in S. 52, Penal Code where it is stated that if a thing is not done with due care and attention it is not done in good faith. Hence, if from the proved facts of this litigation it can be inferred that the public officials acted honestly even though they might have acted negligently it must be held that they acted in good faith within the meaning of S. 17(1), Defence of India Act. But to seek protection under that section it must be further established that the act impugned was either 'done' or 'intended to be done' in pursuance of any provision of the Act or of the Defence of India Rules. Some argument was advanced before us as to where the burden of proof lay to establish that S. 17(1), Defence of India Act has no application.

On behalf of the public officials it was urged, relying on — 'Scammell & Nephew, Ltd. v. Hurley', (1929) 1 KB 419 (D) and the observations of the Chief Justice of India in — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 at p. 81 (E) that there was a presumption that public officials would act honestly and reasonably in exercise of their statutory powers and it was the duty of a party challenging the action of the public officials to establish that they did not act honestly.

On behalf of the plaintiff, however, reliance was placed on some observations in — 'Sham Lal v. Abdul Raof', AIR 1935 All 538 (FB) (F) where it seems to have been indicated that the burden in some circumstances may lie on the public officials to establish their good faith. This point however seems to be of academic interest in the present case. Both parties have led evidence and the question in the end turns on preferring the evidence of one party to that of the other. Moreover, even if it be assumed that the public officials acted honestly it cannot be held in respect of some of the seizures that they either acted in pursuance of any provision of the Defence of India Rules or intended to act in pursuance of any such provision.

(20) The English decisions construing a similar language in the Public Authorities Protection Act, 1893 are to the effect that

"the benefit of that statute can be claimed even by an officer who has acted under a mistaken view as to his duty whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty" (1929) 1 KB 419 (D)' and — 'Newell v. Starkie', (1919) 89 LJ PC 1 (G).

These decisions were noticed in the well-known decision reported in — 'Gurucharan Kaur v. Province of Madras', AIR 1944 FC 41 (H) where statutory protection under S. 270 (1), Government of India Act, 1935 was held to be available to public officials acting under a mistaken view of fact as to their duty. The question as to how far that protection will be applicable where the mistake was in respect of law as to their duty was left open.

(21) Applying the aforesaid principles to the present case we have to see whether any of the various acts of seizure by the public officials was either done or intended to be done in pursuance of any provision of the Defence of India Rules. So far as the 1st, 4th, 5th and 6th seizures are concerned, I have already disbelieved the evidence of the police witnesses to the effect that the plaintiff was present at the time of those seizures and that he showed his licence (Ext. 1) to the police officers concerned (Sic). Hence there was not even a suspicion of contravention of R. 81(4) of the Defence of India Rules so as to justify the seizure of those articles under S. 550, Criminal P. C.

The police officers' statement to the effect that they seized the articles because the licence was not produced when demanded has not been accepted and consequently, on the facts of the case, it cannot be held that they intended to act in pursuance of any provision of the Defence of India

Rules. Though in some of the seizure lists, it was stated that the seizure was made due to the failure of the plaintiff to produce books of account, this reason for seizure was given up in the written statements of these police officers and in their evidence in Court. Hence it is unnecessary to discuss whether the police officers were under a mistaken view of law about their powers to call upon a licensee to produce his books of account.

The Court cannot attribute to them an intention which they have not put forward, especially when the intention alleged by them has been disbelieved. They seem to have acted in a high-handed way and seized the goods with a view to prevent them from being exported from Orissa and they did not care in the least as to whether there was any authority in them to make such seizures. They neither acted nor purported to act under the provisions of any statute. Hence the protection of S. 17(1), Defence of India Act will not be available to these police officers who are liable to pay damages to the plaintiff for the loss sustained by him due to their illegal seizures.

(22) The second seizure, however, stands on a different footing. Two hundred & ninetynine bags of rice of the plaintiff were seized by D. W. 2 on 7-7-1943 during the course of his investigating a cognizable case under Ss. 147 and 341, Penal Code started on a complaint petition (Ext. E-1) filed by the plaintiff himself before the Sub-divisional Magistrate on 3-7-1943. It was on the plaintiff's allegation that a mob of rioters prevented him from despatching 299 bags of rice to Bengal that the police of Khurda under the directions of the Sub-divisional Magistrate instituted F. I. R. and commenced investigation. During such investigation they had ample powers under Ss. 550 and 165, Criminal P. C. to search and seize any of the articles in respect of which an offence was alleged to have been committed. The seizure was therefore lawful under the provisions of the Criminal Procedure Code.

Doubtless, subsequently under the orders of the Sub-divisional Magistrate they were released from custody on 5-8-1943. They were again seized by defendant No. 9 on 12-9-1943 under the orders of the Sub-divisional Magistrate. Free trade period had already expired as early as 16-8-1943 and consequently when the plaintiff was in possession of 300 bags of rice on 12-9-1943 in contravention of the provisions of cl. 3 of the Foodgrains Control Order, 1942, (having no valid licence with him then) the Sub-divisional Magistrate was fully justified not only by R. 124 of the Defence of India Rules but also by the provisions of the Criminal Procedure Code to direct the seizure of those bags of rice. Hence, the Sub-divisional Magistrate and the police officer who acted under his directions are both fully protected.

(23) As regards the seventh seizure, I have already found that 151 bags of rice were seized on 27-7-1943 by D. W. 5 near about Jatni Railway Station and brought to Jatni police station. The plaintiff was then at Khurda several miles away and none produced any licence before the police officer at the time of the seizure. The police officer had, therefore, reasons to believe that a contravention of clause 3 of the Foodgrains Control Order had taken place and he was, therefore, justified in seizing the goods in exercise of the powers conferred on him by S. 550, Criminal P. C.

It is true that three hours after the seizure the plaintiff went to Jatni police station and showed his licence. But the police officer had no authority to release without the orders of a Magistrate any goods that were seized by him. Section 523 (1), Criminal P. C. confers this power of release of such seized articles only on the Magistrate concerned. Hence, the police officer appears to have acted within his authority in respect of this seizure and he cannot be held liable for damages.

(24) The Assistant Price Control Officer of Khurda Sri S. S. Misra was impleaded as defendant No. 3. But he seems to have done nothing that was unlawful. He played no part in the seizure of any of the goods. He merely called upon the plaintiff to produce his account books and scrutinised the same. This power was conferred on him by an order of the Sub-divisional Magistrate dated 9-4-1943 (Ext. H). His action was throughout performed in pursuance of a valid order issued to him by his superior and the suit against him is misconceived.

(25) Coming to the case against defendant No. 1 who is the Government of Orissa, the plaintiff's allegation throughout was that the subordinate officials at Khurda committed these high-handed actions in pursuance of a conspiracy between them and the Government of Orissa to somehow prevent the export of rice from Orissa to Bengal notwithstanding the imposition of free trade by the Government of India. There is, however, no direct evidence of such conspiracy and we were asked to infer such conspiracy from the fact that most of the seizures took place under no authority whatsoever notwithstanding the production of a valid licence by the plaintiff before the police officers concerned. It was also urged that various criminal cases were started against the plaintiff vexatiously and subsequently they were all withdrawn.

We were asked to take judicial notice of the fact which was then notorious that the free trade was imposed by the Government of India in the interests of Bengal where acute famine was then prevailing and the Government of Orissa and the other Governments such as the Government of Bihar did not relish the idea of free trade and they eventually succeeded in persuading the Government of India to re-impose the ban on inter-provincial movement of foodgrains from 16-8-1943. Though there is much force in this argument of the learned Counsel for the plaintiff it will be difficult to infer from these meagre circumstances that the Government of Orissa either conspired with their local officials to prevent the plaintiff from exporting rice to Bengal or else that they connived at the actions of the local officials and subsequently ratified the same.

It may be that the local officials, knowing the attitude of the Provincial Government on the question of free trade, acted with excessive zeal on their own initiative in the hope that by preventing the removal of rice from Orissa they were doing a great service to the people by preventing the drain of such an essential commodity as rice.

The Sub-divisional Magistrate of Khurda (D. W. 6) stated in his cross-examination that whatever he did in connection with the seizure of the goods of the plaintiff was done by him bona fide in discharge of his official duties and in accordance with the instructions received by him from the District Magistrate and the Government. From this statement of the Sub-divisional Magistrate we were asked to infer that the Government were either conniving party to all the seizures or else that they subsequently ratified the same.

But the only part played by the Sub-divisional Magistrate of Khurda was connected with the seizure of 299 bags of rice in respect of which he acted on a complaint petition filed by the plaintiff himself. Doubtless, in respect of the other seizures made by the police regular criminal cases were started on the police report. But there is absolutely no evidence to show that the Sub-divi-

sional Magistrate either instigated the police to make such illegal seizures or subsequently ratified their action. He proceeded in accordance with the provisions of the Criminal Procedure Code and when subsequently it was found that the criminal cases would not stand the District Magistrate of Puri himself directed the withdrawal of those cases.

It was further urged that on 29-7-1943 (see Ext. 3) the District Magistrate of Puri requisitioned all the rice bags that were seized in exercise of his powers under R. 75A (1) of the Defence of India Rules and that this order of requisition would itself justify the finding that the Government ratified the action of the police in unlawfully seizing these rice bags. I am, however, unable to accept this argument. The requisition was made by the District Magistrate in exercise of the statutory power conferred on him by R. 75A (1) of the Defence of India Rules because he was satisfied that the bags of rice were required for maintaining supplies essential to the life of the community. It has nothing to do with the illegality of the previous seizures by the police. The connection between the bags requisitioned and the bags that were illegally seized has also not been established. It is thus no piece of evidence to prove the conspiracy charged against the Government. I am, therefore, unable to hold that there was a conspiracy between the Government and their officials to unlawfully seize the goods of the plaintiff. It is well settled that the Government are not liable for the tortious act of their servants.

(26) Mr. M. S. Rao cited a recent decision of the Assam High Court reported in — 'Union of India v. Ram Kamal', AIR 1953 Assam 116 (I) in support of his contention that the Government of Orissa would also be liable to pay damages for unlawful seizures of the rice bags in the circumstances disclosed in the present litigation. That decision, however, is clearly distinguishable on facts and, moreover, there are certain observations therein which would go against the contention of Mr. Rao. There the facts found were that certain troops occupied the fisheries of a party and damaged the fish that had been reared in the fish nurseries constructed thereon.

The learned Judges of the Assam High Court, after a full discussion of the law regarding the liability of the State for the tortious acts of its servants, held that the occupation of the fisheries by the troops was for the purpose of efficient and successful prosecution of the war and that the Govt. should therefore have requisitioned the fisheries under R. 75A of the Defence of India Rules and paid compensation to the owner for such requisition. Having failed to so requisition the property the Government were liable for trespass by their servants on the property of an individual where such trespass took place for Government purposes. But they declined to hold the Government liable for the wanton acts of waste and destruction committed by the troops in the fish nurseries, observing that these acts were not for the purposes of efficient and successful prosecution of the war and hence not for Government purposes. They were neither authorised by the State nor done under the sanction of any municipal law nor did the State derive any benefit from them.

The ratio of the decision, therefore, seems to be that where the servants of the Government commit trespass on the property of an individual for the purposes of the Government or while acting under the sanction of any municipal law or when the State derives any benefit from their action or subsequently ratifies the same the Government may be liable. But the present case is of a different nature. It cannot be held that the unwarranted seizure of the goods of the plaintiff by the police officers was either authorised by the State or was done under the sanction of any municipal law nor was it done for the purposes of the Government. The State also neither ratified the same nor derived any benefit from such seizure.

(27) Issue No. 3 dealt with the question of limitation. On behalf of the defendants reliance was placed on Art. 2, Limitation Act and it was urged that the special period of limitation of six months would apply. But in view of my finding that the illegal seizures were not either done or even intended to be done in pursuance of any provision either of the Defence of India Rules or of the Criminal Procedure Code it is obvious that that Article would not help those police officers who are responsible for such illegal seizures.

(28) Next comes the question of quantum of damages. The learned lower Court fixed the price per bag of rice (82 standard seers) at Rs. 20/13/2½ pies on the basis of the price lists published in the Orissa Gazette dated 3-9-1943 and 17-9-1943 and also awarded interest at 12 per cent. per annum from the date of seizure till either the date of the suit or the date on which the order was passed by the Magistrate directing the plaintiff to take possession of the bags.. Defendant No. 5 was one of the police officers against whom a decree was passed on that basis. The plaintiff did not file a cross appeal against the decree on the ground that the price per bag fixed by the trial Court was too low.

Doubtless, in his appeal he impleaded defendant No. 7 though he had obtained a decree against him also and urged that the price allowed by the lower Court was too low. But as against defendant No. 5 the plaintiff's failure to file an appeal must be construed to mean that he accepted the decision of the Court to the effect that the prevailing price per bag at that time was only Rs. 20/13/2½ pies and that the reasonable compensation that he was entitled to for unauthorised seizure was only 12 per cent per annum. Defendant No. 5 is one of the appellants in F. A. No. 23 of 1946. But the learned Government Advocate who appeared for him was not able to satisfy me that either the price fixed by the lower Court or the rate of interest allowed by way of compensation was abnormally high.

I think that, on the whole, the lower Court took a reasonable view taking as the basis the price-list published by the Government themselves in the Orissa Gazette at that time. I would, therefore, affirm the damages fixed by the lower Court against defendant No. 5 for unlawful seizure of 180 bags of rice and against defendant No. 7 for unlawful seizure of 41 bags.

(29) In view of my finding, in disagreement with the lower Court, that as regards the first seizure also the police officer concerned (defendant No. 4) was bound to compensate the plaintiff the quantum of damages payable for that unlawful seizure should be calculated on the same basis as that adopted by the learned lower Court. Nineteen bags of rice were seized unauthorisedly on 28-6-1943 by defendant No. 4. He should pay compensation to the plaintiff at the rate of Rs. 20/13/2½ pies per bag with interest at 12 per cent from 28-6-1943 till 16-5-1944 (see Ext. A-5) on which date the trying Magistrate directed the return of the seized rice bags to the plaintiff. He should pay Rs. 437/12/- as total damages. The plaintiff shou'd get interest at 6 per cent per annum pendente lite and also till the date of realisation in respect of damages awarded against defendants Nos. 4, 5 and 7.

(30) I would also confirm the direction of the lower Court regarding the right of these three defendants Nos. 4, 5 and 7 to adjust the price of 19, 180 and 41 bags of rice respectively at the rate fixed by it if they are still in police custody or sold already. No evidence has been led as to what happened to these bags and it will be open to these defendants to take appropriate proceedings if they are so advised.

(31) As regards the 300 bags of rice which were seized on 12-9-43, it appears that due to the failure of the plaintiff to take possession of the same though he was given notice (see Ext. E-7) the bags were sold and the sale proceeds were deposited in the treasury. This fact has been admitted by the then Sub-divisional Magistrate of Khurda (D. W. 6) and from Ext. I-1 it appears that the sale proceeds of those 300 bags amounted to Rs. 5,494/4/6. The plaintiff is clearly entitled to this amount.

Similarly, the 151 bags of rice of the plaintiff which were seized on 27-7-1943 (7th seizure) were sold and the sale proceeds deposited in the treasury under the orders of the Sub-divisional Magistrate of Khurda (see Exts. C-3 and C-4) due to the failure of the plaintiff to take possession of these bags when they were released. From Ext. I it appears that the sale proceeds of these 151 bags amounted to Rs. 2,642/5/6. It is not denied by the defendants that the plaintiff is entitled to this sum. We would, therefore, direct defendant No. 1 to refund to the plaintiff the sum of Rs. 5,494/4/6 and Rs. 2,642/5/6 being the sale proceeds of the aforesaid bags.

(32) I would, therefore, dismiss F. A. No. 23/46 with costs. F. A. No. 18/46 is allowed as against A. S. I. Lokanath Misra (defendant No. 4 and respondent No. 4) with proportionate costs. It is dismissed as against the remaining respondents with costs.

(33) MOHAPATRA, J.: I agree.

K.S.B. Order accordingly.

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NARASIMHAM AND MOHANTY JJ. (5-3-1954)

V. Gurumurty Raju, Appellant v. V. Narasimha Raju and others, Respondents.

M. A. Nos. 25 and 26 of 1949, from order of Sub. J., Berhampur, D/- 29-11-1948.

(a) Arbitration Act (1940), S. 35(1) — Misconduct of arbitrator canvassed in legal proceeding — Validity of award.

Section 35 speaks of the subject-matter of a legal proceeding in a Court and the subject-matter of the reference before an arbitration. It is the identity of the two that attracts the operation of S. 35(1), Arbitration Act. But where the dispute between the parties which was the subject-matter of the arbitration agreement is not canvassed in the legal proceeding started in a Court by one of the parties to the arbitration reference but only the alleged misconduct of the arbitrator the section is not attracted. And consequently the proceedings before the arbitrator will not be invalid. (1912) 3 KB 257; AIR 1921 Cal 770; AIR 1935 Lah 916; AIR 1922 Lah 369, Rel. on. (Para 6)

Anno: Arbitration Act, S. 35 N. 1.

(b) Arbitration Act (1940), S. 30 — Proceedings before arbitrators — Notice to parties — Substantial compliance with natural justice.

Proceedings before arbitrators need not be conducted with such meticulous care as is required in ordinary Civil Courts so long as there is substantial compliance with the principles of natural justice. For example, verbal notice from an arbitrator to a party would suffice and that written notice is not always necessary. Thus, mere absence of formal notice to the parties after resumption of arbitration proceedings on the termination of an interim legal proceeding will not invalidate an award if the arbitrator gave the parties a reasonable opportunity of being heard. AIR 1918 Cal 529; AIR 1952 Ajmer 6, Foll. (Para 8)

Anno: Arbitration Act, S. 30 N. 6.

(c) Arbitration Act (1940), S. 31 — Question relating to agreement.

To pronounce an arbitration agreement to be invalid as an attempt to stifle criminal prosecution it must be established that the withdrawal of the criminal case was the consideration for the agreement and not the motive for the same. AIR 1917 Pat 454; AIR 1941 PC 95, Rel. on. (Para 9)

Anno: Arbitration Act, S. 31 N. 3.

(d) Arbitration Act (1940), S. 21 — Reference to arbitrator pending suit — Parties.

It is not necessary that all parties in a suit should concur in an application for an order of reference to an arbitrator. It is only necessary that all parties interested in the subject-matter of the reference should join in the submission. Further, the parties to a reference cannot challenge the validity of an award on the mere ground that one of the parties to the suit was not a party to the arbitration. AIR 1951 Pat 445; AIR 1951 Simla 183, Foll. (Para 11)

Anno: Arbitration Act, S. 21 N. 4.

(e) Arbitration Act (1940), S. 31 — Opportunity of being heard.

A party who, though repeatedly written to, will not appear before the arbitrator and allows the proceedings to go ex parte, cannot later on say that he was not given an opportunity of being heard. AIR 1914 Cal 818, Foll. (Para 13)

(f) Arbitration Act (1940), S. 32 — Admission of hearsay evidence by arbitrator — Validity of award.

In proceedings before arbitrators the law of evidence need not be very strictly applied. Thus, where owing to the non-co-operative attitude of a party the arbitrator has to admit and rely upon hearsay evidence, the award may not be treated as invalid. AIR 1941 Mad 129; AIR 1922 Lah 480; AIR 1930 Mad 723, Rel. on. (Para 14)

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(A) (1912) 1912-3 KB 257: 81 LJKB 1092 6
(B) (V8) AIR 1921 Cal 770: 47 Cal 752 6
(C) (V22) AIR 1935 Lah 916: 17 Lah 291 6
(D) (V9) AIR 1922 Lah 369: 3 Lah 296 6
(E) (V5) AIR 1918 Cal 529: 43 Ind Cas 770 8
(F) (V39) AIR 1952 Ajmer 6 (1) 8
(G) (V4) AIR 1917 Pat 454: 2 Pat LJ 630 9
(H) (V28) AIR 1941 PC 95: ILR (1942) 1 Cal 1 (PC) 9
(I) (V38) AIR 1951 Pat 445 11
(J) (V38) AIR 1951 Simla 183 11
(K) (V6) AIR 1919 Lah 208: 49 Ind Cas 303 13
(L) (V1) AIR 1914 Cal 818: 25 Ind Cas 951 13
(M) (V28) AIR 1941 Mad 129: 1940-2 Mad LJ 520 14
(N) (V9) AIR 1922 Lah 480: 67 Ind Cas 866 14
(O) (V17) AIR 1930 Mad 723: 122 Ind Cas 516 14

M. S. Rao, for Appellant; P. C. Chatterji and D. V. N. Rao, for Respondents.

NARASIMHAM J.:

These two are analogous appeals from the order of the Subordinate Judge of Berhampur in M. J. C. Nos. 109 of 1946 and 8 of 1947 setting aside an award made by an arbitrator named Sri T. N. Murthy on 15-9-1946.

(2) From 1941 to 1944 one Narasimha Raju took lease of a rice mill belonging to the Maharaja of Parlakimedi by a registered lease deed dated 9-12-1940 (ext. 2) and subsequently admitted several other persons as partners for the management of the mill. The shares of the partners were fixed as follows:

V. Narsimha Raju	...	5 annas.
J. Appa Rao	...	2½ "
Y. Krishna Murty	...	2 "
U. Samba Murty for D. Lakshman Murty	...	2½ "
B. Dali Appana	...	1 "
K. Krishna Raju	...	1 "
V. Gurumurty Raju	...	2 "
		16 annas.

The business of the partners consisted of milling rice and extracting oil from ground-nut. Some of the partners carried on another independent business in which their interests were as follows:

V. Narsimham Raju	...	5 annas.
J. Appa Rao	...	4 "
Y. Krishna Murty	...	2½ "
U. Samba Murty for D. Lakshman Murty	...	2½ "
V. Gurumurty Raju	...	2 "
		16 annas.

Y. Krishna Murty and U. Samba Murty retired from the partnership business and the other partners continued the same for some time. Thereafter, at the request of Gurumurty Raju the partnership business was closed and the profits were divided. Gurumurty Raju claimed his two annas share of the profits. But one Srirama Murty contested the claim of Gurumurty Raju saying that he was entitled to one anna out of the two annas share of Gurumurty. While the dispute between the two was thus going on, Gurumurty Raju brought a criminal case (C. C. No. 139 of 1943) (ext. 3) in the Court of the Joint Magistrate, Berhampur, on 5-10-1942 against some of the partners including Narasimha Raju and Srirama Murty charging them with offences under Ss. 420, 465, 468, 477 read with Ss. 120 and 120B, Penal Code.

Processes were in due course issued in that case and the case was fixed for hearing on 30-12-1943. On that date, however, Gurumurty appeared before the trying Magistrate and stated on oath that as his witnesses had turned hostile he would not be able to prove his case (ext. 12). Thereupon, the learned Magistrate discharged all the accused persons under S. 253 (1), Criminal P. C. On the very same date Gurumurty and all the accused persons of that case jointly executed an agreement (ext. 1) for the determination of all their disputes by an arbitrator named Tangadu Narasimha Murty (Sri T. N. Murty). The terms of reference as embodied in that agreement are as follows:

"1. To determine whether the -/2/- share existed in the name of Gurumurty Raju or in the name of Sriram Murty Raju or in the name of both of them in the joint shop business and the contract business of the rice mill of Sri Parlakimedi Samastanam, which we did from 1-2-1941 belonging jointly, to both or not and to determine what proportionate share each has to get.

2. To determine the accounts kept until the date till which the joint business was carried on or was deemed to have been carried on.

3. To determine the profits got for the said -/2/- share in the mill and joint business.

4. Out of the said profits, to get paid by Vyayaraju Narasimha Raju, separately tne profits that have to be paid to Sriram Murty Raju and Gurumurty Raju in the joint business and mill business.

5. To determine who and in what manner are to bear the costs incurred by both parties in C. C. No. 139/43 on the file of Berhampur 2nd Officer's Court, according to justice and injustice.

6. All the account books, papers, etc., which had been seized and now existing in Court have to be taken return of by Vyayaraju Narasimha Raju and have to be handed over to Tangadu Narasimha Murty Raju, the arbitrator, and to be kept with him.

7. It is requested to give the award by knowing all the matters required to determine all the above matters from the accounts of the said mill and joint business, from the statements of the parties and from the depositions of other witnesses. We have executed this muchilike having agreed to abide by your award without raising any dispute. It is requested by us to give the said award as soon as possible."

It will be noticed that the main point in controversy was as to whether Gurmurty Raju was entitled to two annas share or as to whether Sriram Murty had any interest in that two annas share Doubtless, para. five of the terms of reference related to costs incurred by the parties in the said criminal case. The arbitrator then entered upon his reference and after innumerable adjournments took down the statements of Gurumurty Raju and Sriram Murty on 26-6-1944 (ext's K and K-1). On the next day (27-6-1944) Narasimha Raju asked for time to adduce his evidence in view of the statements made by Gurumurty Raju and Sriram Murty before the arbitrator on the previous day.

Time was accordingly granted by the arbitrator but on 3-7-1944 Narasimha Raju filed a petition under Ss. 5 and 11 of the Arbitration Act before the Subordinate Judge for the removal of the arbitrator on the ground of misconduct. This was registered as M. J. C. No. 34 of 1944 and was eventually dismissed by the Court on 11-2-1946 (ext. 5). During the pendency of that case the arbitration proceedings were stayed; but after the dismissal of the M. J. C. by the Subordinate Judge though Narasimha Raju filed a revision petition (C. R. No. 78 of 1946) before the Patna High Court, no stay order was, however, granted. That revision petition was eventually dismissed for default by the High Court on 26-3-1949.

(3) Soon after the dismissal of M. J. C. No. 34/44 the arbitrator resumed his enquiry & gave notice to the parties. Narasimha Raju, however, on 4-5-1946 asked him for an adjournment (ext. G) stating that he intended moving the High Court in revision against the order of the Subordinate Judge dismissing M. J. C. No. 34/44. The arbitrator refused to grant an adjournment and stated that the enquiry would be held on 20-5-1946 at 5 p.m. and that if Narasimha Raju would not care to appear, the enquiry would be completed ex parte. To that, Narasimha Raju sent a reply (ext. F-2) stating that he would not be able to attend that date and that if the arbitrator completed the enquiry ex parte he (Narasimha Raju) would not be bound by the same. The arbitrator, however, completed his enquiry in due course and after giving notice to the parties on 6-9-1946 pronounced his award (ext. E) on 14-9-1946. Then Gurumurty

filed an application under Ss. 14 and 30, Arbitration Act, for the filing of the award in Court and for passing a decree in terms of the award. This was registered as M. J. C. No. 105 of 1946 in the Court of the Subordinate Judge. Narasimha Raju also filed an application under S. 10, Arbitration Act, for setting aside the award. This was numbered as M. J. C. No. 8 of 1947 and both the M. J. Cs. were heard analogously.

(4) The main question for consideration is whether the award of the arbitrator should be set aside. The following grounds were urged on behalf of Narasimha Raju:

"(i) The object of the arbitration agreement (ext. 1) was to stifle criminal prosecution and as such was unlawful;

(ii) The award was invalid inasmuch as all the partners in the two business did not join in the arbitration agreement;

(iii) The award was hit by S. 35, Arbitration Act, and was, therefore, invalid;

(iv) The arbitrator went beyond the terms of reference in determining the profits of the firm after the date of the reference (30-12-1943); and

(v) The arbitrator was guilty of misconduct in passing the award without giving fresh written notice to Sriram Murty after the resumption of his enquiry in May, 1946."

(5) The learned lower Court rejected grounds Nos. (i), (ii) and (iv) but accepted grounds Nos. (iii) and (v) and hence set aside the award. Gurumurty Raju filed two appeals (M. A. Nos. 25 and 26 of 1949) in the two M. J. Cs. Narasimham Raju, however, did not file a cross-objection against the finding of the learned Subordinate Judge as respects grounds Nos. (i), (ii) and (iv). But Sri D. V. N. Rao on his behalf was permitted to support the judgment of the lower Court in respect of those grounds also.

(6) I shall first deal with the appeal of Gurumurty Raju.

GROUND NO. (III): Section 35 (1), Arbitration Act, says that no reference or award will be invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference. But when legal proceedings upon the whole of the subject-matter of the reference have been commenced between the parties to the reference and notice has been given to the arbitrator, further proceedings shall be invalid. The learned Subordinate Judge thought that the pendency of the revision petition (C. R. No. 78/46) in the Patna High Court against the order of the Subordinate Judge in M. J. C. No. 34/44 would render all proceedings before the arbitrator invalid. He is clearly in error in taking this view.

As already pointed out, the limited question for consideration in that M. J. C. was the alleged misconduct of the arbitrator. The dispute between the parties which was the subject-matter of the arbitration agreement was not canvassed before the Subordinate Judge in M. J. C. No. 34/44. The revision petition before the High Court was against the order of the Subordinate Judge holding that the arbitrator was not guilty of misconduct. Hence, the subject-matter that was pending before the High Court in the civil revision was whether the arbitrator was guilty of misconduct or not. It had absolutely nothing to do with the subject-matter of the reference.

The learned lower Court realised this difficulty but it observed that if the Hon'ble High Court allowed the revision petition and held that the arbitrator was guilty of misconduct the award would be set aside and therefore it may be held that the whole of the subject-matter of the reference was pending before the High Court. This argument is clearly untenable. The effect of the decision of the High Court on the award has nothing to do with the question as to whether the subject-matter of the reference was identical with the subject-matter that was pending before the High Court. It is the identity of the two that would attract the operation of S. 35 (1), Arbitration Act. That section merely reproduces the principle laid down in —'Doleman & Sons v. Ossett Corporation', 1912-3 KB 257 (A) which has been followed in — 'Ram Prosad Surajmal v. Mohan Lal Lachminarain', AIR 1921 Cal 770 (B); — 'Ghansham Das Gowerdan Das v. Tekchand', AIR 1935 Lah 916 (C) & — 'Jai Narain Babu Lal, Firm v. Firm Narain Das Jaini Mal', AIR 1922 Lah 369 (D). The position is so obvious that I need not dilate on it.

(7) GROUND No. (V): The learned lower Court has observed that after the dismissal of M. J. C. No. 34/44 on 11-2-1946, the arbitrator was bound to give fresh written notice to all the parties and that according to his own admission fresh written notice was not issued to Sriram Murty. It, therefore, held that an award passed without hearing Sriram Murty was highly prejudicial and that consequently the arbitrator was guilty of misconduct. I am unable to accept this reasoning of the learned Subordinate Judge. The only person who can legitimately claim to be prejudiced by failure to give written notice to Sriram Murty is Sriram Murty himself. But that person never bothered to contest the case either before the lower Court or before this Court in appeal. He did not care to examine himself as a witness before the lower Court and to say that he was, in fact, prejudiced by failure to give such notice. The person who has objected on his behalf is Narasimha Raju.

But Narasimha Raju was clearly informed by the arbitrator about the resumption of the proceedings after the termination of M. J. C. No. 34/44. I have already referred to the contents of his reply to the arbitrator (ext. F-2) dated 20-5-1946 to the effect that he would not attend the enquiry as he intended filing a revision petition in the High Court though he was clearly told by the arbitrator (ext. F) that if he would not attend the enquiry on the date fixed (20-5-1946) it would be heard ex parte. Thus Narasimha Raju by his own wilful abstention allowed the enquiry to be continued ex parte and he cannot be permitted to say now that failure to give written notice to Sriram Murty has prejudiced the case of the latter, especially when Sriram Murty himself would not come forward to challenge the award.

(8) In this connection, however, it should be noticed that proceedings before arbitrators need not be conducted with such meticulous care as is required in ordinary Civil Courts so long as there is substantial compliance with the principles of natural justice. The actual issue of written notice may not be necessary if it is clear that the parties were informed orally about the resumption of the enquiry after the disposal of M. J. C. No. 34/44. The arbitrator has stated in his evidence that on two occasions after the disposal of that M. J. C. he met Sriram Murty casually near a bus stand and had requested him to produce his account-books in support of his claim. In fact, Sriram Murty had practically taken no part during the first stage of the arbitration proceedings apart from giving his statement on 26-6-1944 (ext. K-1) objecting to the claim of Gurumurty. He omitted to produce his account-books though he promised to produce them. Under these circumstances, I see no reason to disbelieve the evidence of the

arbitrator to the effect that even after the termination of M. J. C. No. 34/44 he told Sriram Murty near a bus stand on two occasions to produce his account-books and that he did not produce the same.

In — 'Mohendra Nath v. Mohilal Koley', AIR 1918 Cal 529 (E) it was held that verbal notice from an arbitrator to a party would suffice and that written notice was not always necessary. Similarly, in — 'Ram Chand v. Atma Ram', AIR 1952 Ajmer 6 (1) (F), it was held that the mere absence of formal notice to the parties would not invalidate an award if the arbitrator gave the parties a reasonable opportunity of being heard. Following these decisions I would hold that Sriram Murty was given a reasonable opportunity by the arbitrator of being heard even after the disposal of M. J. C. No. 34/44 and that the latter did not care to avail of it. In fact, his subsequent conduct before the learned Subordinate Judge and also before this Court makes it absolutely clear that he is not interested at all in the present dispute which is essentially one between Gurumurty on the one hand and Narasimha Raju on the other. I would, therefore, set aside the order of the lower Court holding that the arbitrator was guilty of misconduct.

(9) I may now deal with the contentions raised by Mr. D. N. Rao on behalf of Narasimha Raju against the findings of the learned Subordinate Judge.

GROUND NO. (I): It was urged that the main consideration for the execution of the arbitration agreement (ext. 1) was the withdrawal of the criminal case (C. C. No. 139/43) & as such the agreement would be invalid as an attempt to stifle criminal prosecution. In support of this argument reliance was placed on the fact that the arbitration agreement and the withdrawal of the criminal case took place on the same date (30-12-1943). Narasimha Raju also led oral evidence to show that it was because Gurumurty agreed to withdraw the criminal case that the parties agreed to refer their dispute to the arbitration and that the arbitration agreement was written prior to the appearance of Gurumurty before the Magistrate stating that he would not like to proceed with the case.

The learned lower Court rightly refused to rely on the testimony of Narasimha Raju and his witnesses on this point. The story about an attempt to stifle criminal prosecution was put forward at a very belated stage. In M. J. C. No. 34/44 which was started at the instance of Narasimha Raju this plea was not taken at all. On the other hand, at that time his only allegation was that the arbitrator was guilty of misconduct. One Appa Rao was examined as a witness on his behalf in that M. J. C. and there he stated (Ext. A) that 'after' Gurumurty had deposed in that criminal case the reference to the arbitration was made. This statement if believed would clearly show that the withdrawal of the criminal case was not a consideration for the arbitration agreement.

Thus his earlier deposition in M-J. C. No. 34/44 clearly contradicts the case now put forward by Narasimha Raju and this witness before the lower Court. Gurumurty has frankly stated that after the lapse of so much time he was not in a position to say whether the talk of reference to the arbitration took place prior to or after the disposal of the criminal case. The dispute between the parties regarding their shares was pending from before and the fact that a criminal case had been instituted by Gurumurty and was pending in the Magistrate's Court might have served as a motive for the parties to agree to get their disputes settled by arbitration.

But to pronounce an arbitration agreement to be invalid as an attempt to stifle criminal prosecution it must be further established that the withdrawal of the criminal case was the consideration for the agreement and not the motive for the same (see —'Sukhdeo Dass v. Mangal Chand', AIR 1917 Pat 454 (G). In — 'Bhowanipur Banking Corporation, Ltd. v. Durgesh Nandini Dasi', AIR 1941 PC 95 (H) also this distinction was pointed out and it was observed:

> "The learned Judge is in fact doing nothing more than considering the elements that go to the making of a simple contract, for it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence.
>
> It is of course impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Vaughan Williams J. inadvertently says "must be cognisant of the crime". Proof that there has actually been a crime committed is obviously unnecessary. But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting.
>
> In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution.
>
> The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances."

(10) Mr. D. V. N. Rao, however, invited my attention to clause 5 of the arbitration agreement in which the arbitrator was requested to apportion the costs between the parties in C. C. No. 139/43 and urged that this clause when construed along with the other circumstances would lead to an inference that the withdrawal of the case was the consideration for the agreement. I am, however, unable to accept this argument. It may be that the parties wanted all their outstanding disputes to be settled by the arbitrator and on 30-12-43 the question of apportionment of costs in the criminal case was one of the questions to be decided. I would, therefore, uphold the finding of the lower Court on this ground.

(11) 'Ground No. (ii)'.— It was urged that all the partners of the two businesses did not join in the arbitration agreement and that consequently the award was illegal. This argument, however, is not available for Narasimha Raju who is a party to the agreement. It was pointed out in — Dwarka Nath v. Kedar Nath', AIR 1951 Pat 445 (I) that it was not necessary that all parties in a suit should concur in an application for an order of reference to an arbitrator. It is only necessary that all parties interested in the subject-matter

of the reference should join in the submission. Again in—'Mamraj v. Mt. Kishni', AIR 1951 Simla 183 (J) it was pointed out that parties to a reference cannot challenge the validity of an award on the mere ground that one of the parties to the suit was not a party to the arbitration. It was also pointed out that the award was valid so far as the parties who joined in the reference were concerned.

From the history of the dispute it will be clear that the real contestants are Narasimha Raju on the one hand and Gurumurty Raju on the other. Appa Rao filed a petition in M. J. C. No. 105/46 stating that he was not interested in the dispute and no costs may be awarded against him. He further stated that the dispute was one between Narasimha Raju and Gurumurty Raju. The other partners of the firm had never bothered to appear at any stage of the dispute. The lower Court was, therefore, justified in saying that the arbitration agreement cannot be impugned on the ground that the other partners had not signed it.

(12) 'Ground No. (iv).'— In the award the arbitrator determined the profits till February, 1944. The date of reference to the arbitrator is 30-12-1943. It was urged that the arbitrator had exceeded his jurisdiction in determining the profits up to February, 1944 and that the joint business of the firm should be deemed to have been terminated on the date of the agreement itself (30-12-1943). In support of this argument, clause 2 of the arbitration agreement was translated (from Telugu) by Mr. D. V. N. Rao as follows:

> "To determine the accounts kept until the date till which the joint business was carried on or was deemed to have been carried on."

On the other hand, the translation given by the other side is as follows:

> "Up to what date the Samasthanam rice and oil mill business and joint business were joint and to settle accounts till that date."

It will be noticed that this translation omits any reference to 'deemed to have been carried on'. The Telugu passage in the certified copy of the agreement (ext. 1) is not very clear on the subject. But I do not think that Mr. D. V. N. Rao's contention can be accepted. The business was taken on lease for a period of three years from 1-2-1941 till 1-2-1944. The arbitrator found that the business was actually carried on till that date and therefore held that Gurumurty was entitled to two annas share of the profits. In terms, the arbitration agreement does not terminate the partnership business and the difference that had arisen between the partners would not suffice to show that the partnership business was either actually terminated or shall be deemed to have been terminated on the date of the agreement. I would confirm the finding of the lower Court on this point.

(13) Mr. D. V. N. Rao then urged a new point regarding the misconduct of the arbitrator. It was not specifically mentioned in the lower Court; but as there is some evidence in support of the same I have thought it desirable to deal with it also. The arbitrator stated that after the termination of M. J. C. No. 34/44 when he resumed his enquiry in May, 1946 he wrote to two firms (Mutha Appalaswamy and Sons of Tilaru and Ladi Dalappanna of Kotkapeta) and ascertained from them the market rates of ground-nut, ground-nut oil and ground-nut cake and utilised the information given by them in passing his award. The replies of those two firms to the arbitrator are marked exts. J. and J-1. No person from the firms was examined as a witness before the arbitrator.

Mr. D. V. N. Rao, therefore, contended that the arbitrator had made private enquiries without the knowledge of the parties and that consequently his award was invalid. He relied on — 'Kannaiya Lal v. Khairati Lal', AIR 1919 Lah 208 (K). This argument, however, is not fully borne out by the materials on record. As early as 26-6-1944, Gurumurty in his statement before the arbitrator (ext. K) while giving a list of his witnesses, mentioned the names of Mutha Appalaswamy and Sons of Tilaru and Ladi Dalappanna of Kotkapeta and requested the arbitrator to examine them. Narasimha Raju was present at that time and he was fully aware of the fact that those two firms were being cited as witnesses by Gurumurty Raju. When the arbitrator resumed his enquiry and gave notice to Narasimha Raju (ext. F) on 10-5-1946 Narasimha Raju in his reply (ext. F-2) refused to attend the enquiry and stated that he would not be bound by the same if it was made ex parte.

It was this persistent refusal on his part to appear before the arbitrator to adduce his evidence that led the arbitrator to complete the enquiry ex parte and obtain the required information from the two firms in question. Doubtless, if Narasimha Raju had appeared before him and insisted on cross-examining the representatives of the firms and the arbitrator had refused to give him that opportunity, a question of prejudice might arise. But his conduct throughout the arbitration proceedings was one of non-co-operation and he cannot, therefore, urge that the enquiry was made behind his back. In — 'Nabin Chandra v. Sinclair Murray and Co.', AIR 1914 Cal 818 (L) it was pointed out that a party who though repeatedly written to would not appear before the arbitrator and allowed the proceedings to go ex parte, cannot later on say that he was not given an opportunity of being heard.

(14) Mr. D. V. N. Rao then contended that under clause 7 of the arbitration agreement it was expressly stipulated that the award should be based on the statements of the parties and the depositions of witnesses and that consequently the arbitrator had no jurisdiction to take into consideration the letters (exts. J and J-1) sent by Mutha Appalaswamy and Sons of Tilaru and Ladi Dalappanna of Kotkpeta unless they were examined as witnesses before him. I have already explained the circumstances under which the letters of the two firms were received by the arbitrator. The mere failure to examine the representatives of the firms as witnesses would not be material on the facts of this case inasmuch as Narasimha Raju had declined to appear before the arbitrator though he was aware as early as June, 1944 that Gurumurty had cited the two firms as witnesses on his behalf. At best it may amount to an admission of hearsay evidence.

But it is well known that in proceedings before arbitrators the law of evidence need not be very strictly applied. As pointed out in — 'Venkatachellam v. Suryanarayana Murty', AIR 1941 Mad 129 (M) in examining an award passed in arbitration proceedings reasonable latitude must be allowed and the Court would be reluctant to interfere unless some real injustice or substantial divergence from the law can be proved. Similarly, in — 'Budh Ram v. Chandu', AIR 1922 Lah 480 (N), it was observed that where parties produced no evidence and the arbitrators made enquiries from the

neighbouring parties and passed their award on hearsay and conjecture, such an award could not be set aside. (See also — 'Martirosi v. Subramaniam Chettiar', AIR 1930 Mad 723 (O)).

(15) I am, therefore, of the opinion that the arbitrator is not guilty of misconduct, that the procedure adopted by him was in accordance with the principles of natural justice and that Narasimha Raju by his own conduct deprived himself of the opportunity of being heard.

(16) The appeals are, therefore, allowed, the order of the lower Court is set aside and a decree is passed in terms of the award. The appellant is entitled to costs of both the Courts from Narasimha Raju. Only one set of costs is allowed for the two appeals and the two M. J. Cs

(17) MOHANTY, J.: I agree.

V.S.B. Appeals allowed.

A.I.R. 1954 ORISSA 239 (Vol. 41, C.N. 74)

PANIGRAHI C. J. AND NARASIMHAM J.
(21-4-1954)

Saleb Khan and another, Appellants v. Madar Saheb Pir and others, Respondents.

Second Appeal Nos. 2 and 11 of 1949, from decision of Addl. Sub-J., Cuttack, D/- 26-8-1948.

(a) Muhammadan Law — Wakf — Mutawalli — Alienation — (Limitation Act (1908), Arts. 142 and 144; 134A to 134C).

When the wakf deed makes it clear that the Mutawalli was a beneficiary being entitled to appropriate for his use the surplus income out of the usufruct for meeting the expenses of the Pir, alienations made by him are voidable and not void ab initio. Possession of the alienee would, therefore, be adverse to the endowment only from the date of death, resignation or removal of the previous manager. (Para 3)

Anno: Limit. Act, Arts. 142 and 144 N. 49; Art. 134A to C, N. 5.

(b) Muhammadan Law — Wakf — Mutawalli — Alienation — Permission of Court.

It is a well settled principle of Muhammadan Law that in the absence of any express provision in the wakf deed a Mutawalli is not entitled to make any alienation of the wakf property, even for legal necessity, without the permission of the Court. But in appropriate cases alienations may be permitted with retrospective effect. 37 Cal 179; AIR 1953 Mad 143, Foll. (Para 4)

There is no authority in support of the contention that an application for permission to alienate wakf property should, in the first instance be filed before the trial Court. When all necessary facts for the purpose of giving permission are available, the High Court may exercise discretion conferred by law and permit the alienations.

(In view of the concurrent findings of fact about the legal necessity and the admitted position regarding the extent of the property that was alienated and the total extent of the wakf property, the alienations in dispute were permitted with retrospective effect). (Para 5)

CASES REFERRED: Paras

(A) (V20) AIR 1933 PC 75: 12 Pat 251 (PC) 3
(B) (V22) AIR 1935 PC 44: 57 All 159 (PC) 3
(C) (V23) AIR 1936 PC 183: 59 Mad 809 (PC) 3
(D) ('10) 37 Cal 179: 3 Ind Cas 353 4
(E) (V40) AIR 1953 Mad 143: 1952-2 Mad LJ 657 4

M. S. Rao, for Appellants; M. M. Das, for Respondents.

NARASIMHAM J.:

These two analogous appeals arise out of the reversing judgment of the Additional Subordinate Judge of Cuttack setting aside the judgment and decree of the Munsif of Kendrapara and decreeing the plaintiff's suit for recovery of possession of two small house sites.

(2) The plaintiff is a Pir represented by its present Mutawalli Alimulla. The wakf in favour of the Pir was created by the father of Alimulla named Ramjanulla some time in 1908 by a wakfnama (Ext. 1). The total property dedicated to the Pir in that wakfnama is 14.8 acres (including the disputed house sites) and it was expressly stated in the deed of dedication that the surplus income from the wakf property may be appropriated by the Mutawallis.

After the death of Ramjanulla, his wife (Alimulla's mother Hazara Bibi) became the Mutawalli and managed the wakf property till her death on 4-12-1933. During her period of management she executed two kabalas (Ext. A-1 dated 6-12-1922 and Ext. A dated 7-9-1925) in favour of the predecessors-in-interest of the appellants transferring small portions of house sites for Rs. 230/- and Rs. 200/- respectively. The area of the house site transferred by the first deed is eight decimals and the area transferred by the second deed is six decimals. Alimulla joined in the execution of the two sale deeds by his mother; but admittedly at that time he had no interest as he was not the Mutawalli.

After the death of his mother he became the Mutawalli of the wakf property and brought the suits under appeal for a declaration that the alienations were not binding on the wakf and for recovery of possession of the disputed house sites on behalf of the Pir.

(3) The trial Court held that the alienations were made by Hazara Bibi for the purpose of discharging the previous debts binding on the wakf, for repairing the Pirsthan and also for meeting the routine expenses of the Pir. This finding was upheld by the appellate Court and was rightly not challenged before us.

But the two lower Courts differed on the question of limitation. The trial Court held that the alienations were void ab initio and that limitation would run from the date of the alienations. On this view, the suits were clearly time-barred. But the lower appellate Court held that the alienations were only voidable, that they were valid during the life-time of the Mutawalli and that limitation would commence from the date of death of Hazara Bibi on 4-12-1933. In this view the two suits were not time-barred. Hence, it decreed the plaintiff's suit.

We are satisfied that the lower appellate Court took a correct view on the question of limitation. The wakf deed makes it clear that the Mutawalli

was a beneficiary being entitled to appropriate for his use the surplus income out of the usufruct for meeting the expenses of the Pir. The lower appellate Court rightly relied on — 'Ram Charan v. Naurangi Lal', AIR 1933 PC 75 (A); — 'Mahadeo Prasad v. Karia Bharthi', AIR 1935 PC 44 (B) and — 'Daivasikhamani Ponnambala v. Perivanan Chetti', AIR 1936 PC 183 (C), in support of the view that alienations of this type made by a Mutawalli of a Muslim religious endowment or by a Mahant of a Hindu Muth are voidable and not void ab initio. Possession of the alienee would, therefore, be adverse to the endowment only from the date of death, resignation or removal of the previous manager. The suits are, therefore, not time-barred.

(4) It is a well settled principle of Mahommedan Law that in the absence of any express provision in the wakf deed a Mutawalli is not entitled to make any alienation of the wakf property, even for legal necessity without the permission of the Court (see Mulla's Mahommedan Law, 13th Edn., Art. 207 at p. 194). On behalf of the appellants, therefore, Mr. Rao filed a petition requesting this Court to grant permission with retrospective effect. He urged that as the alienations were made for the legal necessity of the Pir and as the total area of the property alienated was insignificant compared to the total extent of the wakf property the Court would be justified in exercising its discretion retrospectively in favour of the alienees.

The power of the Court to sanction alienations with retrospective effect has been recognised in several decisions commending from — 'Nemai Chand v. Golam Hossein', 37 Cal 179 (D). In a recent decision of the Madras High Court reported in — 'Abdul Kadir v. Mahlarathul Kadiria Sabha', AIR 1953 Mad 143 (E), the law on the subject has been fully reviewed and the contrary view expressed by Ameer Ali has not been accepted. With respect, we would follow the Madras and Calcutta decisions and hold that in appropriate cases alienations may be permitted with retrospective effect.

(5) The next question for consideration is whether on the facts found by the two lower Courts we would be justified in granting permission at this stage. I have already shown that the findings are to the effect that the alienations were made for the purposes of the wakf. The total extent of the property as given in the wakf deed is 14.8 acres and the extent of the two alienations is .14 acres. Considering the small area of the property that was sold for the purposes of paying off the previous debts and for other necessary expenses it cannot be seriously urged that the corpus of the wakf property would be materially impaired if these two alienations are permitted.

Mr. Das thereupon urged that the application for permission ought to have been filed before the trial Court and that this Court sitting in second appeal should not grant permission. He has, however, not been able to cite any authority in support of his contention that an application for permission should, in the first instance, be filed before the trial Court. Doubtless, if the giving of permission requires further investigation of facts this Court would remand the case to the trial Court for a finding regarding those facts. But in view of the concurrent findings of fact about the legal necessity and the admitted position regarding the extent of the property that has been alienated and the total extent of the wakf property, we consider that all necessary facts for the purpose of giving permission are available before us and we may therefore exercise discretion conferred by law and permit the two alienations. We may mention that in the Madras case cited above, permission was given at the first appellate stage.

(6) We would therefore permit the two alienations with retrospective effect and dismiss the plaintiff's suits. Both parties will bear their own costs throughout. The appeals are allowed accordingly.

(7) PANIGRAHI C. J.: I agree.

H.G.P. Appeals allowed.

A.I.R. 1954 ORISSA 240 (Vol. 41, C.N. 75)

PANIGRAHI, J. (27-11-1953)

Narayan Bajoria and others, Petitioners v. Fagu Swain, Opposite Party.

Criminal Revn. No. 89 of 1953.

Criminal P. C. (1898), S. 344 — Case under S. 379, I. P. C. for removal of crop from land subject matter of S. 145, Criminal P. C. proceedings.

Case under S. 379, Penal Code, started at the instance of tenant of some of co-sharer-landlords against rival landlords for removal of crop from land — Land subject matter of dispute among co-sharer-landlords and proceeding under S. 145, Criminal P. C. pending — Held that case under S. 379, Penal Code, should be stayed till disposal of S. 145 proceeding because the question whether the removal amounted to theft would depend upon who was in actual possession of the land at the time of the alleged removal. (Para 1)

Anno: Criminal P. C., S. 344 N. 11, 12.

P. C. Chatterji and B. K. Ray, for Petitioners; M. S. Rao and S. C. Das, for Opposite Party.

ORDER: Heard counsel for the parties. This is a fit case which, in my opinion, ought to be allowed. There has been some dispute among the co-sharer-landlords of some lands which are the subject-matter of proceedings under section 145 Cr. P. C. Fagu Swain is alleged to be the tenant of some of the cosharers and claims to have raised the crop which was removed by the other cosharers. A criminal case under section 379 I. P. C. started at the instance of Fagu Swain is now pending against the rival landlords and their servants. The trying magistrate was moved for adjourning the case till the disposal of the proceedings under S. 145, Cr. P. C. That prayer having been rejected the petitioners have now come up to this court and renewed their prayer for staying the proceedings in the theft case until the disposal of the S. 145 proceedings. The dispute is essentially one between rival landlords relating to possession of the land, from which the crop appears to have been removed.

The question whether the removal would amount to theft would depend upon who was in actual possession of the lands at the time of the alleged removal. In these circumstances it is not fair that the parties should be harassed in respect of the same dispute in two separate proceedings.

I would, therefore, direct that the proceedings in the case under S. 379 I. P. C. should be stayed till the disposal of the miscellaneous case under S. 145, Cr. P. C. The revision is accordingly allowed.

G.M.J. Revision allowed.

A.I.R. 1954 ORISSA 241 (Vol. 41, C.N. 76)

NARASIMHAM AND MOHANTY JJ. (26-2-1954)

Jagannath Patnaik, Plaintiff-Appellant v. Sri Pitambar Bhupati Harichandan Mohapatra, Defendant-Respondent.

First Appeal No. 46 of 1949, from judgment of Addl. Sub. J., Cuttack, D/- 31-1-1949.

Master and servant — Personal service — Nature of relationship between employer and employee — Death of employer — Termination of employment — (Contract Act (1872), Ss. 37, 40 and 201).

A Dewan of a zamindari may perform some of the functions of an agent on behalf of the zamindar. But the relationship between him and the zamindar is essentially that of master and servant or employer and employee and the general principles regulating contracts of employment between master and servant will, therefore, apply and not the principles dealing with the contract between principal and agent. It is the implied condition of an agreement for personal service that the death of either party will dissolve it. Hence, in the case of such a contract the question ultimately turns on a true construction of the contract and the ascertainment as to whether it was one of the implied conditions of the contract that the contracting parties should live throughout the period of the contract. (1868-69) 4 CP 744; (1929) 46 TLR 121; (1901) 1 KB 59 (63), Rel. on. (Paras 6, 7, 9)

Where the Dewan appointed by the previous Zamindar brought a suit against his successor claiming compensation for premature termination of his service as a Dewan:

Held, on the construction of the contract of employment and applying the principles of English law dealing with contracts of personal service, that the contract was dissolved by the death of the previous employer. (Para 11)

CASES REFERRED: Paras

(A) (1868-69) 4 CP 744: 38 LJCP 326 7
(B) (1929) 46 TLR 121 7, 8
(C) (1901) 1901-1 KB 59: 70 LJKB 26 8
(D) (V41) AIR 1954 SC 44: 1954 SCR 310 (SC) 10

P. V. B. Rao and K. Patnaik, for Appellant; P. Mohanty, for Respondent.

NARASIMHAM J.:

This is a plaintiff's appeal against the decision of the Additional Subordinate Judge of Cuttack dismissing his suit for recovery of damages for breach of contract.

(2) The defendant is the present proprietor of an impartible estate known as Killa Sukinda situate in Cuttack district. The previous proprietor of the said estate was one Sri Krutibas Bhupati Harichandan Mohapatra who died on 10-12-43 and was succeeded by the defendant who is his son's son. The defendant's father predeceased his father. The plaintiff is an experienced Revenue Officer who has served in the former States of Orissa in various capacities for several years. He had also served as a Manager of Sukinda estate for some time prior to 1938 and had given full satisfaction to the then proprietor. From 1938 to the 1st quarter of 1941 he was employed in Talcher State as Sadar Subdivisional Officer. The proprietor of Sukinda estate was however anxious to utilise his services in his estate and on 3-12-40 he wrote a letter (Ext. 1) to the plaintiff requesting him to take charge of the management of his estate and to discharge his duties in the same efficient manner as he had done on a previous occasion. There were subsequent negotiations between the two which culminated in a contract dated 26-12-40. The proprietor handed over to the plaintiff a letter of appointment (Ext. 2) which was to the following effect:

"To

Babu Jagannath Patnaik, Government-Pensioner, Khurda, Puri (At present Sadar, S.D.O., Talcher State).

Dated Sukinda the 26th December, 1940.

You are appointed Dewan of the Sukinda Estate on a monthly salary of Rs. 200/- (Rupees two hundred only).

Your services shall not be terminated during seven years to come except on proved dishonesty or misconduct.

You should join as soon as possible.

Sd/- Illegible.
Raja and Proprietor, Sukinda Estate
26-12-1940."

The plaintiff's reply (Ext. 3) was as follows:

"To

The Raja Saheb of Sukinda.

Sir,

In acknowledging the receipt of your letter of today's date appointing me as the Dewan of your Estate, I beg to furnish Dewanship for seven years or even more, if my health permits.

I am trying my best to join as soon as possible.

I have the honour to be,
Sir,
Your most obedient servant,
Sd/- Jagannath Patnaik.
26-12-1940."

Then the plaintiff terminated his services in Talcher State and joined Sukinda Estate as its Dewan on 17-5-1941. During the lifetime of the previous proprietor everything went on smoothly and the plaintiff discharged his duties as Dewan to the full satisfaction of his master. But when the proprietor died on 10-12-1943 and was succeeded by his grandson (the defendant) troubles seem to have started and on 24-3-1944 the plaintiff was given notice of discharge (Ext. 2-a) in which the defendant stated that as he had applied to the Collector for taking over charge of his estate under the Court of Wards he was terminating the services of the plaintiff with effect from 1-4-1944. The plaintiff received that letter on 25-3-1944 and immediately sent a reply (Ext. 3-a) drawing the attention of the defendant to the terms of the contract of employment, under which the plaintiff was guaranteed seven years service except for proved dishonesty or miscon-

duct. To that the defendant replied (Ext. b-b) that under the existing circumstances he was helpless in the matter and there was no other alternative except to dispense with the plaintiff's services. The plaintiff's subsequent representation to the Court of Wards was rejected. Hence, the suit was brought claiming salary for the balance of seven years' period originally stipulated for in the contract.

(3) One of the pleas taken by the defendant in the trial Court was that the plaintiff was guilty of dishonesty and misconduct during his tenure of office as Dewan and that consequently even if the terms of the contract entered into with the plaintiff by his grandfather (Ext. 2) be held to be binding on the defendant the plaintiff was not entitled to any relief. An issue was raised on this question but at the time of argument, this issue was given up and was rightly not agitated before us.

(4) Hence, the limited question for consideration by this Court is whether the terms of the contract between the plaintiff and the defendant's grandfather as embodied in Exts. 2 and 3 are binding on the defendant. Mr. Rao's argument may be summarised as follows: (i) It was an implied condition of the contract that the plaintiff should be engaged for a period of seven years irrespective of whether the proprietor of Sukinda Estate lived throughout the period. The proprietor intended that the contract should be binding on his heirs and successors-in-interest. (ii) The contract was entered into for the benefit of Sukinda Estate and would bind the present proprietor (the defendant) whether he is described as the successor of the previous proprietor or the survivor of the joint family.

(5) The first question, however, is of paramount importance inasmuch as if it be held that it was an implied condition of the contract that it should subsist only during the lifetime of the promisor and the promisee the second question would not arise for consideration at all.

(6) The learned lower Court proceeded on the assumption that the contract was between principal and agent and that consequently under S. 201, Contract Act, the agency terminated on the death of the principal or the agent. Here the lower Court has obviously committed an error. A Dewan of a zamindari may perform some of the functions of an agent on behalf of the zamindar. But the relationship between him and the zamindar is essentially that of master and servant or employer and employees and the general principles regulating contracts of employment between master and servant would, therefore, apply and not the principles dealing with the contract between principal and agent.

(7) The English Law on the subject is well settled. As early as 1869 in the well-known case of — 'Farrow v. Wilson', (1868-69) 4 CP 744 at p. 745 Willes J. observed:

> "In this case our judgment is for the defendants. Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally by the death of the master the servant is discharged of his service, not in breach of the contract, but by implied condition."

This has been followed in innumerable later decisions including — 'Graves v. Cohen', (1929) 46 TLR 121 (B), where also it was pointed out that it was the implied condition of an agreement for personal service that the death of either party would dissolve it. I may in this connection refer to pp. 1151 and 1177 of Chitty on Contracts (12th edition) where the same principle has been reiterated.

(8) Mr. Rao however contended that where personal service is involved as stated above there may be cases where though the contract may be dissolved by the death of the employee it may not be dissolved by the death or dissolution of the employer. In support of this he relied on — 'Phillips v. Alhambre Palace Co.', (1901) 1 KB 59 (C). In that case the employer was a partnership firm and it was held that so far as the employer was concerned the contract was not of such a personal character as to be terminated by the death of a partner of the firm. Cases where the employers are either a firm of partners or corporate bodies, however stand on a slightly different footing and there may be several instances where contracts of personal service entered into between such employers and employees may not involve the continued existence of the employer during the period of the contract. This distinction was brought out in — '(1929) 46 TLR 121 (B)' where it was observed: "A partnership case may involve rather different considerations."

(9) The question ultimately turns on a true construction of the contract and the ascertainment as to whether it was one of the implied conditions of the contract that the contracting parties should live throughout the period of the contract. For that purpose the following observations of Lord Alverstone C. J. in — '1901-1 KB 59 (C) at p. 62' are helpful:

> "The principle of law, however, seems to be that it must be determined in each case whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party..... If in any particular case the contract is one which has relation to the personal conduct of the contracting party, then the death of that party puts an end to the contract; if, on the other hand, it has no such relation, the death of the contracting party has not that effect."

(10) It is true that the aforesaid principle of English Law of contract relating to master and servant has not been expressly incorporated in

the Indian Contract Act. But in the second para of S. 37 of that Act it is stated:

> "Promises bind the representatives of the promisors in case of the death of such promisors before performance, 'unless a contrary intention appears from the contract'."

Similarly, in S. 40 it is stated that if from the nature of the case it appears that it was the intention of the parties that the promise should be performed by the promisor himself his representative will not be competent to perform the same. Thus in the Indian Contract Act also it is stated expressly that the question is one of ascertaining the true intention of the parties. The English decisions dealing with contracts of personal service have been referred to in the commentaries under these two sections in Pollock and Mulla on Indian Contract Act and there seems therefore no doubt that the principle laid down in those decisions as regards the implied condition in cases of contracts of personal service would apply with equal force. Mr. Rao relied on a recent decision of the Supreme Court reported in — 'Satyabrata v. Mungneeram Bangur and Co.', AIR 1954 SC 44 (D) and urged that the principles of English Law of Contract should not be applied too literally in construing the provisions of the Indian Contract Act. As a broad proposition of law this argument may be right. But in construing Ss. 37 and 40, Indian Contract Act, there is no special reason as to why the principles of English Law as regards contracts between master and servant may not be applied in ascertaining the true intention of the parties.

(11) The whole question, therefore, resolves itself into whether at the time when the plaintiff and the previous proprietor of Sukinda Estate entered into a contract on 26-12-1940 it was implied that the contract should subsist only during the life-time of both of them. The plaintiff was specially selected for the post in view of his proved ability as shown by his previous record of service and the special confidence reposed in him by the previous proprietor. The relationship between the Dewan and the proprietor of an impartible estate is of a somewhat intimate and personal nature though much of the work of the Dewan is connected with the administration of the estate.

No Dewan will be able to discharge his duties unless he is able to adjust himself to the whims and caprices of the proprietor. The then proprietor was an old man aged about 72 years when he entered into the contract. The plaintiff knew him well from before having served as a Manager on a previous occasion. It is a fair inference to make that the plaintiff agreed to serve him for seven years because knowing the nature of the previous proprietor he did not anticipate any difficulty in the discharge of his duties. It was urged that the advanced age of the previous proprietor and the reasonable anticipation of his death in the near future would justify the inference that when the plaintiff agreed to serve him for seven years it was intended by the parties that the agreement should subsist even after the death of the previous proprietor.

The obvious answer to that argument is found in the plaintiff's age itself. The plaintiff also was aged 65 years at that time and notwithstanding such an advanced age he expected to live at least for seven years more and hence bound himself to serve that estate for that period. Hence, there is no special reason as to why we should assume that when the proprietor entered into the contract in 1940 and bound himself to engage the plaintiff for seven years he expected that he would not live for that period.

There is no evidence to show that the proprietor was then suffering from any serious illness or else that his death was anticipated by people who knew the condition of his health. The plaintiff also in his evidence did not state that he was led to believe either from the conduct of the proprietor or from his health and other circumstances that the proprietor may not live for the stipulated period of seven years. I am, therefore, of the opinion that in view of the close and confidential relationship between the proprietor of an impartible estate and his Dewan and the previous knowledge by both the contracting parties of the merits and abilities of the plaintiff on the one hand and the nature and temperament of the proprietor on the other, the contract is one which has relation to the personal conduct of both the contracting parties and the death of either of them puts an end to the contract.

The plaintiff has not stated on oath to the contrary, nor did he while obtaining the letter of appointment (Ext. 2) from the previous proprietor insist on the insertion of a provision to the effect that the contract should subsist even though the proprietor may not live throughout the stipulated period. On the other hand, his admission in cross-examination was to the following effect:

> "There was no talk at the interview between the late proprietor and myself that the heirs of the proprietor would also be bound by the terms of the contract of appointment."

This answer supports the view that at the time of the contract neither party was thinking of the contingency that may arise if the proprietor dies during the period of the contract. On the meagre materials available in this case it cannot be fairly inferred that the parties to the contract contemplated that it should continue after the death of the employer. On the other hand, it appears more probable that they presumed that the state of things which existed in 1940 would continue for the stipulated period of seven years and it was with reference to that presumption alone that they entered into the contract. The principles of English law dealing with contracts of personal service would therefore apply with full force and the contract should be held to be dissolved by the death of the previous proprietor.

(12) In view of this finding it is unnecessary to discuss the second question raised by Mr. Rao as to how far a contract of this type entered

into by the proprietor of an impartible estate in North Orissa would bind his successor.

(13) Mr. Rao then urged that even if the contract of 1940 be held to have been dissolved by the death of the previous proprietor a fresh contract on the same terms was entered into between the plaintiff and the defendant when the latter succeeded to the estate on 10-12-43. In support of this argument he relied on the admitted fact that the plaintiff was retained in service by the defendant from the date of the death of his grandfather (10-12-1943) till the end of March, 1944 and was allowed to draw his monthly salary in accordance with the terms of the original contract. He also relied on the evidence of the plaintiff (P. W. 2) to the following effect:

> "After the death of the late proprietor, the defendant, his mother and his uncle requested me to continue in service as Dewan as before. The defendant was aware of the terms of my appointment under the late proprietor."

Mr. Rao urged that the conduct of the defendant in retaining the plaintiff for a period of more than three months after the death of his grandfather and paying the monthly salary in terms of the previous contract and requesting the plaintiff to continue as Dewan of the estate as 'before' would suffice to prove the fresh contract entered into between the parties. This argument is undoubtedly attractive but unfortunately no specific issue as to whether a fresh contract was entered into after the death of the previous proprietor was raised. Even in the pleadings such a case was not put forward. Apart from the oral testimony of the plaintiff quoted above there is nothing else to support it. Moreover, on 27-3-1944 (Ext. 3-a) when the plaintiff sent a reply to the defendant on receiving his notice of discharge he did not invite the special attention of the defendant to the fact that after the death of the defendant's grandfather the defendant had specially requested the plaintiff to continue as Dewan as before.

On the other hand, in that reply (Ext. 3a) the plaintiff referred to the undertaking given by the defendant's grandfather in Ext. 2 making it appear as if the defendant's attention was being drawn for the first time to that undertaking then. In the plaintiff's memorial to the Court of Wards (Ext. 5) dated 8-8-1944 also there is no mention of any such undertaking given to him by the defendant on succeeding to the estate. There is thus no contemporaneous documentary evidence to show that after the death of the previous proprietor the defendant agreed to retain the plaintiff as Dewan on the same terms as before. Mr. Rao thereupon urged that a fresh issue may be framed on this point and a finding may be called for from the lower Court after giving both parties an opportunity of adducing all available evidence. I am however reluctant to allow this issue to be raised at such a belated stage in the absence of any indication either in the pleadings or in contemporaneous documents to show that there was such a fresh contract.

(14) For the aforesaid reasons I would confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

(15) MOHANTY, J.: I agree.

V.S.B. Appeal dismissed.

A.I.R. 1954 ORISSA 244 (Vol. 41, C.N. 77)

PANIGRAHI C. J. AND MOHAPATRA J.

(26-2-1954)

Dolgovind Mahapatra and another, Appellants v. Anathbandhu Naik and another, Respondents.

Second Appeals Nos. 98 and 129 of 1949, from decision of Addl. Sub. J., Puri, D/- 11-1-1949.

(a) Civil P. C. (1908), S. 66(1) and (2) — Case held fell under exception to Cl. (2).

Where it is not a case where the plaintiff comes with the allegation that the properties were purchased on behalf of the plaintiff but, on the contrary, the definite allegations of the plaintiff as contained in the plaint are to the effect that when the defendant was managing the properties of the plaintiff as a Power-of-Attorney holder and agent even though the plaintiff supplied the money for purchase of different items of property in court sale, the defendant with a fraudulent desire inserted his name in the sale certificates though the properties actually remained in the possession and enjoyment of the plaintiff and that the defendant has no right, title and interest thereof, the plaintiff's suit comes within the exception as provided for under Cl. (2) and is not really hit by the mischief of Cl. (1) of the section. If really the plaintiff had brought the case that he had asked the defendant to purchase the property in the defendant's name or that while supplying the money he had consented to the purchase being in the defendant's name, the suit would be barred under S. 66, Cl. (1) but on the contrary, there being nothing to indicate that the plaintiff had consented to the name of the defendant being inserted in the sale certificates, the case comes under the exception of Cl. (2) of S. 66. (Para 6)

Anno: Civil P. C., S. 66 N. 10.

(b) Civil P. C. (1908), S. 66 — Applicability.

Where in respect of some properties prior to the court sales the title remained with the plaintiff, the properties being his ancestral property, but they were purchased in execution of decrees to which the plaintiff was not a party, the plaintiff's rights by virtue of the purchases are not affected. The plaintiff can fall back upon his antecedent titles and the question of applicability of S. 66 will not arise. Similarly where the plaintiff was all along in possession of properties sold in execution of decree to which he was not a party and had acquired title by adverse possession consideration of S. 66 will not arise. AIR 1929 PC 228, Relied on. (Para 7)

Anno: Civil P. C., S. 66 N. 9, 12.

(c) T. P. Act (1882), S. 41 — Bona fide purchaser.

Where the lands in dispute were all along in possession of the plaintiff and not of the transferor and the transferee was the resident of the same village, it is impossible to accept that the transferee was not aware of the possession of the plaintiff. At least any little enquiry would have been sufficient to inform him of the real position regarding possession, which is the very first step of a bona fide purchaser to enquire before finalising the transaction. (Para 10)

In such a case it is not possible to accept the transferee as bona fide purchaser having entered into the transaction in good faith. (Para 10)

Anno: T. P. Act, S. 41 N. 21.

(d) Civil P. C. (1908), S. 66 — Case held fell under Cl. (1) of S. 66.

Where it is the case of the plaintiff that the defendant who was his agent had purchased the property benami in his (defendant's) name, with the full consent of the plaintiff, the case cannot really come within the exception as provided for in Cl. (2) of S. 66, but is directly met by the mischief of Cl. (1). (Para 11)

Anno: Civil P. C., S. 66 N. 7, 21.

(e) Civil P. C. (1908), S. 66 — Transferee from certified purchaser.

The plea of bar under S. 66 is available to the transferees from the certified purchaser. (Para 13)

Anno: Civil P. C., S. 66 N. 16.

CASES REFERRED: Paras

(A) (V16) AIR 1929 PC 228: 56 Ind App 330 (PC) 12

(B) (V25) AIR 1938 Cal 602: 181 Ind Cas 102 13

(C) (V15) AIR 1928 Cal 338: 107 Ind Cas 67 13

In S. A. No. 98/49:

P. C. Chatterji, S. K. Ray and L. K. Dasgupta, for Appellant; P. Misra, G. C. Das and S. Misra, for Respondent.

In S. A. No. 129/49:

P. Misra and G. C. Das, for Appellant; P. C. Chatterji, for Respondent.

MOHAPATRA J.:

These two appeals arise out of two suits heard together in the trial Court and one judgment of the trial Court cover both the suits. They were heard together before the lower appellate Court, who, however, passed two judgments. Both the appeals would be covered by the present judgment of ours.

(2) SECOND APPEAL NO. 98 OF 1949: This appeal arises out of O. S. No. 12/543 of 1947/45 wherein the present appellant Dolgovind Mahapatra is the only defendant. The plaintiff brought the suit for declaration of his title and for confirmation of possession in respect of the suit properties described in two schedules Ka and Kha consisting of 16 items of property each of the schedules containing 8 items.

The main allegation of the plaintiff is that the properties in suit really belonged to him even though they stand in the name of the defendant. Ka schedule properties are the subject-matter of the private sales and Kha schedule properties were acquired in court sales. All these items of property indeed stand in the name of defendant.

The defendant is the maternal uncle of the present plaintiff, who lost his father prior to the year 1923 and the defendant being a general power-of-attorney holder managed the properties of the plaintiff. The plaintiff attained majority in the year 1930 but in spite of his attaining majority, the defendant continued management till the year 1942.

Plaintiff's version is that the defendant is a man of no means, the properties in suit were acquired from out of the funds belonging to the plaintiff which were in the hands of the defendant during the time when he was in charge of management of the properties of the plaintiff, and with those funds they have been acquired and are still in continuous possession of the plaintiff ever since the time of acquisitions.

(3) The defence is that in fact the defendant is the real owner of the properties, the funds were supplied by him for the purpose of acquisition of different items of property at different times and he is continuing in possession thereof. In respect of Kha schedule properties, his additional plea is that the present suit is barred under the provisions of S. 66, Civil P. C.

(4) So far as Ka schedule properties are concerned, the simple question for determination in suit is whether kabalas in respect of the 8 items of property appertaining to Ka schedule are benami transactions i.e. whether the plaintiff is the real owner in respect thereof even though the properties have been purchased in the name of the defendant.

Both the Courts below have examined the volume of evidence adduced in the case from the right point of view throwing the onus upon the plaintiff and have applied the well known different tests for the purpose of coming to the conclusion as to the nature of the transaction in dispute to determine who is the real owner whether the plaintiff or the defendant. (His Lordship reviewed the evidence and proceeded):

(5) All the title deeds in respect of the properties in dispute are coming from the custody of the plaintiff and have been filed in Court by the plaintiff. The defence explanation as to how the documents came into possession of the plaintiff has been rejected by the Courts below. Both the Courts have concurrently found that in fact in spite of the transactions being in the name of the defendant the suit properties are all along in undisturbed and continuous possession of the plaintiff ever since the time of their acquisitions. The learned trial Court on a very elaborate and exhaustive judgment and on an examination of evidence in respect of different items of property, has come to the finding that the purchase money in each case was supplied from out of the plaintiff's funds. This finding has been confirmed by the lower appellate Court.

In view of the above considerations, therefore, in our opinion, the Courts below were perfectly justified in coming to the only available conclu-

sion that the Ka schedule properties really belonged to the plaintiff.

(6) The main defence in respect of Kha schedule properties is that the present suit is barred under the provisions of S. 66, Civil P. C., which is parallel to the provisions of S. 27, Bihar and Orissa Public Demands Recovery Act.

Section 66 runs as follows:

"66(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

The learned lower appellate Court has rightly found that the plaintiff's suit comes within the exception as provided for under cl. (2) and is not really hit by the mischief of cl. (1) of the section. It is not a case where the plaintiff comes with the allegation that the Kha schedule properties were purchased on behalf of the plaintiff. On the contrary, the definite allegations of the plaintiff as contained in paragraph 10 of the plaint, are to the effect that when the defendant was managing the properties of the plaintiff as a Power-of-Attorney holder and agent even though the plaintiff supplied the money for purchase of different items of property in court sale, the defendant with a fraudulent desire inserted his name in the sale certificates though the properties actually remained in the possession and enjoyment of the plaintiff and the defendant has no right, title and interest thereof. If really the plaintiff had brought the case that he had asked the defendant to purchase the property in the defendant's name or that while supplying the money he had consented to the purchase being in the defendant's name, the suit would be barred under S. 66, cl. (1) but on the contrary, there being nothing to indicate that the plaintiff had consented to the name of the defendant being inserted in the sale certificates, the case comes under the exception of cl. (2) of S. 66.

Moreover, on a consideration of the circumstances of the case, the Courts below have rightly come to the conclusion that the defendant taking advantage of his position as the manager has played fraud in getting the sale certificates in his name. Both the Courts below after a careful consideration have come to the conclusion that the purchase money in respect of the Kha schedule properties was from out of the plaintiff's funds. It appears in respect of some of the items of property that the expenses for the purchase money have been entered in the plaintiff's accounts and that they appear in the writing of the defendant himself. In our opinion, it is clear on a consideration of the above circumstances, that the defendant is a man of very small means and being the maternal uncle of the plaintiff in charge of the management of the properties has played fraud in getting these properties in his own name indeed without the consent of the plaintiff.

(7) We would further observe that in respect of item nos. 3, 4, 5 and 6 of the Kha schedule properties prior to the court sales admittedly the title remained with the plaintiff, the properties being his ancestral property. They were purchased in execution of decrees to which the plaintiff was not a party and as such, the plaintiff's rights by virtue of the purchases were not affected. The plaintiff can fall back upon his antecedent titles and the question of S. 66, Civil P. C., will not arise.

In respect of the 7th item of property of schedule Kha, as it appears from the date of acquisition of the property, it was acquired more than 12 years prior to the suit and the finding being that the plaintiff was all along in possession of all these properties, he has acquired title by adverse possession in which case also, consideration of S. 66 will not arise.

In conclusion, therefore, we are definitely of the view that the plaintiff has been able to make out his title in respect of the properties described in schedules Ka and Kha of the plaint and is entitled to the declaration prayed for and for confirmation of his possession. The appeal is, therefore, dismissed with costs and the judgment and decree of the lower appellate Court are confirmed.

(8) SECOND APPEAL NO. 129 OF 1949: This appeal arises out of a suit in O. S. No. 47/306 of 1947/46 which was filed nearly a year after the other suit. Here also, the plaintiff is the same Anathbandhu Naik and defendant 1 Dolgovinda Mohapatra is the maternal uncle of the plaintiffs. Defendants 2 & 3 are subsequent transferees from Dolgovind by virtue of a registered sale deed dated 21-2-1944, for a sum of Rs. 340/-. The suit property is of an area 4.04 acres in Sisipur mouza when purchased in execution of a decree for rent on 25-11-1932. The sale certificates stand in the name of defendant 1. Plaintiff's allegation is that the purchase money was paid from out of the funds belonging to the plaintiff and that since the date of the purchase the plaintiff was all along in possession of the properties till 21-2-1944 when he was dispossessed by defendants 2 and 3.

The plaintiff's further allegation is that the purchase on 25-11-1932 was made benami in the name of his maternal uncle, who was enjoying full confidence of the plaintiff and his mother and that he was also in charge of the management of the properties. The plaintiff on his allegation being the real owner prays in this action for declaration of his title and for recovery of possession.

(9) The defence was two-fold:— (1) that the transferees claim protection under the provisions

of S. 41, Transfer of Property Act; that they are bona fide purchasers for valuable consideration from the ostensible owner and (2) that the present action is clearly barred under the provisions of S. 66, Civil P. C. The trial Court had decreed this suit also along with the other suit in the same judgment.

The lower appellate Court, however, while upholding the decision in respect of the other suit, reversed the decree in respect of this suit and dismissed the plaintiff's suit upholding both the contentions of the defence.

(10) We agree with the finding of the trial Court which has not been reversed by the lower appellate Court that in fact the purchase money came out of the funds of the plaintiff and further that plaintiff was all along in possession of the suit properties since the date of taking delivery of possession till 21-2-1944, i.e., the date of transfer in favour of defendants 2 and 3. We are not inclined to accept the view of the lower appellate Court that the transferees are entitled to protection under S. 41, Transfer of Property Act. The admitted fact is that these transferees belong to the same village where the lands in suit are situate. When the fact is that the lands in dispute were all along in possession of the plaintiff and not of the transferor, defendants 2 and 3 being the residents of the same village, it is impossible to accept that they were not aware of the possession of the plaintiff. At least any little enquiry would have been sufficient to inform them of the real position regarding possession, which is the very first step of a bona fide purchaser to enquire before finalising the transaction. As we get it from the judgment of the trial Court, the defence version in evidence is that because defendant 1 is in possession of the lands they did not consider it necessary to make enquiries any further or to ask the title deeds of the latter. In this view, therefore, it is not possible for us to accept them as bona fide purchasers having entered into the transaction in good faith. The defence contention on this point, therefore, must fail.

(11) But there is a real difficulty in the way of the plaintiff to get a decree in the present suit on account of his statements in the pleading itself. More than once in the plaint he has mentioned that this property was purchased by him benami in the name of defendant 1, who was his agent on 25-11-1932. It is significant to note that there is no averment of any fraud nor even is there any averment that defendant 1 purchased the property in his name without the consent of the plaintiff. The lower appellate Court has rightly construed the plaint read as a whole to mean that defendant 1 purchased these properties in his name with full knowledge of the plaintiff and the mother. This being the position, the case cannot really come within the exception as provided for in cl. (2) of S. 66, Civil P. C. P., but is directly met by the mischief of cl. (1) unlike the other case.

(12) The appellant tried to make out a case that the plaintiff is entitled to a declaration of his title in respect of the court sale on the basis of adverse possession for a continuous period of 12 years after the date of sale. Indeed, if he is able to establish his title by adverse possession, S. 66 will not be a bar to the present suit as has been decided by their Lordships of the Privy Council in — 'Mahomed Abdul Jalil Khan v. Md. Obaid Ullah Khan', AIR 1929 PC 228 (A).

But unfortunately for him, the plaintiff's case was to the effect that he was in possession till the date of the kobala dated 22-2-1944 and has, therefore, prayed for recovery of possession in the present action. The learned trial Court also had found that the plaintiff was in possession till February, 1944. The period falls short of the statutory requirement to mature plaintiff's title by adverse possession and as such, he is not entitled to fall back upon this position.

(13) It is next urged that the plea of bar under S. 66, Civil P. C., is not available to the transferees from the certified purchaser.

Indeed, under S. 317 of the old Code, a suit was barred only as against the certified purchaser but not against any one claiming title under him. This was the view held by all the High Courts except the Bombay High Court. The language in the old Code was "no suit shall be maintained against the certified purchaser".

But the present section has settled the conflict at rest by introducing the language

> "no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed."

This introduction gives legislative effect to the Bombay view. We may in this connexion refer to the latest edition of the Civil Procedure Code by Mulla "1953" at page 275.

Mr. Chatterji appearing on behalf of the respondents further relies upon a Bench decision of the Calcutta High Court in — 'M. Ali Ahmed v. Shamsunnessa', AIR 1938 Cal 602 (B), where after discussion of the position of law under the old Code as compared with the new, their Lordships have come to the conclusion that the objection under S. 66 applies to a suit against the assignees of the benamidar.

The same view also was expressed in the case of — 'Faz-lur Rahman v. Sardar Ali', AIR 1928 Cal 338 (C). We are, therefore, constrained to find that the present suit is barred under S. 66, Civil P. C.

(14) In conclusion, therefore, Second Appeal No. 98 of 1949 is dismissed with costs and Second Appeal No. 129 of 1949 is dismissed but as the plaintiff's suit fails merely on a technical ground in spite of the position that he had supplied the purchase money and was in possession of the properties till 1944 the defendants will not be entitled to recover any cost from the plaintiff when we have found that the transferees are not bona fide purchasers and had not acted in good faith.

(14) PANIGRAHI C. J.: I agree.

R.G.D. Order accordingly.

A.I.R. 1954 ORISSA 248 (Vol. 41, C.N. 78)

PANIGRAHI C. J. AND MOHAPATRA J.

(12-8-1954)

S. K. Ghosh, Petitioner v. Maheswar Dehuri, Opposite Party.

Supreme Court Appeal No. 9 of 1954, against order of High Court in Govt. Appeal No. 5 of 1952, D/- 29-10-1953.

(a) Criminal P. C. (1898), S. 367 — Remarks in judgment — Duty of Court — Remarks against third person — Propriety of.

It is undoubtedly true that the Court always acts as the friend of the accused, but where the Magistrate went much beyond his legitimate function and imported his personal knowledge into the evidence, by himself cross-examining the P. Ws. and trying to make out the defence case that the superintendent of police insisted on the Sub-Inspector to alter the station diary, and also by letting in the defence evidence to prove that the Superintendent of Police was determined to put Sub-Inspector into trouble and that therefore he suggested an alteration in the station diary.

Held, that the Magistrate allowed a lot of irrelevant material to be brought on the record as if the Superintendent of Police was himself on trial. After having recorded so much evidence it was but fair, and necessary, that the Superintendent of Police should have been called into the box and given an opportunity to explain. It was equally important that no animadversions should have been made against the Superintendent of Police who was not before the Court either as party or as witness. It was wholly unnecessary for the Magistrate to deliver a homily on the police officers and to charge the Superintendent with having abetted the lodging of a false case after denying him an opportunity to explain.

(Para 5)

Anno: Criminal P. C., S. 367 N. 4, 8.

(b) Criminal P. C. (1898), S. 561A — Expunction of remarks in judgment — Jurisdiction of High Court — Nature of.

The jurisdiction of the High Court under S. 561A is limited to an examination of the evidence already recorded by the Magistrate and the propriety of the Magistrate's remarks based on that evidence alone. It is not open to the High Court to take additional evidence and justify the remarks made by a subordinate court, in the light of that additional evidence. The jurisdiction is intended to be exercised when remarks are made against strangers which remarks may do irreparable harm to them and who have not even been heard in their defence by the Court which passes these remarks. It is not intended to substitute the opinion of the High Court for the opinion of the lower Court. When the High Court has called for an explanation on certain facts both from the Magistrate and the Superintendent of Police there is no reason as to why the explanation given by the Superintendent of Police should not be accepted in preference to the ex-cathedra observations made by the Magistrate.

Held, on the facts of the case, that the petitioner had been subjected, to a process of judicial injustice in both the Courts by the admission of improper evidence and the failure of the Courts to justly appraise it.

(Paras 6, 7, 7a)

Anno: Criminal P. C., S. 561A, N. 7.

(c) Criminal P. C. (1898), S. 367 — Reasons for decision.

It is not open to a Court to indulge in surmises and damage the reputation of a responsible officer by drawing inferences from facts which have no legs to stand upon. "Probable, perhaps, and might have been" are expressions which would hardly inspire confidence in the soundness of a judgment. The only security that Judges have for the proper exercise of their extra-ordinary power to censure parties or witnesses is the trained reason and habit of seeking principles even while using discretion in applying them. (Para 6)

Anno: Criminal P. C., S. 367 N. 7.

(d) Constitution of India, Art. 134(1)(c) — Certificate of fitness for appeal — (Criminal P. C. (1898), Ss. 367, 561A).

When there is no authoritative pronouncement of the Supreme Court on the points which are substantial points of law and are likely to arise again and again and the matter is also of considerable public importance as public servants have no protection or security against undeserved remarks passed by subordinate courts, except by invoking the inherent jurisdiction of the High Court and where the High Court improperly refuses to exercise it or erroneously exercises it, it is necessary that the party aggrieved should be permitted to seek redress in the Supreme Court as no other remedy is available. (Paras 8, 9)

Anno: Const. of India, Art. 134 N. 7; Criminal P. C., S. 367 N. 8; S. 561A N. 7.

M. Mahanti, for Petitioner; S. Patnaik, for Opposite Party.

PANIGRAHI C. J.:

This is an application under Art. 134(1)(c) of the Constitution praying for special leave to appeal to the Supreme Court against an order passed on 29-10-1953, by a Division Bench of this Court, in a proceeding under S. 561-A, Criminal P. C. The circumstances giving rise to an application of this kind are somewhat unusual and for a correct appreciation of the points raised in this application, it will be necessary to set out a few facts.

(2) The petitioner is a member of the Indian Police Service and was, at the relevant time, the Superintendent of Police Mayurbhanj. A dacoity case was registered at Morada Police Station on 26-4-1951. During the investigation of that case one Maheshwar Dehuri and two other persons were arrested and brought to the police out-post at Rasgovindpur for interrogation. Maheshwar made certain confessional statements and was arrested at about 7 p.m. on that day by Shri K. M. Das, the

Sub-Inspector of Police, and was handed over to one D. Gartia, the officer in charge of the Rasgovindpur Police outpost. Two constables were deputed to watch the accused who was sitting on the verandah of the outpost, but the accused escaped from custody at about 8 p.m. A case under S. 224, Penal Code was, therefore, registered, and 11 witnesses were examined for the prosecution and 12 for the defence.

(3) The prosecution, besides examining a number of witnesses relied upon Ext. 6, the confession made by the accused under S. 164, Cr. P. C., in that case and upon Ext. 9, the statement made by him under S. 342, Cr. P. C., in the Court of the Committing Magistrate enquiring into the case of dacoity. The trying Magistrate, Shri P. R. Chandra did not, however, choose to rely on this evidence as he was of opinion that the fact of the arrest of the accused had not been noted in the Station Diary maintained at the Rasgovindpur outpost. Nor had an F. I. R. been drawn up at that outpost immediately after the accused escaped from custody. The Magistrate, therefore, came to the conclusion that the 'arrest' of the accused which is an essential ingredient of the offence under S. 224, I. P. C., had not been established.

(4) The accused attempted to prove that the petitioner abetted the fabrication of the F. I. R. through Shri J. C. Chakrabarty (P. W. 1) the Inspector of Police. The Magistrate, after a lengthy discussion of the evidence, came to the conclusion that a persistent attempt had been made by the prosecution

> "to introduce changes in the Station Diary and thereby bolster up the prosecution case."

He accordingly held that prosecution case had not been proved. But instead of resting content with that finding, the Magistrate proceeded to make certain general observations on Police Officers, and particularly on the conduct of the petitioner, Shri S. K. Ghosh, which are damaging to his reputation. The passage in paragraph 5 of the Magistrate's judgment to which exception has been taken reads as follows:

> "It is a pity that Supervising Officers of the rank of Superintendent of Police and Inspector of Police have fallen in line with the Sub-Inspector of Police, and have not tried to find out or present matters as they were. It is a very sad reflection on the Police administration of a district that he stooped so low as to suggest to this subordinate to change valuable police papers in order to see to the success of the case. It is also very highly objectionable that the head of the police administration of a district could allow deferring and back-dating the F. I. R. on which trial courts lay utmost importance and, as a matter of fact, has been a party to it. There is no doubt in my mind that the Inspector J. C. Chakrabarty (P. W. 1) has lodged this false case and S. I. K. M. Das (P. W. 2) and Superintendent of Police S. K. Ghosh have abetted the lodging of the false case. In the fitness of things they deserve a trial in court for this, but I think justice will be done if Government take action against these officers."

In the end, he found the accused not guilty and acquitted him.

(4a) The State appealed under S. 417, Cr. P. C., against the order of acquittal and the three Police Officers filed petitions under S. 561-A in this Court praying for expunction of the objectionable remarks made by the learned Magistrate. These petitions were numbered as Criminal Revisions 110, 111 and 112 of 1952. The Government Advocate filed a petition to examine Shri Ghosh as a witness in the appellate proceedings and put in the confidential diary of D. W. 1, the Station Diary of Morada Police Station, and some other papers as additional evidence, to prove that the conclusions drawn by the Magistrate, relating to the genuineness of the F. I. R. were unsound.

This Court, however, rejected the prayer of the prosecution to adduce any further evidence to contradict D. W. 11's evidence, but allowed Shri S. K. Ghosh to be examined, as it had been alleged that Shri Ghosh had been summoned by the defence but was not examined and an application by the prosecution made in the lower Court to examine him as a Court witness had also been rejected. This Court upheld the order of acquittal and dismissed the appeal filed by the State, and also dismissed the revisions filed by the three Police Officers.

(5) Learned counsel for the petitioner, Shri S. K. Ghosh, complains that his client has been made a victim of judicial lynching both in the trial court and in this Court and that his case has not been fairly considered in either of the Courts. He has drawn our attention to a few extraordinary circumstances attending this case, the most important one being that the Magistrate, Shri P. R. Chandra, took a hostile attitude against the Police in general and the Superintendent of Police, in particular, from the very commencement of the trial. It is pointed out that the Magistrate himself cross-examined P. W. 1 at length before a charge had been framed.

It is undoubtedly true that the Court always acts as the friend of the accused, but the Magistrate appears to have gone much beyond his legitimate function and to have imported his personal knowledge into the evidence. In the course of his examination of P. W. 1 the Magistrate suggested to him whether it was not a fact that accused Maheshwar had not been arrested (see page 8, line 58 of the printed paper book in Govt. Appeal No. 5 of 1952.) A further question was put by the Magistrate as to whether the arrest of the accused was noted in the Station Diary.

It is difficult for me to guess as to how the Magistrate came to know that the fact of the arrest of the accused had not been noted in the Station Diary, at so early a stage. A note is made that the suggestion had been made by the defence, but it should have been left to the defence to put that question and elucidate the point. It would appear from the last answer given by P. W. 1 that the Magistrate was trying to make out the defence case that the Superintendent of Police insisted on the Sub-Inspector, Shri Gartia, to alter the station diary.

Secondly, it is pointed out that the entire defence evidence was let in to prove that the Superinten-

dent of Police was determined to put Sub-Inspector Gartia into trouble and that therefore he suggested an alteration in the Station diary. This evidence was wholly irrelvant to the decision of the case, as the only point for determination was whether the accused had escaped from lawful arrest. Instead of confining himself to this only issue the Magistrate allowed a lot of irrelevant material to be brought on the record as if the Superintendent of Police was himself on trial. After having recorded so much evidence it was but fair, and indeed necessary, that the Superintendent of Police should have been called into the box and given an opportunity to explain.

The Magistrate however in his order No. 30 dated 12-12-51 (page 89 of the Paper Book) said that the evidence of the four persons sought to be examined by the P. I. as Court witnesses was not essential for a just decision of the case. The Magistrate was perhaps justified in observing that the examination of any witnesses at that stage was not essential for the just decision of the case. It was equally important that no animadversions should have been made against persons who were not before the Court either as parties or as witnesses. It was wholly unnecessary for the Magistrate to deliver a homily on the Police Officers and to charge the Superindendent with having abetted the lodging of a false case after denying him an opportunity to explain.

(6) It is unfortunate that this Court while observing in paragraph 9 of its judgment that the police witnesses were divided into two parties, one party headed by Shri S. K. Ghosh supporting the prosecution and the other party headed by Deputy Superintendent of Police Shri Sanatan Panda—(D. W. 9) supporting the defence case, has failed to appreciate the contention of the petitioner that the Magistrate's remarks were not justified by the evidence that was actually before him. Whatever may be the opinion of this Court of the evidence of Shri S. K. Ghosh the jurisdiction of this Court under S. 561-A, Criminal P. C., is limited to an examination of the evidence already recorded by the Magistrate and the propriety of the Magistrate's remarks based on that evidence alone. I do not think it is open to this Court to take additional evidence and justify the remarks made by a Subordinate Court, in the light of that additional evidence. In endorsing the remarks of the Magistrate this Court has indulged in surmises as to what was probable, what the Superintendent of Police would have thought or done. Towards the end of paragraph 22 of the judgment Narasimham J. delivers himself of the following observations:

> "It is also probable that the S. P. thought that by starting a case under S. 224, Penal Code, against Maheswar the latter may get frightened and may help the police in the detection of the dacoity case by confessing his guilt and naming his accomplices.....In other words, the case under S. 224, Penal Code, was perhaps started with the primary object of facilitating the investigation in the parent dacoity case by compelling Maheshwar to tell the Police all that he knew. Whatever might have been the motive of S. P. Shri S. K. Ghosh in dictating draft F.I.R. to Inspector Banerjee on the 29th evening, I have no doubt that the F. I. R. was drawn up at his instance and ante-dated."

I would respectfully dissent from these observations as I am of opinion that it is not open to a Court to indulge in surmises and damage the reputation of a responsible officer by drawing inferences from facts which have no legs to stand upon. "Probable", "perhaps" and "might have been" are expressions which would hardly inspire confidence in the soundness of a judgment. The only security that Judges have for the proper exercise of their extraordinary power to censure parties or witnesses is the trained reason and habit of seeking principles even while using discretion in applying them.

While disapproving of the conduct of the Magistrate in putting questions to the first witness for the prosecution this Court also held that there was no indication on the record to show that the Magistrate was biassed against the prosecution from the very beginning as was alleged. As I have shown already, the very nature of the questions put by the Magistrate, betrays his bias. A closer study of the evidence would also indicate that both the police officers and the Magistrate were divided into two camps in the district, either because of the fact that the Sub-Inspector of Police, Sri Gartia, was immediately suspended by the Superintendent of Police, for negligence of duty, or for some other reason.

I need refer only to the evidence of D. W. 1 the Bench Clerk of the Magistrate Shri U. C. Misra who recorded the confessional statement of the accused. This witness wanted to prove that the confession was not voluntary as the Investigating Officer was present when it was being recorded. D. W. 2 is the Deputy Magistrate who was directed by the District Magistrate to hold an enquiry as to whether the confession had been recorded voluntarily.

I am surprised that the District Magistrate should have taken this extraordinary step of enquiring into the voluntary character of a confession which was the subject-matter of a regular criminal trial. I am therefore inclined to the opinion that the District Magistrate and the Superintendent of Police had, for some reason or other, fallen out and that the atmosphere had been so vitiated as to render a fair and impartial trial impossible. Some of the Police Officers took the side of the suspended Police Sub-Inspector and approached the S. P. to pursuade him not to take any steps against him (see p. 27, evidence of D. W. 9 and p. 32, the evidence of D. W. 11 in the paper book.)

After delivery of judgment on 4-2-1952 the Magistrate noted in the order-sheet that the Superintendent of Police had requested him a week earlier to declare the case "True, but no evidence", and that he was anxious to save P. W. 1. This Court called for an explanation from the Magistrate and was satisfied that the Magistrate was "an intimate friend of the Superintendent of Police and, therefore, took no action against Shri Ghosh". Nonetheless it is obvious that this intimate friend did not hesitate to give a stab in the back of Shri Ghosh, after he has pronounced his judgment.

(7) In paragraph 28 of his judgment, Narasimham J. has referred to a Bombay case laying down certain principles bearing on the function of the High Court acting under S. 561-A, Cr. P. C., while recording his agreement with these principles, I regret to say, my learned brother appears to have overlooked the import of the passages quoted while applying them to the facts of this case. One particular passage in the quotation which is of great significance is this:

> "A jurisdiction like this is intended to be exercised when remarks are made against strangers which remarks may do irreparable harm to them and who have not even been heard in their defence 'by the Court which passes these remarks'. This jurisdiction is not intended to substitute the opinion of the High Court for the opinion of the lower Court."

(7a) In his evidence before this Court, the Superintendent of Police denied that he had requested the Sub-divisional Magistrate, Shri P. R. Chandra, on 26-1-52 to declare the case to be true. He also explained why he wrote a letter to the Magistrate. The explanation given by him is that the defence wanted to drag him into the box just to humiliate and harass him. But in spite of this, this Court observed:

> "Such a conduct on the part of the Superintendent of Police is certainly objectionable and the strong language used by the learned Magistrate against him, Inspector Chakravarty and S. I., K. M. Das, seems justified."

There is no reason given as to why the explanation given by the Superintendent of Police should not be accepted in preference to the 'ex cathedra' observations made by the Magistrate. It seems to me that the petitioner has been subjected, unfortunately, to a process of judicial injustice in both the Courts by the admission of improper evidence and the failure of the Courts to justly appraise it.

(8) The points, therefore, that arise for consideration by the Supreme Court may be formulated as follows:

(i) Whether a Court acts within its jurisdiction in making remarks which adversely affect the status, prestige and official position of a person who is not given an opportunity to explain.

(ii) Whether the remarks made by the Magistrate in the concluding paragraph of his judgment were necessary for the decision of the case before him, and whether in any event they can be justified if the evidence on which they are based is found to be irrelevant.

(iii) Whether the jurisdiction of the High Court under S. 561-A, Criminal P. C., is not limited to a consideration of the evidence already recorded by the lower Court, or whether it is open to the High Court to take additional evidence into consideration and, on the strength of such evidence, refuse to exercise its jurisdiction under S. 561-A.

We have not been referred to any authoritative pronouncement of the Supreme Court on these points and as these are likely to arise again and again it is necessary to obtain the considered opinion of the Supreme Court. The matter is also of considerable public importance as public servants have no protection or security against undeserved remarks passed by subordinate Court, except by invoking the inherent jurisdiction of the High Court and where the High Court improperly refuses to exercise it or erroneously exercise it, it is necessary that the party aggrieved should be permitted to seek redress in the Supreme Court as no other remedy is available.

(9) We would accordingly allow this petition and certify that this is a fit case for grant of leave to appeal to the Supreme Court under Art. 134(1)(c) of the Constitution.

MOHAPATRA J.:

(10) The three points of law formulated by my Lord in the last page of his judgment as arising in the present case are substantial points of law of considerable public importance requiring pronouncement of their Lordships of the Supreme Court. I would, therefore, agree with my Lord and certify that this is a fit case for grant of leave to appeal to the Supreme Court under Art. 134(1)(c) of the Constitution.

H.G.P. Petition allowed.

A.I.R. 1954 ORISSA 251 (Vol. 41, C.N. 79)

NARASIMHAM AND MISRA JJ. (6-9-1954)

Mangal Chandra Dan, Appellant v. The State.

Criminal Appeal No. 105 of 1953, from order of S. J., Koraput-Jeypore, D/- 2-12-1953.

Criminal P. C. (1898), Ss. 222, 233, 234, 235, 236, 237, 238, 239 and 537 — Joinder of charges.

Though on the general principles of construction of statutes Ss. 234, 235, 236, 237, 238 and 239 should be construed as supplementing one another and dealing with those exceptions to the general rule of separate trial for every distinct offence as provided in S. 233, yet where neither S. 234 nor S. 235 would apply the trial must be held to be clearly vitiated by misjoinder and it will not be proper to rely on S. 234 for some of the charges and on S. 235 for the rest. (Para 8)

The accused was a temporary postman attached to a post office during April and May, 1952. It was alleged that during that period he received three money orders payable to three different persons and that he committed criminal breach of trust of the amounts covered by the three money orders and either forged the thumb-impressions of the payees on the money order forms or used those money order forms as genuine knowing them to contain forged thumb-impressions. The Magistrate framed six charges against the accused; three of them were under S. 409, Penal Code, in respect of the alleged commission of breach of trust of the sums of Rs. 10, Rs. 25/- and Rs. 50/- respectively covered by the three money orders. The remaining three charges were under S. 471/467, Penal Code, which dealt with forgery of the acknowledgment receipt and the money order forms in respect of each of the charges.

Held that an offence under S. 409, Penal Code, was undoubtedly not of the same kind as an offence under S. 471/467, Penal Code. Hence, S. 234, Cr. P. C., would not apply to the present case. Section 235 also would not help inasmuch as the offences committed in respect of the three money orders did not form part of the same transaction though the offence under S. 409, Penal Code, and the offence under S. 471/467, Penal Code, in respect of each of the money orders were done in the course of the same transaction. Hence the trial was vitiated by misjoinder and the defect could not be cured. Case law discussed.

(Paras 3, 4, 7, 8)

Anno: Cr. P. C., S. 222 N. 6; S. 233 N. 1, 5; S. 234 N. 8; S. 235 N. 2; S. 239 N. 2; S. 537 N. 10.

CASES REFERRED: Paras

(A) ('07) 30 Mad 328: 5 Cri LJ 341 4, 5, 7
(B) (V28) AIR 1941 Cal 707: 43 Cri LJ 389 4, 7
(C) (V40) AIR 1953 Cal 258: 19 Cut LT 281 5
(D) (V7) AIR 1920 Pat 775: 60 Ind Cas 422: 22 Cri LJ 230 6
(E) (V21) AIR 1934 Pat 232: 35 Cri LJ 876 6
(F) (V37) AIR 1950 All 167: 51 Cri LJ 571 6
(G) (V39) AIR 1952 Bom 177: 1952 Cri LJ 779 (FB) 7

Shovash Chandra Roy, for Appellant; Asst. Govt. Advocate, for the State.

NARASIMHAM J.:

This is an appeal from the judgment of the Sessions Judge of Koraput-Jeypore convicting the appellant under Ss. 409 and 467/471, I. P.C., and sentencing him to various terms of imprisonment and fine.

(2) The appellant was a temporary postman attached to Jeypore post office during April and May, 1952. It was alleged that during that period he received three money-orders payable to three different persons named Bansulia Dombru, Guru Mohuria and Ratni Ghasiani and that he committed criminal breach of trust of the amounts covered by the three money-orders and either forged the thumb-impressions of the payees on the money-orders forms or used those money-order forms as genuine knowing them to contain forged thumb-impressions.

The full particulars of the money-orders are given below:

Money-order No.	Name of payee.	Date of entrustment with the appellant.	Alleged date of payment
2419	Bansolia Dambaru	28-4-52	1-5-52
3675	Ratani Ghasiani	26-5-52	29-5 52
3674	Guru Mahuria	26-5-52	29-5-52

The learned Magistrate framed six charges against the appellant, three of them were under S. 409, I. P. C., in respect of the alleged commission of breach of trust of the sums of Rs. 10/-, Rs. 25/- and Rs. 50/- respectively covered by the three money-orders. The remaining three charges were under S. 471/467, I. P. C., which dealt with forgery of the acknowledgment receipt and the money-order forms in respect of each of the charges.

(3) Mr. Ray, on behalf of the appellant urged that the trial was vitiated by misjoinder of charges and that Ss. 234 and 235, Cr, P. C., on which the learned Sessions Judge has relied would not apply to the facts of this case. It is not the case of the prosecution that the criminal breach of trust in respect of the three money-orders and the forgery of the thumb-impressions of the payees in respect of each of the money-orders were all done in the course of the same transaction though the general design of the appellant as Postman to misuse his official position and commit criminal breach of trust of the money-orders entrusted with him, especially when the payees were illiterate persons, appears to have been implied in the prosecution case.

Doubtless, the offence under S. 409, I. P. C. and the offence under S. 471/467, I. P. C. in respect of each of the money-orders were done in the course of the same transaction. Mr. Ray urged that though the trial of the appellant for the three charges under S. 409, I. P. C. would be permissible under S. 234, Cr. P. C. and his trial for the three charges under S. 471/467, I. P. C. would also be permissible under the same section, joint trial for all the six charges would not be permissible inasmuch as the offences committed in respect of the first money-order were not part of the same transaction as the offences committed in respect of the second money-order and the third money-order.

(4) Section 234, Cr. P. C. permits the joint trial of three offences of the same kind committed during the course of one year. An offence under S. 409, I. P. C. is undoubtedly not of the same kind as an offence under S. 471/467, I. P. C. Hence, S. 234, Cr. P. C. would not apply to the present case. Section 235 (1), Cr. P. C. says that any number of offences whether of the same kind or not and whether committed during the period of one year or not may be tried at one trial if they all form part of one transaction. This section also would not help in the present case inasmuch as the offences committed in respect of the three money-orders did not form part of the same transaction.

Mr. Roy relied on a Madras decision reported in — 'Kasi Visvanathan v. Emperor', 30 Mad 328 (A) where on facts very similar to the present one, it was held that such joint trial was illegal. He also relied on — 'H. F. Bellgard v. Emperor', AIR 1941 Cal 707 (B).

(5) Sections 234 and 235, Cr. P. C. came up for consideration before a Division Bench of this Court in — 'Guru Charan Samal v. The State', AIR 1953 Cal 258 (C). There the facts were slightly different. A Post Master was charged with having committed criminal breach of trust in respect of a gross sum consisting of the total of three sums covered by three money-orders and with forgery, falsification of accounts to facilitate the commission of that offence. There was, however, only one charge for the offence under S. 409, I. P. C. which was framed relying on S. 222 (2), Cr. P. C. which says that when a person is

charged with criminal breach of trust of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and such a charge shall be deemed to be a charge of one offence within the meaning of S. 234, Cr. P. C.

Having thus framed one charge under S. 409, Cr. P. C. the trial Court in that case framed three charges under S. 467/471, I. P. C. in respect of each of the money-orders and three other charges under S. 477A, I. P. C. in respect of those money-orders. A Bench of this Court held that there was no misjoinder inasmuch as the main charge under S. 409, I. P. C. should by virtue of the deeming provision of S. 222(2), Cr. P. C. be held to be a charge of one offence only and all other offences under Ss. 467/471 and 477A, I. P. C. were connected with the main offence and formed part of the same transaction so as to attract the principles of S. 235, Cr. P. C.

Mr. Ray, however, distinguished that case by pointing out that there was only one charge under S. 409, I. P. C. whereas in the present case three separate charges under S. 409, I. P. C. had been framed in respect of each of the money-order. Hence, the deeming provision of S. 222(2), Cr. P. C. was not available. Mr. Roy relied in particular on the following observations of mine in that judgment:

"If, however, three separate charges of criminal breach of trust in respect of each of the money-orders had been framed the position may differ."

I also relied on certain observations in 30 Mad 328 (A) where the absence of one charge under S. 409, I. P. C. by taking recourse to S. 222(2), Cr. P. C. was used as a circumstance for holding that there was misjoinder.

(6) I am inclined to accept Mr. Roy's contention. In all the reported decisions where it was held that a joint trial for various acts of criminal breach of trust of money, forgery and falsification of accounts to cover up that breach of trust was permissible the main offence under S. 409, I. P. C. was the subject matter of only one charge and not of separate charges. Thus in the earliest Patna case on the subject — 'Gajadhar Lal v. Emperor', AIR 1920 Pat 775 (D) there was one charge under S. 408, I. P. C. in respect of the gross sum that was said to have been misappropriated and three charges under S. 477A, I. P. C. for falsification of accounts in respect of certain items included in the total sum alleged to have been misappropriated. It was held that there was no misjoinder.

Similarly, in — 'Ramkishoon Pershad v. Emperor', AIR 1934 Pat 232 (E), where the previous decisions on the subject were fully reviewed there was only one charge under S. 409, I. P. C. based on S. 222(2), Cr. P. C. though the various items of money that were said to have been misappropriated were specified in that charge. It was held that there was no misjoinder if there was a joint trial for that offence and for two offences under S. 477A, I. P. C. dealing with falsification of accounts to cover up the various acts of misappropriation.

Doubtless, in the last portion of the judgment in that case the learned Judges held that even if three charges under S. 409, I. P. C. had been framed there would be no misjoinder. This portion of it was not necessary for the decision of that case. The main reason for holding that there was no misjoinder was that by virtue of S. 222(2), Cr. P. C. the charge of criminal breach of trust should be deemed to be a charge of one offence. Similarly, in a recent Allahabad case reported in — 'Rex v. Dayashankar', AIR 1950 All 167 (F) there was only one charge under S. 408, I. P. C. in respect of the gross sum said to have been misappropriated.

(7) It appears to me that if a Court does not rely on S. 222(2), Cr. P. C. and frames three separate charges under S. 409, I. P. C. for the three sums said to have been misappropriated there would be a misjoinder if those offences are tried jointly with the offences under Ss. 467/471 or 477A, I. P. C. arising out of each act of misappropriation. The Madras case referred to above is a direct authority on this point. Similarly, the Calcutta decision reported in AIR 1941 Cal 707 (B) and a decision of the Bombay High Court reported in — 'D. K. Chandra v. The State', AIR 1952 Bom 177 (G) support the view that three offences of the same kind under S. 234, Cr. P. C. cannot be jointly tried with other offences which may form part of the same transaction as each of those three offences of the same kind, unless all the offences taken together can be said to form part of one transaction. Thus in Calcutta case there were three charges under S. 420, I. P. C., three charges under S. 467 and three other charges under S. 477A, I. P. C.; the offences under Ss. 467 and 477A, I. P. C. were alleged to have been committed for the purpose of committing the offence of cheating. Yet it was held that the trial was vitiated by misjoinder. Similarly, in AIR 1952 Bom 177 (G), two separate charges under S. 409, I. P. C. and two alternative charges under S. 420, I. P. C. were held to be bad.

(8) It is true that on the general principles of construction of statutes Ss. 234, 235, 236, 237, 238 and 239, Cr. P. C. should be construed as supplementing one another and dealing with those exceptions to the general rule of separate trial for every distinct offence as provided in S. 233, Cr. P. C. But where neither S. 234 nor S. 235, Cr. P. C. would apply the trial must be held to be clearly vitiated by misjoinder and it will not be proper to rely on S. 234 for some of the charges and on S. 235 for the rest. The special position arising out of the application of S. 222(2), Cr. P. C. has been fully dealt with in the Bench decision of this Court cited above. In other cases the general rule of separate trial for every distinct offence would prevail. I would, therefore, hold that the trial was vitiated by misjoinder and the defect cannot be cured.

(9) The next question is whether there should be a separate trial of the appellant in respect of the offence said to have been committed in relation to each of the three money-orders. So far as the second and third money-orders are concerned,

on the evidence before the lower Court it appears that the misappropriation was only temporary inasmuch as the appellant eventually paid the sum due to the payees. I do not think it advisable at this belated stage to order retrial for those offences. As regards the 1st money-order, however, he ought to be tried afresh for the offences under Ss. 409 and 471/467, I. P. C.

(10) I would therefore, allow the appeal, set aside the conviction and sentence and direct a fresh trial of the appellant for the offence under Ss. 409 and 471/467, I. P. C. said to have been committed in respect of money-order No. 2419. As more than two years have elapsed, the trial should be expedited.

(11) MISRA J. : I agree.

D.H.Z. Appeal allowed.

A.I.R. 1954 ORISSA 254 (Vol. 41, C.N. 80)

NARASIMHAM AND MOHAPATRA JJ.

(27-8-1954)

Ramdhan Das Ram Kissan Firm, Appellant v. Kishori Chand Geor Firm, Respondent.

Second Appeal No. 322 of 1950, from decision of Sub. J., Cuttack, D/- 23-3-1950.

(a) Sale of Goods Act (1930), S. 11 — Time with respect to delivery, if essence of contract.

Though S. 11 makes it clear that stipulations as to time of payment would ordinarily be not of the essence of a contract for sale of goods, yet on the question whether the time of delivery of goods would also be not of the essence of the contract the section merely says that it depends on the terms of the contract. But in ordinary commercial contracts for sale of goods time is prima facie of the essence with respect to delivery. Where forward contracts are entered into by the parties who are anticipating fluctuations in prices, in the absence of any evidence to the contrary, the prima facie view that in commercial transactions of this type time is of the essence of delivery may be accepted. The parties who were gambling on fluctuation in prices must obviously have intended that time was of the essence of the contract. (1877) 2 AC 455; (1879) 4 CPD 239; (1892) 8 TLR 687, Rel. on. (Para 9)

Anno: S. G. Act, S. 11 N. 1.

(b) Contract Act (1872), S. 73 — Sale of goods — Measure of damages.

Where for calculating damages for breach of contract to supply goods the market price on the date of the breach is not available as no transaction took place on that date the rate that was prevalent just before and just after that date can be taken into consideration. 26 Bom 746, Rel. on. (Para 4)

Anno: Contract Act, S. 73 N. 5, 22.

CASES REFERRED: Paras

(A) ('02) 26 Bom 744: 4 Bom LR 504 4, 10
(B) (1863) 32 LJCP 154: 14 CBNS 65 8
(C) (1877) 2 AC 455: 46 LJQB 561 9
(D) (1879) 4 CPD 239: 48 LJQB 492 9
(E) (1892) 8 TLR 687 9

G. C. Das, for Appellant; S. C. Chakravarty, for Respondent.

NARASIMHAM J.:

This is an appeal by the defendant-firm against the concurrent decisions of the two lower Courts decreeing the plaintiff-firm's suit for damages for breach of contract.

(2) The plaintiff and the defendant are two firms carrying on business in Cuttack town. The plaintiff-firm alleged that the defendant-firm entered in to two forward contracts dated 22-8-45 and 23-8-45 with them for the supply of a certain quantity of tobacco of the variety known as 'Motichur K. G. No. 2' at the stipulated prices. The due date for the first contract was 19-11-45 and for the second contract 19-12-45. It was alleged that the defendant firm failed to supply the goods on the stipulated dates and the plaintiff firm, therefore, claimed damages on the basis of the difference between the contracted rate and market rate for the goods on 19-11-45 and 19-12-45.

(3) The defendant firm, however, denied the first contract altogether. They admitted the second contract but alleged that they were unable to supply the goods on the date fixed due to the conduct of the plaintiff firm in purchasing all available stock of Motichur K. G. No. 2 apprehending a fall in the prices and fraudulently changing the trade mark to P. S. and S. B.' and selling the same at such a low rate as Rs. 73/- per maund. On 6-1-46 the defendant firm offered to supply Motichur of P. S. and S. B. brand but the plaintiff firm refused to accept the same.

The defendant firm, therefore, made a counter claim for damages against the plaintiff firm. Both the Courts held that the first contract was well proved by the entry in the Sauda Book of the plaintiff firm (Ext. 1) and the evidence of their broker (P. W. 4). This is a pure finding of fact which was rightly not challenged in this appeal. As the second contract was admitted it may thus to be taken as well established that both the contracts were entered into by the defendant firm with the plaintiff firm as alleged in the plaint.

(4) Both the Courts further held that the plaintiff firm did not corner all tobacco of K. G. variety in the market as alleged by the defendant firm nor did they alter the brand from K. G. No. 2 to P. S. and S. B. Hence, they held that the defendant firm had no excuse for failure to supply the contracted brand of tobacco. As regards the measure of damages, they held that the plaintiff firm were entitled to the difference between the market price and the contracted price on the due dates. The market price on the due date in respect of the first contract (19-11-45) was available from the evidence on record. But the market price on the due date in respect of the second contract (19-12-45) was not available as no transaction took place on that date. Both the Courts, therefore, took in to consideration the rate that was prevalent just before and just after that date relying on — 'Jugmohan Das v. Nusserwanji', 26 Bom 744 (A).

(5) Mr. Das on behalf of the appellant raised the following questions of law:

(i) There was a commercial impossibility in performing the second contract inasmuch as K. G.

No. 2 was not available in the market in December, 1945;

(ii) The finding of the appellate Court was that K. G. No. 2 was of the same quality as P. S. and S. B. and consequently the plaintiff-firm should have accepted the defendant firm's offer dated 6-1-46 to supply tobacco of P. S. and S. B. variety, time of delivery of the goods being not of the essence of the contract;

(iii) Both the Courts were not justified in taking the market price on the dates preceding and succeeding the date of the breach of contract for the purpose of ascertaining the market rate on the date of the breach.

(6) The first point must fail on the findings of fact of both the Courts. Doubtless, the trial Court observed that there was very little stock of K. G. variety of tobacco by Margasir-Purnima (December, 1945) at Cuttack in the market and it was not possible for the defendant-firm to deliver the goods as contracted by them. But the trial Court further found that one Kumar Sahu who had contracted with the plaintiff firm to supply 4,500 bags of K. G. No. 2 delivered 375 bags between 28-11-45 and 27-12-45. Similarly, one Ramchandra Banshidhar supplied 25 bags of K. G. variety on 2-12-45 and Sundar Das Damodar Hansaraj sold 25 bags of the same variety on 9-12-45.

Hence tobacco of K. G. variety was available at Cuttack in December, 1945, though not in large quantities, and in the absence of any clear evidence on the side of the defendant-firm it cannot be held that the contract could not be performed due to commercial impossibility. The place of manufacture of the variety of tobacco was admittedly at Bhotmali and there is nothing on record to show that the defendant-firm could not have secured that variety of tobacco from that place and supplied it to the plaintiff-firm on the due date.

(7) The second point, however, requires detailed consideration. Mr. Das's argument was that K. G. No. 2 and P. S. and S. B. varieties of tabacco were identical. The letters 'K. G.' stood for 'Keshorichand Gheorchand' which is the name of the plaintiff-firm. The letters 'P. S.' stood for 'Pushraj Sagarmal' and 'S. B.' for 'Sampatroy Basudeb'. All these persons are said to be partners of the firm 'Keshori-Gheorchand'. It was therefore alleged by the defendant-firm that the plaintiff-firm purchased all available stock of K. G. variety of tobacco and finding that the market was falling changed the brand to 'P. S. and S. B.' and sold the same in the market at a low price thereby putting the defendant-firm to loss. This is, however, a pure question of fact on which both the Courts held against the defendant-firm. Apart from the uncorroborated testimony of the defendant-firm there is practically no evidence to show that the plaintiff-firm cornered K. G. variety of tobacco and altered the brand to P. S. and S. B.

(8) Mr. Das next contended that the appellate Court had come to a clear finding that K. G. No. 2 was of the same quality as P. S. and S. B. and that though the parties had stipulated in the original contract that K. G. No. 2 alone would be supplied, it was intended by both of them that "K. G. No. 2" should stand for quality and not for description of the goods. Mr. Das therefore urged that so long as tobacco of the same quality as K. G. No. 2 was supplied the plaintiff firm were bound to accept the same in accordance with the true intention of the parties when they entered into the contract.

He relied on — 'Hopkins v. Hitchcock', (1863) 32 LJCP 154 (B). In that case the contract between the parties was for the supply of iron marked "S. and H." The iron which was supplied was, however, marked 'H and Co." The parties were aware that the original firm of iron manufacturer was "S. and H. Co." but it had been changed to "H. and Co." and that the iron manufactured by both the companies was of identical quality. On these materials the Court found as a fact on a true construction of the contract that there was no stipulation for supply of a particular brand of iron, the letters "S. and H" being used to describe a particular quality of iron only. The applicability of the aforesaid decision to the present case would arise only if the defendant-firm had established that tobacco of the variety known as K. G. No. 2 was identical in quality with tobacco marked P. S. and S. B. The judgments of both the lower Courts would not support the assumption that the said two varieties of tobacco were of the same quality.

Mr. Das relied on the penultimate sentence of the judgment of the lower appellate Court while discussing point No. (2) to the following effect:

> "and there is satisfactory evidence to hold that S. B. and P. S. marks of Motichur was of the same quality as K. G. No. 2 Motichur."

He urged that this was a clear finding of fact about the qualities of the two varieties being the same. But in the earlier portions of the judgment the lower appellate Court has observed:

> "Though they placed orders for K. G., perhaps they received inferior stock as the former was not available at Bhotmali."

Again, it was observed:

> "they are not bound to receive P. S. and S. B. marks even if it be accepted for the same quality as K. G. No. 2 sun mark."

Hence, if the entire discussion of the lower appellate Court regarding point No. 2 be carefully considered it would appear that he did not come to a finding that K. G. No. 2 and P. S. and S. B. are of the same variety and that perhaps the word 'not' was omitted through oversight in the penultimate sentence of that paragraph quoted above. The trial Court has come to a finding that P. S. and S. B. is inferior stuff compared to K. G. No. 2 and the appellate Court has, in essence, confirmed this finding. As there is some ambiguity in the judgment of the appellate Court we went through the evidence adduced by the parties in this connection. Apart from the bare statement of the defendant (D. W. 1) there is practically no evidence on record to show that they are of the same quality.

On the other hand, the defendant's own exhibit (Ext. A-3) gives the price of tobacco of P. S. and S. B. variety on 16-11-48 at Rs. 85/- per maund and Ext. A-8 gives the price of K. G. No. 2 on the same date to be Rs. 90/- per maund. This difference of Rs. 5/- per maund as disclosed from the defendant's exhibits in respect of the two varities of tobacco prevailing in the market on the

same day would lead to a reasonable inference that the qualities of the two varities were not the same. Hence, the assumption on which Mr. Das has built up his argument cannot be accepted.

(9) Again, Mr. Das is not right in saying that the time of delivery was not of the essence of the contract. Mr. Das relied on S. 11, Sale of Goods Act, which runs as follows:

"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of contract of a sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

Though the section makes it clear that stipulations as to time of 'payment' would ordinarly be not of the essence of a contract for sale of goods, yet that section does not support Mr. Das's contention that the time of delivery of goods would also be not of the essence of the contract. On this question the section merely says that it depends on the terms of the contract. But it is well settled by a series of decisions that in ordinary commercial contract for sale of goods time is prima facie of the essence with respect to delivery — 'Bowes v. Shand', (1877) 2 AC 455 at pp. 463 and 464 (C); — 'Reuter v. Sala', (1879) 4 CPD 239 at p. 249 (D) and — 'Sharp v. Christmas', (1892) 8 TLR 687 (E).

Here, the very nature of the contract between the parties is sufficient to show that the time of delivery was of the essence of the contract. Forward contracts were entered into by the parties who were anticipating fluctuations in prices. The defendant's own exhibits (Ext. A series) show how the price of tobacco fluctuated from 14-11-45 to 31-12-45. In the absence of any evidence to the contrary the prima facie view that in commercial transactions of this type time was of the essence of delivery may be accepted.

It was, however, urged that these were mere forward contracts in which actual delivery was never the main consideration and that the parties were gambling on fluctuation in prices. This argument also would go against Mr. Das's contention inasmuch as the parties who were gambling on fluctuation in prices must obviously have intended that time was of the essence of the contract. Hence the plaintiff-firm were not bound to accept the belated offer of the defendant-firm on 6-1-46 to supply P. S. and S. B. variety of tobacco.

(10) As regards the third point, the Bombay decision relied on by the lower Courts, namely, — '26 Bom 744 (A)' is a complete answer. The rate on the date of the breach (19-12-45) was not available. Mr. Das, however, urged that Ext. A-9 showed that K. G. variety was avilable at the rate of Rs. 72/8- per maund on 28-12-45 and that the trial Court should not have estimated the price at Rs. 96/- per maund on 19-12-45. The lower appellate Court has, however, discussed the importance of Ext. A-9 and given reasons for disbelieving the rate as given in that exhibit. This is a pure question of fact which cannot be reagitated in the second appeal.

(11) I would, therefore, affirm the judgments of both the Courts and dismiss the appeal with costs.

(12) MOHAPATRA J.: I agree.

D.H.Z. Appeal dismissed.

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